NORTH CAROLINA REPORTS

VOLUME 188

This book is an exact photo-reproduction of the original Volume 188 of North Carolina Reports that was published in 1925.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1972

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS
VOL. 188

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1924
FALL TERM, 1924

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
STATE PRINTERS
1925

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OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1924.

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ASSOCIATE JUSTICES:

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HERIOT CLARKSON,
GEORGE W. CONNOR.

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OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
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Garland E. Midyette	Third	Northampton.
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.
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W. A. Devin	Tenth	Granville.

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B. F. Long	Fifteenth	Iredell.
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EASTERN DIVISION

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J. E. Swain	Nineteenth	Buncombe.
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FALL TERM, 1924

List of applicants to whom license to practice law in North Carolina was granted by Supreme Court at Fall Term, 1924:

ABERNETHY, CHARLES LABAN, JR.....New Bern.
ARENDELL, BANKS.....Raleigh.
ARMSTRONG, FRANK MARSHALL.....Troy.
AYCOCK, WILLIAM PRESTON.....Selma.
BARLOW, CHARLES FRANKLIN.....Dillon, S. C.
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HILL, GEORGE WATTS.....Durham.
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MORRIS, FRED HELSABECK.....Kernersville.
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YORK, WILLIAM MARVIN.....Greensboro.
YOUNG, VICTOR VERNON.....Durham.

UNDER COMITY ACT

DAVIS, CARL H. (from Virginia).....Wilmington.
DIGHTON, SAMUEL REED (from Georgia).....Greensboro.
PATLA, JOSEPH ARBEY (from South Carolina).....Asheville.
PHELPS, VICTOR EDWARD (from Florida).....Wilmington.
SAINT-AMAND, CLAUDIUS EMILE (from South Carolina).....Wilmington.
WILSON, WILLIAM HAROLD.....Charlotte.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1925

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, 1925
First District	February 10
Second District	February 17
Third and Fourth Districts	February 24
Fifth District	March 3
Sixth District	March 10
Seventh District	March 17
Eighth and Ninth Districts	March 24
Tenth District	March 31
Eleventh District	April 7
Twelfth District	April 14
Thirteenth District	April 21
Fourteenth District	April 28
Fifteenth and Sixteenth Districts	May 5
Seventeenth and Eighteenth Districts	May 12
Nineteenth District	May 19
Twentieth District	May 26

SUPERIOR COURTS, SPRING TERM, 1925

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, 1925—*Judge Cranmer.*

Camden—Mar. 9.
Beaufort—Jan. 12*; Feb. 16† (2); April 6†; May 4† (2).
Gates—Mar. 23.
Tyrrell—Jan. 26 (2); April 20; June 1†.
Currituck—Mar. 2; April 27†.
Chowan—Mar. 30.
Pasquotank—Dec. 29† (2); Feb. 9†; Mar. 16; June 8† (2).
Hyde—May 18.
Dare—May 25.
Perquimans—Jan. 19; April 13.

SECOND JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Sinclair.*

Washington—Jan. 5 (2); April 13†.
Nash—Jan. 26; Feb. 16† (2); Mar. 9; April 20† (2); May. 25.
Wilson—Feb. 2*; Feb. 9†; May 11*; May 18†; June 22†.
Edgecombe—Jan. 19; Mar. 2; Mar. 30† (2); June 1 (2).
Martin—Mar. 16 (2); June 15.

THIRD JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Devin.*

Northampton—Mar. 30 (2).
Hertford—Feb. 23; April 13 (2).
Halifax—Jan. 26 (2); Mar. 16† (2); April 27*; June 1 (2).
Bertie—Feb. 9 (2); April 27† (3).
Warren—Jan. 12 (2); May 18 (2).
Vance—Mar. 2 (2); June 15 (2).

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Bond.*

Lee—Mar. 23 (2); May 4.
Chatham—Jan. 12; Mar. 16†; May 11.
Johnston—Feb. 16† (2); Mar. 9; April 20† (2).
Wayne—Jan. 19 (2); April 6† (2); May 25 (2).
Harnett—Jan. 5; Feb. 2† (2); May 18.

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Barnhill.*

Pitt—Jan. 12†; Jan. 19; Feb. 16†; Mar. 16 (2); April 13 (2); May 18† (2).
Craven—Jan. 5*; Feb. 2† (2); April 6‡; May 11†; June 1*.
Carteret—Jan. 26; Mar. 9; June 8 (2).
Pamlico—April 27 (2).
Jones—Mar. 30.
Greene—Feb. 23 (2); June 22.

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Midyette.*

Onslow—Mar. 2; April 13† (2).
Duplin—Jan. 5† (2); Jan. 26*; Mar. 23† (2).
Sampson—Feb. 2 (2); Mar. 9† (2); April 27 (2).
Lenoir—Jan. 19*; Feb. 16† (2); April 6; May 18*; June 8† (2).

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Daniels.*

Wake—Jan. 5*; Jan. 26†; Feb. 2*; Feb. 9†; Mar. 2*; Mar. 9† (2); Mar. 23† (2); April 6*; April 13† (2); April 27†; May 4*; May 18† (2); June 1*; June 8 (2).
Franklin—Jan. 12 (2); Feb. 16† (2); May 11.

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Horton.*

New Hanover—Jan. 12*; Feb. 2† (2); Mar. 2† (2); Mar. 16*; April 13† (2); May 11*; May 25† (2); June 8*.
Pender—Jan. 19; Mar. 23† (2); May 18.
Columbus—Jan. 26; Feb. 16† (2); April 27 (2).
Brunswick—Jan. 5†; April 6; June 15†.

NINTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Grady.*

Robeson—Jan. 26*; Feb. 2; Feb. 23† (2); Mar. 30 (2); May 11† (2).
Bladen—Jan. 5‡; Mar. 9*; April 20†.
Hoke—Jan. 19; April 13.
Cumberland—Jan. 12*; Feb. 9† (2); Mar. 16† (2); April 27† (2); May 25*.

TENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Calvert.*

Alamance—Feb. 23*; Mar. 30†; May 4†; May 25† (2); June 15*.
Durham—Jan. 5† (2); Feb. 16*; Mar. 2† (2); Mar. 23*; April 27†; May 18*.
Granville—Feb. 2 (2); April 6 (2).
Orange—Mar. 16; May 11†.
Person—Jan. 26; April 20.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Schenck.*

Ashe—April 6 (2).
Forsyth—Jan. 5 (2); Feb. 9† (2); Feb. 23† (A); Mar. 9† (2); Mar. 23*; May 18† (3); June 22† (A).
Rockingham—Jan. 19*; Feb. 23† (2); May 11; June 15†.
Caswell—Mar. 30.
Alleghany—May 4.
Surry—Feb. 2; April 20 (2); June 22† (2).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge McElroy.*

Davidson—Jan. 26*; Feb. 16† (2); May 4*; May 25†; June 22*.
Guilford—Jan. 5† (2); Jan. 19*; Feb. 2† (2); Mar. 2* (2); Mar. 16† (2); April 13† (2); April 27*; May 11† (2); June 1† (2); June 15*.
Stokes—Mar. 30*; April 6†.

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Bryson.*

Stanly—Feb. 2†; Mar. 30; May 11†.
Richmond—Dec. 29*; Jan. 5†; Mar. 16†; April 6*; May 25†; June 15†.
Union—Jan. 26*; Feb. 16† (2); Mar. 23; May 4†.
Anson—Jan. 12*; Mar. 2†; April 13; April 20†; June 8†.
Moore—Jan. 19*; Feb. 9†; May 18†.
Scotland—Mar. 9†; April 27; June 1.

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Lane.*

Mecklenburg—Jan. 5*; Feb. 2† (3); Feb. 23*; Mar. 2† (2); Mar. 30† (2); April 27† (2); May 11*; May 18† (2); June 8*; June 15*.
Gaston—Jan. 12*; Jan. 19† (2); Mar. 16† (2); April 13*; June 1*.

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Shaw.*

Montgomery—Jan. 19*; April 6† (2).
Randolph—Mar. 16† (2); Mar. 30*; June 1† (2); June 15* (2).
Iredell—Jan. 26 (2); Mar. 9†; May 18 (2).
Cabarrus—Jan. 5 (2); Feb. 23†; April 20 (2).
Rowan—Feb. 9 (2); Mar. 2†; May 4 (2).

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Stack.*

Catawba—Feb. 2 (2); May 4† (2).
Lincoln—Jan. 26.
Cleveland—Mar. 23 (2).
Burke—Mar. 9 (2).
Caldwell—Feb. 23 (2); May 18† (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Harding.*

Alexander—Feb. 16.
Yadkin—Feb. 23.
Wilkes—Mar. 2; June 1† (2).
Davie—Mar. 16; May 25†
Watauga—Mar. 23 (2).
Mitchell—April 6 (2).
Avery—April 20 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Long.*

Transylvania—April 6.
Henderson—Jan. 5† (2); Mar. 2 (2); May 25† (2).
Rutherford—Feb. 2† (2); May 11 (2).
McDowell—Feb. 16 (2); June 8† (2).
Yancey—Mar. 23 (2).
Polk—April 20 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Webb.*

Buncombe—Jan. 12† (2); Jan. 26; Feb. 2† (2); Feb. 16; Mar. 2† (2); Mar. 16; April 6† (2); April 20; May 4† (2); May 18; June 1† (2); June 15 (2).
Madison—Feb. 23; Mar. 23; April 27; May 25.

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1925—*Judge Finley.*

Haywood—Jan. 5† (2); Feb. 2 (2); May 4† (2).
Cherokee—Jan. 19 (2); Mar. 30 (2); June 15†.
Jackson—Feb. 16 (2); May 18† (2).
Swain—Mar. 2 (2).
Graham—Mar. 16 (2); June 1† (2).
Clay—April 13.
Macon—April 20 (2).

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—ISAAC M. MEEKINS, *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.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1924

N. J. ROUSE v. CITY OF KINSTON.

(Filed 21 June, 1924.)

1. Trespass—Damages—Condemnation—Municipal Corporations—Cities and Towns—Statutes—Waiver.

Where a city is sued for damages for running its water-supply pipe on the plaintiff's lands, and it is made to appear that the pipe land is upon the State's highway over the plaintiff's land, the plaintiff, as the dominant owner, may maintain his action, and the denial of this title or right by defendant is a waiver of its right that the plaintiff should have proceeded before the clerk under the statute (C. S., ch. 33) entitled Eminent Domain, sec. 1706; and the plaintiff may maintain his action of trespass in the Superior Court.

2. Water—Subterranean and Percolating Waters—Damages—Evidence.

Where a city has dug artesian wells to supply its inhabitants with water, for pay, adjoining or adjacent to the plaintiff's land, causing the water from his artesian wells thereon to be so greatly diminished in volume or flow that it rendered the lands unproductive and deprived him or his tenants of wholesome drinking water, etc., to the impairment of their health, and greatly depreciated the value of the lands, the measure of damages is not confined to the present use of the lands, and the jury may consider any and all the purposes to which the property was reasonably adapted and might with reasonable probability be applied, and award to plaintiff the difference between the fair market price of the lands before and after the defendant's unlawful act.

3. Same—Instructions—Appeal and Error.

Where a city has unlawfully taken the pure water supply for its inhabitants, from an adjacent or adjoining owner of lands, to the injury of his property, by the boring of artesian wells: *Held*, evidence of pre-

vious negotiations between the parties looking towards a financial adjustment of the plaintiff's damages, which had never been consummated, is not reversible error, when the trial judge has instructed the jury they could only consider it as fixing the defendant city with notice that damages would follow to the plaintiff from the boring of the defendant's artesian wells.

4. Same—Reasonable Use.

The owner of lands is only entitled to the reasonable use of percolating waters collected in subterranean channels on his own lands; and where a city has dug artesian wells for the water supply of its inhabitants, so as to practically exhaust the supply to the artesian wells of an adjoining owner, to the injury of the productiveness of his lands and the health of his tenants, it is responsible in damages to the plaintiff for the injury to his lands thereby caused; and the English common-law doctrine to the contrary is inapplicable under our statute, C. S., 970.

STACY, J., dissenting.

CIVIL ACTION, heard before *Grady, J.*, and a jury, at November Term, 1923, of LENOIR. Appeal by defendant.

The material facts are:

The plaintiff, N. J. Rouse, was a resident of Kinston since 1883, and a native of Lenoir County. In 1914 he bought what is known as the "Caswell Lodge Plantation," about 2 miles west of Kinston, on the State Central Highway, No. 10, containing 581 acres—approximately 300 acres of wood and timber land that is in low ground, subject to overflow, and about 281 acres of cleared land. The "Gin House" tract was purchased later, and contained about 18 acres.

It was in evidence that when the plaintiff purchased the plantation it was in a complete state of dilapidation and had the appearance of a farm being neglected and practically going to waste; no sign of paint; no buildings on it, except the main building; a few old barns, with roofs practically off; two or three little tobacco barns and tenant houses that had gone to decay. The water that was available was from open wells, and the water was poor, repellant, unhealthy, not drinkable.

Dr. W. T. Parrott testified: "The health conditions prevailing on the Caswell Lodge place up to the time Mr. Rouse bought it, I would say, were as bad as the health conditions in the Mississippi bottom. It had a bad reputation—the way the land ran—in a slope—and the drainage from the hills above. It had shallow wells. It was worse than a perfectly flat place. All the organic waste from the hills would naturally filter there. I saw the place after Mr. Rouse had dug these wells. I have practiced medicine on the plaintiff's plantation, both before and after he bought it, and as far as practice on that farm was concerned, the deep wells practically put me out of business. . . . Beginning in

1903 or 1904, the general health of the community has increased wonderfully. I recall the health conditions in this vicinity in 1902. Typhoid fever is communicable through the drinking water, but such things as malarial chills come from another source—surface conditions bring that about. In the last twenty-three years the ideas of the general public and the profession as to community health problems has undergone a complete change. The surface drainage of this place as well as others similarly situated has removed the malarial conditions by removing the mosquito that caused it."

The health conditions were bad. Could not get any drinking water on the place, could smell it when it was gotten out of the wells. The water was muddy. The people who lived on the place were sickly and many died. In wet seasons the water looked like stagnant water from pools. Scum collected on it.

For farming, it was practically abandoned; very little farming done on it. White or negro tenants would not live on it. It was good land; the trouble was the water.

D. F. Wooten, ex-sheriff of the county and president of the First National Bank of Kinston, who had 17 years experience in farm operation, and who owned half of the land for ten or twelve years, testified that the farm was unhealthy and the water not there for domestic purposes.

This was the condition of the plantation when the plaintiff bought it. The plaintiff was mayor of Kinston. The first artesian well dug in Kinston was at the corner of the old pumping station. It was discovered 8 August, 1904, and that well discharged between 30 and 40 gallons natural flow. The plaintiff testified: "My first experience with artesian wells was when I was mayor. That well was dug at the direction of Dr. Tull and myself. He was chairman of the board of county commissioners and it was an experiment, and when that water came up, that water ascended the pipes 7 or 8 feet." With the experience that the plaintiff had in that locality, artesian wells were the only ones that would furnish pure and wholesome water fit for domestic purposes. He said: "I began to explore for deep wells promptly after I got it. I saw it was impossible to get tenants; the first objection was that there was no water and was unhealthy, and I determined to try and get deep water. . . . It is good land, all of it. The lightest soil that you can find on the plantation that is good for agricultural purposes going towards LaGrange. In between the highway and the railroad down to this end it is just a little lighter than the balance, and going west it is a good clay subsoil. Cultivate excellent crops on it regularly—tobacco, corn, rye, oats, any crop that grows in this section, and it is all adequate to trucking. I knew when I bought the place that it was

necessary to drive an artesian well, which I did. When I bought that place I did not own the gin premises mentioned here. I bought the gin premises and there was a well there sunk by a former owner and was running feebly, furnished sufficient water for the tenants until these wells were put down. The first thing I did was to condemn the open well at the northern end of the porch of the main building and had this well sunk there at the back porch and brought from the back porch and entered into this basin, and it produced as fine water as any we have; the well was not as good a well as the second one. It was a good well and good water, and abundant. The water went to a depth of 200 feet, and we piped the water to a reservoir on the back porch; used it for several years on the back porch. I had two lines piped to the well. One line I took off to the dairy, which is about twenty feet north of the back porch. I took a pipe and conducted it to the dairy and had a sink made for butter and milk, and this water ran into the sink in which the butter and milk was kept, and the water was flowing continuously, didn't have to do any pumping; then, after going into the dairy, we had it so arranged that it went into the horse lot about thirty feet east of the dairy. The water was running through the trough all the time and went through the public road to the highway and watered my cattle; my cow stables are south of the road. The water from the horse lot emptied into another trough, and escaping from that it emptied into these marl holes, and was carried across the public road into the two houses that are there now. These were tenant houses. From that well I ran pipes into the tenant houses and furnished them from the same well without any artificial pressure. There were two pipes; one went to the residences and one went into the dairy. Then a third pipe went in a northwest direction through my garden. The low ground could have been irrigated. I put down plant first; it began to sog my garden; irrigated it too much. This is the only well at the house. On the other side of this plantation some houses are scattered here and there, and I took those two residences, two houses painted red that lie west of the highway, built those houses, and I sunk a well midway between the houses to furnish them both with water. That well was carried down a depth of 200 feet, lined it all the way down, and out of that well came the largest flow of artesian water I have ever seen. I have had experience as to artesian wells. I was mayor when it was discovered that we could get artesian wells here. It was freer than the city wells. This well furnished a good deal more water than either of the city wells. We put a tap on it and reduced it; it was coming so strong you could not catch it with a dipper, and a system of piping was installed and water taken into the residence further west, occupied by J. D. Stevens. That water flowed with great volume through his kitchen

into the sink and went through both houses. It was 150 yards between the two houses and the well was between the two; 75 yards each one was to the well. Both were dependent upon that well. Including the labor, the piping and help incident to exploration and digging of these wells, my best estimate would be that they cost about a thousand dollars for the two. It might be a few hundred dollars either way. Things were cheaper then. That is not including the piping around the residence; I am speaking about the wells alone. In addition to that, the cost of pipes to the different residences I would say that added $150 or $200 to it; I expect $200. I did not keep an account of it. The uses of this stream of water made the plantation desirable to live upon; in the first place, supplied as good water as is in the world, with the result that it is a healthy plantation. It enabled me to get an entirely satisfactory class of tenants. I can get as many tenants as I want, because it is healthy and good water. It has made it particularly desirable for a dairy. I built a silo and got me a herd of cattle. The low land is elegantly adapted for pasture land, and with the water it makes it ideal for a dairy. Another purpose, it is entirely adaptable to irrigation. The large well on the highway, which I estimate to be running 75 to 100 gallons a minute, was brought up four or five feet above the ground, which made it then in its location about twelve feet above the level of the cleared land. Immediately I saw an ideal situation for irrigation. It could have easily been carried over the land for irrigation with a hydraulic ram or small motor; it was entirely practicable and sufficient water furnished to have pumped it into a reservoir that would have supplied a row of houses along my entire front along the highway. In addition to that, there was enough water there and the location was such, its elevation, with little expense to have installed various kinds of machinery. It was adaptable to a mill for doing the usual and necessary grinding that a plantation needs to have done. . . . I would say that a moderate estimate of that land, located as it is with fertile soil, improved as I had improved it. I had marled the plantation practically all over. I had cleared quite a lot of land north of the railroad that had been cut down for fifty years and never cultivated. I had kept cattle all these years, ranging from a herd of fifteen to thirty-five. I have planted it in rye and have the land now in good fertile condition. I think the market value of that land would be moderately placed at from $150 to $175 an acre through. There are five hundred and eighty-one acres, and $87,000 would be a conservative estimate of land at that time. . . . Q. 'What was the condition after the supply of water had been diminished?' A. The possibilities of the place in respect to irrigation are gone and no water that you can get from the pump. I think that place without deep

water would become a waste plantation again. But for the timber on it, and as an agricultural proposition, I would not undertake to pay the taxes, if deprived of deep water. That plantation has not only State and county taxes, but is in the city of Kinston school district. I would say that certainly without deep water the Caswell Lodge plantation is not worth half of its value that it had with it. After the deep-well water is eliminated, it would not be worth half price. With the city water supply, I would say that the value had been diminished from twenty-five to thirty-three and a third per cent."

Since purchasing the plantation, and his success in securing deep artesian water, the plaintiff had placed improvements on the plantation of from fifteen to twenty thousand dollars, and had brought the same from a condition of practically waste land to a desirable farm and to a high state of cultivation.

The city purchased from R. F. Hill, the adjacent owner to the western boundary of plaintiff's land a half acre of land at a cost of $250. Soon after purchasing said lot of land from R. F. Hill the city began the sinking of deep wells thereon, and expressed its purpose to conduct water therefrom through a ten-inch main into the city of Kinston, and in May, 1922, began at the city limits to prepare for laying pipes from the city along the Central Highway to its auxiliary pumping station on the plot of land purchased from R. F. Hill, the half-acre plot purchased from R. F. Hill, adjoining the plaintiff's western boundary, and was some several hundred yards west from plaintiff's highway well.

The plaintiff had certain negotiations with the city trying to arrive at an adjustment. The city laid its main across the plaintiff's land and along the highway, plaintiff having fee-simple title to same, pending the negotiations, but no agreement was reached.

It was contended by plaintiff that the gin-house well of the plaintiff and the main dwelling-house well of the plaintiff, both concurrently with the sinking of the defendant's wells and transporting water therefrom to the city, ceased to flow, and neither well since said time to the present furnishes any water whatever to the plaintiff's premises, and at those locations left plaintiff without any available water supply that can be used, and there is none available except from the city's mains. The highway well was reduced to an amount at present inadequate to supply the tenant residence as theretofore supplied, the flow from said well still gradually diminishing.

An overflow artesian well of R. F. Hill, a short distance west of the city's well, likewise discontinued its flow contemporaneously with the opening of the city's wells, the wells of the city being ten-inch wells, three in number. The complete cessation of the flow of two of plaintiff's wells and the diminution of the flow of the third from about 75

to 100 gallons a minute to 8 gallons per minute, and the entire cessation of the flow of R. F. Hill's well were contemporaneous with the opening of the city's ten-inch wells, and cessation of the flow of the city's wells while in construction by sanding or by capping the same caused the water to return in plaintiff's wells and in the well of R. F. Hill in former volume, to be followed immediately by cessation again when the flow from the city's wells was again released.

It was testified to by different witnesses that the market value of the land was from $30,000 to $150,000, and after the city had sunk its deep-water wells and the plaintiff's wells had dried up, the market value had decreased from 15 to 50 per cent.

The defendant contends:

"That the city found it necessary, in order to meet the demands of its inhabitants for water for sanitary purposes and for fire protection, to increase the number of its artesian wells, and in 1922 it sank three artesian wells on a small tract of land which it purchased from one Hill, lying immediately west of plaintiff's Caswell Lodge Farm, and immediately south of the Central Highway. Pursuant to what the plaintiff and the city thought would result in an amicable adjustment, and pending these efforts, each party expecting a final settlement by agreement, the city laid its water mains across plaintiff's property and began to pump water from its reservoir, supplied by its three artesian wells, across plaintiff's land."

The efforts to reach an amicable adjustment failed. The plaintiff instituted this action.

The defendant answered and set up its right to condemn, in order to supply its inhabitants with water, a right of way across plaintiff's lands pursuant to an ordinance duly passed by it so condemning such right of way, and asked in its answer that condemnation proceed, commissioners be appointed, and in due course that it be determined what, if any, damage the plaintiff had suffered at the hands of the defendant city.

The case came on for trial; the court below, over the defendant's objection, tried the case as a common-law trespass on the part of the city. Evidence was introduced on behalf of the plaintiff, tracing the condition of the plaintiff's farm as far back as his witnesses could remember, especially with reference to the water conditions, the healthfulness of the occupants of the said farm, its rundown condition, all of these conditions increasing in severity until the plaintiff purchased the land a good many years ago; then evidence was introduced to show that the value had gradually increased under plaintiff's management and expenditures until he sank artesian wells on it, and then, with reference to its increasing desirability for tenants, agricultural, dairy,

residential and industrial uses, etc., and asserting against the defendant that when it sank its three wells on its own land that it thereby deprived the plaintiff's farm of a chief element of value, to wit, its artesian water, by causing its artesian wells to diminish in flow, and some of them to dry up, and that the plaintiff suffered damages in the laying of the water main, some two thousand feet in length, across his land, practically all of this distance, except two hundred feet, being within the Central Highway, by consent of the State Highway Commission. The defendant contended that it had a right to condemn its right of way and have the damages assessed by a jury, and that the plaintiff was not damaged materially in any respect, and that whatever damages he might have suffered was more than offset by the benefits accruing to said farm in having the city water main across it, with full privileges of use of the city water at the same rates as inhabitants of the city, without the attendant burden of city taxes and restrictions, and that said water main was so far below the surface as not to interfere with any reasonable use of plaintiff's property, and supported this with evidence.

Defendant further contended, and there was evidence to support this contention, that the value of plaintiff's farm had increased on account of being connected with the city water system in a material amount, and was worth more after the city sank its wells and put in operation its water mains, and that while in fact the sinking of said wells on its own land did not interfere with the flow of plaintiff's wells, and that there was no physical relation between plaintiff's wells and the city wells, that as a matter of right the city had the full and free right and power to sink wells on its own land as it did, and to take therefrom all the water that might naturally rise from such wells into its reservoir, and that then it had a full and perfect right, and that it was its duty, to transport the said water into its water system for its inhabitants in order that their health and sanitary conditions should be promoted, and that fire protection should thereby be afforded, and that such was not an invasion of the plaintiff's property rights with respect to his said farm, and created no liability on the part of the defendant for the use of its said wells and the water flowing therefrom.

It appears distinctly and plainly in all the evidence offered by the plaintiff and the defendant that the water in controversy flows naturally and without the application of artificial force from the defendant's wells into its reservoir, and that no pumping or other means is used to extract the water from said wells, although electricity is used to pump said water, after it has flowed naturally into the reservoir, from said reservoir into the main and into the city water system.

The following judgment was rendered in the court below, on the issues submitted:

"This action coming on for trial before his Honor, Henry A. Grady, judge, and a jury, upon the issues submitted, the said issues and the answers of the jury thereto being as follows:

"1. Did the defendant sink artesian wells on its own lands, adjacent to the lands of the plaintiff, and thereby wrongfully and unlawfully withdraw waters from the lands of the plaintiff in such quantities as to diminish and retard the flow of waters from the artesian wells of the plaintiff as alleged in the complaint? A. Yes.

"2. If so, what damages is the plaintiff entitled to recover by reason of such unlawful act? A. $8,000.

"3. Did the defendant wrongfully and unlawfully enter upon the lands of the plaintiff and place water mains thereon as alleged in the complaint? A. Yes.

"4. If so, what damages is the plaintiff entitled to recover by reason of such unlawful act? A. $1,000.

"It is now, on motion, considered, ordered and adjudged that the plaintiff, N. J. Rouse, do recover of the defendant, the city of Kinston, the sum of $9,000 (nine thousand dollars), with interest thereon from 5 November, 1923, until paid at 6 per cent per annum; and further, that the plaintiff do recover of the defendant the costs of this action, to be taxed by the clerk.

"It is further considered, ordered and adjudged that, in consideration of the amount assessed as damages by the jury in response to the fourth issue, that the defendant, city of Kinston, be and is hereby adjudged entitled to and that it has an easement over and across the lands of the plaintiff for its water main as at present laid and constructed, extending from its auxiliary water station adjacent to and west of plaintiff's lands to the eastern boundary of plaintiff's lands, that is the eastern boundary of plaintiff's gin-house tract described in the complaint, with the right to enter upon said strip of land on which said water main is constructed, and in which it is imbedded for the purpose of maintaining and repairing the same, and for such necessary purposes as are incident to the use of said water mains as a part of the water system of the defendant, said easement to continue so long as the defendant shall use and maintain the said water main as a part of the water system of the defendant. And this judgment shall have the full force and effect of giving and assuring unto the defendant a permanent easement or right to maintain its lines and wires and poles across the defendant's lands as the same are now constructed and to construct them otherwise as they are at present located for the purpose in connection with its water plant.

"And it is further ordered, adjudged and decreed that the defendant shall have, under this judgment and in this action, the full right and power and authority to continue and to operate its wells at its pumping station as it may desire according to law in view of the recovery against it herein."

The defendant excepted to the judgment as signed in favor of plaintiff, assigned error, and appealed to the Supreme Court. On the trial 144 exceptions were taken. There are 53 assignments of error and grouping of exceptions by defendant, which material ones we will consider in the opinion.

George Rountree, Robert H. Rouse, and Cowper, Whitaker & Allen for plaintiff.

Jno. G. Dawson, F. E. Wallace, L. R. Varser, Dickson McLean, and H. E. Stacy for defendant.

CLARKSON, J. The defendant's first assignment of error:

"The defendant moved the court to remand the case to the clerk, to the end that commissioners might be appointed as in condemnation proceedings, based on defendant's answer, or to appoint the commissioners to view the premises and assess the damages, which the court declined to do."

C. S., ch. 33, "Eminent Domain," sec. 1706, is as follows:

"The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporations, or persons following: . . .

"Section 2. Municipalities operating water systems and sewer systems and all water companies operating under charter from the State or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies."

We said in *Parks v. Comrs.*, 186 N. C., 498: "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. *Jones v. Comrs.*, 130 N. C., 452; *Dargan v. R. R.*, 131 N. C., 623; *Durham v. Rigsbee*, 141 N. C., 128; *Luther v. Comrs.*, 164 N. C., 241; *Pharr v. Comrs.*, 165 N. C., 523; *Shute v. Monroe*, 187 N. C. 683.

In the present case the defendant denies the right of plaintiff to recover damage for the pipe line running along the State Highway No. 10, plaintiff having a fee-simple title to the land. In *Teeter v. Tel. Co.*, 172 N. C., 785, it is said: "It is not denied by defendant that the telegraph line superimposed upon a railroad right of way is an additional burden which entitled the owner to compensation. *Hodges v. Tel. Co.*, 133 N. C., 225; *Phillips v. Tel. Co.*, 130 N. C., 513." To the same effect is a water main. Defendant also denies the right of plaintiff to recover damages for the diversion of the percolating and flowing water in and under the lands of plaintiff.

C. S., 1716, is as follows:

"For the purpose of acquiring such title the corporation, or the owner of the land sought to be condemned, may present a petition to the clerk of the Superior Court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal."

Under the above section, the condemnation proceedings is "For the purpose of acquiring 'such title,'" etc. The defendant denies that the plaintiff has a title that can be condemned except a short distance of the pipe line over his land. The defendant contended that the State Highway Commission had given the plaintiff the right to the use of the land for the underground water mains along its right of way. The plaintiff had the fee-simple title in the land.

We think the principle in *Keener v. Asheville*, 177 N. C., 4, applicable. It is there said: "In this view, the present case, we think, comes clearly within the recent decision of *Mason v. Durham*, 175 N. C., 638. There the county commissioners, in straightening a public road, had taken a strip of plaintiff's land. In an action to recover damages, defendants denied plaintiff's ownership of the land and, generally, his right of action, and on the hearing resisted recovery for the reason, among others, that plaintiff's remedy was in petition to the board of commissioners, as the statute provided, and it was held, among other things: 'The county board of commissioners, in acting upon a petition by the injured owner whose land had been taken for road purposes, under a statute providing for the assessment of damages by this method, does so in an administrative capacity; and where the board has taken and is using the land for such purposes, *and the owner has not followed the special method provided and brings his action in the Superior Court for his damages, the defendant's denial of plaintiff's ownership and its liability for the damages waives its right to insist that the statutory method should have been pursued by the plaintiff.*'" (Italics ours.) *Fleming v. Congleton*, 177 N. C., 186. The defendant denies plaintiff's

ownership to reasonable use of the percolating water and damages for pipe line along highway, the fee simple belonging to plaintiff.

This assignment cannot be sustained.

Defendant's second assignment of error:

"The court erred in admitting evidence offered by the plaintiff tending to show the condition of the plaintiff's farm from the time of the alleged trespass and injury until some fifty or sixty years prior thereto, including in this evidence statements as to health conditions on said farm and vicinity, complaints of tenants on account of water and as to health conditions, . . . and including agricultural conditions on the farms and ancient methods of farming, etc., . . . and did not confine these to the time of the alleged injury." (The part of this assignment left out we do not think material.)

In *Power Co. v. Power Co.*, 186 N. C., 183, *Stacy, J.*, lays down the measure of compensation, as follows: "It is the accepted position here and elsewhere that in condemnation proceedings, where property is taken for 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 (2 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 market, 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 capacity 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."

In *Creighton v. Water Comrs.*, 143 N. C., 172, the witness was asked the character of meadow land before a dam was erected and water backed on such land. The answer was: "I have been working with it

about thirty years, and it was certainly good meadow—just as fine as anybody's meadow in the country."

The witness further gave the value of hay gotten from the land from year to year, although he said he had never weighed it but got four to six to eight two-horse loads.

Mr. Justice Hoke says: "This testimony was offered and admitted to show the character and quality of the land appropriated, and was clearly competent."

In *Myers v. Charlotte,* 146 N. C., 248, *Chief Justice Clark,* for a unanimous Court, says: "The value of land is largely a matter of opinion derived from a variety of circumstances," and proceeds to illustrate his holding.

The court below, on this aspect of the case, charged the jury as follows: "I charge you that the measure of damages in respect to this second issue, in case you should answer the first issue 'yes,' is the difference in value between the land in question immediately prior to the digging of plaintiff's wells and immediately subsequent thereto. That is to say, you will ascertain from this evidence the true market value of the land in question immediately before such wells were sunk, and you will then ascertain the true market value immediately after the wells were sunk. You will then deduct the latter figure from the first, and the remainder will be your answer to the second issue."

We think the charge in accordance with the law of this State. The evidence bearing on the question of compensation naturally takes a wide range—the surrounding circumstances and facts. From the record both sides were allowed latitude, and we can find no fact of prejudicial or reversible error.

In re Drainage District, 162 N. C., 129, it was said: "The other, that the court instructed the jury to take into consideration the health of the community instead of confining them to the question of health in so far as it affected the lands within the drainage district, cannot be sustained, for the court charged that the jury should consider 'not only the increased facilities of the land for producing crops, but the benefit to the health of the people who live in the district.'"

In *Snell v. Chatham,* 150 N. C., 736, *Clark, C. J.,* said: "It is an old saying that 'fragments of all the sciences are taken up in ashes of the law.' It is not long since that our progressive brethren of the medical profession have discovered that one kind of mosquito (anopheles) causes malaria; that another (stegomyia) carries yellow fever, and another still spreads the Asiatic cholera; that house flies spread typhoid fever, that fleas on rats communicate the dreaded Bubonic plague, and lesser germs, as bacteria and bacilli, are the agents of other diseases. For thus do 'the weak things of the world confound the things which

are mighty.' 1 Cor. 27. Acting on these discoveries, under authority of law the stegomyia and yellow fever have been extirpated in Cuba and the Bubonic plague was stayed in San Francisco because mosquitoes and rats were systematically destroyed by the officers of the law. There is no reason that the plaintiff's home shall not be freed of malaria by authority of a judgment based upon medical advice, especially as the parties agreed that such remedy (whatever the majority of the medical arbitrators should find it to be) should be entered as the judgment of the court."

That stagnant water, in light of present-day medical opinion, is obnoxious to health in this country, chiefly as it serves for a breeding place for certain species of malaria-carrying mosquito, the only means at present known by which that disease is disseminated. The life and habitat of the mosquito has received the most careful investigation at the hands of the United States health authorities. Vol. 23, 17 July, 1908, of the Public Health Report of the United States Marine Hospital Service.

The benefit to the health of the people who lived on the plantation is more important than the increased facilities of the land for producing crops, and it is clearly competent in fixing the market value of the land to show before and after the artesian wells were sunk the condition of the health of the inhabitants who lived on the land. Good health can more easily create wealth. It gives strength and vigor to work.

This assignment cannot be sustained.

Defendant's assignment of errors 3 and 52:

"The court erred in admitting evidence as to conversations between the plaintiff and board of aldermen and in permitting the introduction of plaintiff's written proposal which was never accepted by the defendant, and in denying the defendant the privilege of showing that the plaintiff did agree for the defendant to cross his land pending the negotiation looking toward an adjustment by consent and in charging the jury that they might consider written proposals and evidence of efforts between the parties to adjust the matters as evidence of notice that the sinking of the wells and laying off the water mains would result in damage to plaintiff."

The court below charged the jury: "In conclusion, I desire to call your attention to the fact that during the progress of this trial a controversy arose about the introduction of certain evidence as to a contract between plaintiff and the defendant city of Kinston, a copy of the proposed contract having been offered in evidence. I charge you that there never has been any contract between the city of Kinston and the plaintiff, Mr. Rouse. . . . It was never accepted by the city and never completed nor executed. This evidence in respect to the contract

and to the dealings between Mr. Rouse and the city of Kinston, including the proposal and his rejection, was offered for the sole purpose of showing, if it does show, that the city of Kinston had notice at the time of the sinking of the wells and the laying of the water main that such act would necessarily cause the plaintiff damages, and that is the only purpose for which this evidence was offered, and you cannot consider it in any other light."

We think if error was committed it was not prejudicial. The court's positive instruction, "You cannot consider it in any other light," was all the defendant could ask.

These assignments cannot be sustained.

Assignment of error No. 4:

"The court erred in admitting evidence as to possible future uses and developments of plaintiff's farm, based on the supposed continued flow of plaintiff's private artesian wells, such as residential, industrial, and commercial uses, admitting opinions as to these and that such developments were impossible with city water, but were possible only with water from private artesian wells. Also that rates for outside water users would be raised or discontinued in the near future, including a letter that outside water rates had been raised since this controversy, and with this injecting private opinion as to value as distinguished from market value, allowing witness to say 'would not give one-half for it.'" We have already discussed the rule of compensation.

We think the defendant has no reason to complain. The defendant's witnesses went into this matter in every phase. For example, S. L. Lynch testified: "I own a piece of land on the edge of town between Kinston and the Caswell Lodge plantation of Mr. Rouse. I was raised on a farm, and am still a little interested in farming. I have been seeing the Caswell Lodge plantation for 25 or 30 years. Never been all over it, only riding the different roads to go by. I just about know the boundaries on the west of Mr. Hill and east of the Watford land. I think thirty or thirty-five thousand dollars would have been a good price for the farm in May, 1922, before the city sank its wells and laid its pipe line there. I think forty thousand dollars or more would be the value of the place after the deep wells were sunk by the city and the water connection made with Kinston across the land. In my opinion connecting the water supply of the city across the land increased the value of the land; it increased mine and I think it did theirs."

This assignment cannot be sustained.

Assignments of error Nos. 9 and 10:

"The court erred in refusing to submit the issue framed by defendant as to unlawful diversion of water from the plaintiff's land and damages flowing therefrom, and in submitting the issue in the following form:

'Did the defendant sink upon its own land, adjacent to the plaintiff's land, artesian wells of such strength and force as to unlawfully interfere with and absorb the underground percolating waters under the lands of the plaintiff, and thereby diminish, retard or destroy the flow of waters from the plaintiff's wells, as alleged in the complaint?' and in submitting an issue of damages designating such interference as an unlawful act."

Assignments of error Nos. 13, 14, etc.:

"These assignments of error present the question as to the correctness of his Honor's view that the English rule of absolute ownership of land did not cover the absolute right to use underground percolating waters not contained in any well-defined underground stream according to the owner's desire, but that such use was limited to the rule applied in some of the American courts and known as the 'reasonable user' rule, limiting the owner the use of such percolating waters on the premises which contained the wells. The various phases of the application of the trial court's view are presented in the several exceptions noted in this group of assignments of error."

The above assignments of error set forth the main contention in this case. The "reasonable user" of underground percolating water. The issue was drawn and the contest waged over the doctrine of "reasonable use" of percolating water. The authorities are conflicting. We are of the opinion that the reasonable use doctrine is supported by the greater weight of authorities in the United States and is the just and equitable rule to follow.

In 27 R. C. L., sec. 91, it is said, in part: "The law respecting the rights of property owners in percolating subterranean waters is of comparatively recent development. The first English decision dealing with underground waters was rendered in 1840, and the case which has become recognized as the leading one on the subject was decided in 1843. According to the doctrine laid down by this and subsequent decisions, and known as the common-law rule, or English rule, water which percolates through the soil without any definite channel is regarded as much a part of the freehold through which it courses as the clays, sand, gravel and rocks found therein, and the owner, at least in the absence of malice, has the absolute right to intercept the water before it leaves his premises and make whatever use of it he pleases, regardless of the effect that such use may have on a lower proprietor through whose land the water, in its natural course, was wont to filtrate and percolate. This rule was followed in nearly all of the early and in a number of the later American cases, in the absence of express contract and of positive authorized legislation, *but the trend of modern opinion in this country is toward the 'reasonable use' rule.*" (Italics ours.)

C. S., 970, is as follows: "All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State." This law was passed in 1778, ch. 5, and from an examination is practically the exact language as C. S., 970.

The English decision referred to in R. C. L., *supra,* is *Acton v. Blendell* (1843), 12 Mees. & W., 324; 13 L. J. Exch., held that a landowner has no such right or interest in a subterranean water course as to enable him to maintain an action against a landowner who, in carrying on mining operations upon his own land in the usual manner, drains away the water from the land of the first-mentioned owner and lays his well dry. This decision might well have been based upon the doctrine of reasonable use, but it was rested upon the absolute ownership on the part of the mine owner of all that lay beneath the surface of his land.

We do not think the English rule laid down in 1843 applicable and consonant or consistent with the just ideals of our Government. It is persuasive but not binding on this Court. *Meeker v. East Orange,* 77 N. J. L., 623 (1909), is a similar case as the instant one. The authorities are there carefully and thoroughly reviewed by *Pitney,* Chancellor (afterwards on the Supreme Court Bench of U. S.). He said, for a unanimous Court: "Upon the whole we are convinced, not only that the authority of the English cases are greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of 'reasonable user' rests is better supported upon general principles of law and more in consonance with natural justice and equity. We therefore adopt the latter doctrine. This does not prevent the proper use by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation or otherwise, nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted. But it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land when they are taken, if it results therefrom that the owner of the adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agricultural, pasturage or other legitimate uses."

In *Westphal v. City of N. Y.*, 69 N. E., 369; 177 N. Y., 143, it was held: "The defendant, to supply a public need of its citizens, established the driven wells and pumping stations upon its own property; but the effect of their operation has been to withdraw, or to abstract, waters from the surrounding lands, to the injury of the plaintiffs. This was a natural effect and, as a consequential injury, there has been an invasion of the plaintiff's property rights, which constituted a technical trespass, for the resultant damages of which a right of action accrued."

In *Midway Irrigation Co. v. Snake Creek Mining and Tel. Co.*, 271 Fed. Rep., 162, it was held: "The rule generally adopted by not only the courts of the arid States, but by most of the American courts, so that it may be said to be the American, as distinguished from the English rule, is that, while the owner of the land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby becomes a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with the beneficial use of the land, especially if such use in excess of the reasonable and beneficial use is injurious to others, who have substantial rights to the water. *Meeker v. City of East Orange*, 77 N. J. Law, 623; 74 Atl., 379; 25 L. R. A. (N. S.), 465; 134 Am. St. Rep., 798; *Smith v. Brooklyn*, 18 App. Div., 340; 43 N. Y. Supp., 141, affirmed 160 N. Y., 359; 54 N. E., 787; 45 L. R. A., 664; *Forbell v. New York*, 164 N. Y., 522; 58 N. E., 644; 51 L. R. A., 695; 79 Am. St. Rep., 666; *Bassett v. Salisbury*, 43 N. H., 569; 82 Am. Dec., 179; *Willis v. Perry*, 92 Iowa, 297; 60 N. W., 727; 26 L. R. A., 124; *Stillwater Co. v. Farmer*, 89 Minn., 58; 93 N. W., 907; 60 L. R. A., 875; 99 Am. St. Rep., 541."

In *Erickson v. Crookston Waterworks P. and L. Co.*, 100 Minn., 481, it was held:

"The law of correlative rights applies to the use by adjoining landowners of waters drawn from an artesian basin. Such proprietors must so use their wells as to not unreasonably injure their neighbors.

"The circumstances of a particular case may render it illegal for such landowner to make merchandise of such supply in a particular manner.

"A water company acquired title to lands on which were wells flowing from an underground basin, the source of supply of a hundred or more similar wells on lands of adjoining owners in the natural use of the soil. It is held that the water company had no right to deprive them, or any of them, of water by use of artificial force in pumping the water in the artesian basin to a low level, in order that it might supply a neighboring community with water as merchandise."

In *Horne v. Utah Oil Refining Co.*, 59 Utah Rep., 279 (1921), *Thurman, J.*, has gone into a most exhaustive discussion of the entire subject,

and it was held in that case that "The owner of land is entitled only to a reasonable use of the percolating waters under his land for purposes connected with the beneficial ownership or enjoyment of his own land; and for the use of such water by an owner to be a 'reasonable use,' especially in an artesian district, it should be limited first to his just proportion according to his surface area; and second, he should not be entitled even to this quantity to the injury of others similarly situated, unless it is reasonably necessary for the beneficial purposes to which he devotes the water; and the owner has no right to injure his neighbors by an unreasonable diversion of the water for the purpose of sale or carriage to distant lands."

The *Horne case* was affirmed in a decision by the same judge in *Glover v. Utah Oil Refining Co.* (1923), 218 Pac. Rep., 955.

This matter is also discussed at length by *Temple, J.,* in the famous case of *Katz v. Walkinshaw,* 141 Cal., 116; 64 L. R. A., 236. Sustaining the doctrine of reasonable use, he says: "But this question was completely put at rest, so far as the State of New York is concerned, by the case of *Forbell v. New York,* 164 N. Y., 522; 51 L. R. A., 695; 79 Am. St. Rep., 666; 58 N. E., 644. It was a suit by another plaintiff to restrain the same operations considered in *Smith v. Brooklyn.* Here there was no visible stream or pond on plaintiff's land. His injury was merely that the level of the water held in the soil was lowered, to his injury. In stating the case the Court said: 'The defendant (city) makes merchandise of the large quantity of water which it draws from the wells that it has sunk upon its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his land is thereby affected, but does complain, and the courts below have found, that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown.' This statement shows a striking similarity of the issues made in that case to those involved here. The court proceeds to state the usual doctrine in regard to percolating water, and approves the doctrine for the cases in which it is properly applicable. No doubt the land proprietor owns the water which is parcel of his land, and may use it as he pleases, regard being had to the rights of others. It is not unreasonable that he should dig wells in order to have the fullest enjoyment and usefulness of his estate, or for pleasure, trade, or whatever else the land as land may serve. 'But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region there about, and lead it to his own land, and by merchandising it prevent its return,

is, however reasonable it may appear to the defendants and its customers, unreasonable as to the plaintiff and the others, whose lands are thus clandestinely sapped, and their value impaired.'"

The *Walkinshaw case* was affirmed after a rehearing, *Shaw, J.* (64 L. R. A., 250), said: "It is clear, also, that the difficulties arising from the scarcity of water in this country are by no means ended but, on the contrary, are probably just beginning. The application of the rule contended for by the defendant will tend to aggravate these difficulties rather than to solve them. Traced to its true foundation, the rule is simply this, 'That, owing to the difficulties the courts will meet in securing persons from the infliction of great wrong and injustice by the diversion of percolating water if any property right in such water is recognized, the task must be abandoned as impossible, and those who have valuable property acquired by and dependent on the use of such water must be left to their own resources to secure protection for their property from the attacks of their more powerful neighbors, and failing in this, must suffer irretrievable loss; that might is the only protection.

> 'The good old rule
> Sufficeth them, the simple plan,
> That they should take who have the power,
> And they should keep who can.'

"The field is open for exploitation to every man who covets the possession of another, or the water which sustains and preserves them, and he is at liberty to take that water if he has the means to do so, and no law will prevent or interfere with him, or preserve his victim from the attack. The difficulties to be encountered must be insurmountable to justify the adoption or continuance of a rule which brings about such consequences."

The facts in the *Walkinshaw case, supra,* were: "The action was brought to enjoin defendant from drawing off and diverting water from an artesian belt, which is in part on or under the premises of plaintiffs, and to the water of which they have sunk wells, thereby causing the water to rise and flow upon the premises of plaintiffs, and which they aver had constantly so flowed for twenty years before the wrong complained of was committed by defendant. The water is necessary for domestic purposes and for irrigating the lands of plaintiffs, upon which there are growing trees, vines, shrubbery, and other plants, which are of great value to plaintiffs. All of said plants will perish, and plaintiffs will be greatly and irreparably injured if the defendant is allowed to divert the water. These facts are admitted, and further, that defendant is diverting the water for sale, to be used on lands of others distant from the saturated belt from which the artesian water is derived."

Mr. Weil in his work on Water Rights in the Western States, Vol. 2 (3 ed.), in secs. 1039 and 1040, briefly defines and discusses the "English Rule," both as to percolating water and water courses, and carefully makes the distinction. In section 1041 the "American Rule" is referred to as a modification of the English rule, and reference is made to list of cases from 18 American jurisdictions where the English rule "has been either expressly departed from or doubted in one form or another." The cases are cited in the note to section 1066, and are from the following States: California, Colorado, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, West Virginia, and also from the United States Supreme Court.

The *contra* view is held in many states. In Ohio and Pennsylvania the courts have ruled that where the subterranean supply of water is stopped by the lawful act of an adjoining landowner, the resulting injury is *damnum absque injuria*. See *Appeal by Lybe*, 106 Pa., 626, 51 Am. Rep., 542; *Frazier v. Brown*, 12 Ohio St., 294; *Elster v. City of Springfield*, 49 Ohio St., 82, 30 N. E., 274.

To the same effect are the cases of *Hunte v. Laramie*, 181 Pac., 137 (a Wyoming case); *Henninger v. McGinnis*, 108 S. E., 671 (a Virginia case decided in September, 1921); *Huber v. Merkel*, 117 Wis., 355; *Chatifield v. Wilson*, 28 Vt., 49; *Houston & Texas Central Railroad Co. v. East*, 98 Tex. Rep., 146; *Chase v. Silverstone*, 62 Maine, 175.

An interesting discussion of "Reasonable use of percolating water in the West" is to be found in Harvard Law Review, March, 1924, p. 602 (Vol. 37, No. 5), *et seq.*

The facts in the instant case succinctly are: The plaintiff purchased 581 acres of land in 1914—281 acres cleared land and balance bottom land. The cleared land was good for all kinds of farming, trucking, dairying, etc.; considerable frontage of his land was on the State Central Highway No. 10, that could be utilized for homes. The land was about two miles from the thriving city of Kinston. When purchased, the houses on the land had become almost worthless and in decay. The farm land had gone to waste; impossible to get white or colored people to live in the houses, or farm the land, on account of the bad surface water in shallow wells that the tenants had to drink. The place was sickly; no tenants could be obtained, on account of bad water—surface wells. The plaintiff had had experience—one of the promoters of the idea of artesian wells for water in that section of the State. He had found from experience that from the deep artesian wells could be obtained clear, pure and wholesome water, fit for domestic purposes, for man and beast. He sunk artesian wells, at a considerable cost, and obtained a splendid supply of pure and wholesome water, fit for domes-

tic use. One well on the highway was estimated to run 75 to 100 gallons per minute, and the flow was reduced to 8 gallons a minute after the city wells were sunk. The water made the land adaptable for irrigation. He rebuilt the Caswell Lodge, or Red House, and built numerous tenant houses. He put artesian water in them. He built barns, ran a dairy, built a silo, got a herd of cattle, and was able, on account of the good and wholesome water, to get the most efficient tenants and all he needed. He painted the houses, improved the land and brought it up to a high state of cultivation, and it became a very valuable plantation, producing fine crops. He spent large sums of money to do this.

From the testimony of witnesses, after the artesian wells were dug he made of a desert place an oasis.

"And the desert shall rejoice and blossom as a rose."

In 1922 the city of Kinston, a thriving, up-to-date, modern city, was in need of more water to meet the demand of an increasing population. It needed pure and wholesome water for domestic purposes, drinking, sanitary, and fire protection. It was known to the officials of Kinston that the deep artesian wells on the plaintiff's plantation had produced pure and wholesome water. It was no experiment, no useless digging by the city, at large cost, to hunt the subsurface, percolating water. It was found by plaintiff on his plantation in a large quantity. The city of Kinston was unable, for causes not clear in the record, to buy or condemn, as they had the right to do, and pay just compensation for the subsurface percolating water on plaintiff's land. They purchased a half-acre of land for $250.00 from an adjoining landowner, established an auxiliary water station, and sunk artesian wells—three 10 inches in diameter, one 158 feet deep, another 178, and another 608 feet deep. The wells are about 75 feet apart and several hundred yards from plaintiff's wells. The water from these wells comes from its own force into the reservoir; it is then pumped into the city mains from the reservoir, and sold to the dwellers in Kinston, and used for drinking and sanitary purposes, fire protection, etc. Since the city sunk its wells, the plaintiff's wells have gradually diminished and have practically dried up, and it has left plaintiff without any available water supply that can be used, except what is available from the city's mains. The Highway well is so reduced to an amount inadequate to supply the tenant residence near it. The cessation of the flow in plaintiff's wells was cotemporaneous with the city's sinking the three 10-inch wells. As a result, plaintiff's wells are practically worthless and dry. That on account of the city of Kinston taking the water, the farm is returning to its former dilapidated condition, and its value has been

materially decreased. It is difficult for plaintiff now to get tenants. His dairy has been destroyed.

Under the English rule promulgated in 1843 (*Acton v. Blundell, supra*), plaintiff would have no cause of action, under the facts in this case. Taking the subterranean or percolating water by the defendant would be *damnum absque injuria*. It is contended by defendant that the rule applies of *cujus est solum, ejus est usque as cœlum et ad inferos*. To whomsoever the soil belongs, he owns also to the sky and to the depths. This is a maxim of the common law. This principle allows the landowner to take soil, rock, or anything he desires from the land. He can build the Tower of Babel, "whose top may reach unto Heaven," and he can go to the center of the earth, and all above and below belongs to him. But this rule is limited by another well-known doctrine or maxim of the common law, "*Sic utere tuo ut alienum non lædas.*" So use your own as not to injure another's property.

Water is a fluid, mobile, unstable. "Unstable as water, thou shall not excel." The human body is composed of 70 per cent water. We find in Dalton's Human Physiology (7 ed.), p. 36: "According to the best calculations, water constitutes in the human subject about 70 per cent of the entire bodily weight. . . . In accordance with the results formerly obtained by Barral—that, for a healthy adult man, the average quantity of water introduced into the system is about 2,000 grammes per day." It is necessary to sustain human life. It is needful in agriculture and industry. Percolating water being mobile and unstable, and being so important to health, agriculture and industry, we think the "reasonable-use" doctrine is correct in principle. Such an important factor in the human body, and useful for other purposes, should not be monopolized, as under the English rule, but the American rule of reason should prevail.

Law is considered the perfection of reason and founded on justice and common sense. It would be contrary to the administration of justice and right to construe the law, in a case of this kind, which would work injustice and wrong, to be that the plaintiff had no remedy. The defendant realized that this percolating water, in law and morals, could not be taken and sold as a commodity to the injury and detriment of plaintiff, without just compensation. In its answer it says, "and it has continuously been ready, able and willing to negotiate with the plaintiff as to a money compensation."

We think the American rule, adopted in most of the States where this question has arisen, the "reasonable use" of percolating water, the correct rule. The beauty of the common law is that it is elastic and at all times fitted to meet modern life and changing conditions when consonant with right and justice. We think there is no error in the charge

of the court below, as follows: "This rule does not prevent the private use by any landowner of percolating waters subjacent to his soil, in manufacturing, agriculture, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining, or the like, although by such use the underground percolating waters of his neighbor may be thus interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale, for uses not connected with any beneficial ownership or enjoyment of the land from which they are taken, if it thereby follows that the owner of adjacent lands is interfered with in his right to the reasonable use of subsurface water upon his own land, or if his wells, springs or streams are thereby materially diminished in flow or his land rendered less valuable for agriculture, pasturage, or for legitimate uses. . . . I therefore charge you that, in the absence of contract or legislative enactment, whatever is reasonable for the owner to do with his subsurface water, he may do. He may make the most of it that he reasonably can. It is not unreasonable for him to dig wells and take therefrom all of the waters that he needs in order to get the fullest enjoyment and usefulness from his land, for the purposes of abode, productiveness of the soil, or manufacture, or whatever else the land is capable of. He may consume it at will; but, to fit it up with wells and pumps of such pervasive and potential reach that from their base he can tap the waters stored in the lands of others, and thus lead them to his own land, and by merchandising it, prevent its return, to the injury of adjoining landowners, is an unreasonable use of the soil, and in such event the injured neighbor may bring his action for damages."

In *Smith v. Morganton*, 187 N. C., p. 802, it was said: "The doctrine finds support in our decisions which hold that a riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of the water by other like proprietors." See cases cited.

Under the "Eminent Domain" chapter 33, *supra*, the municipalities of the State have a right, under a clear interpretation of the law, to acquire all necessary land and water rights by purchase or condemnation (paying just compensation) or otherwise, for the public use or benefit of such body politic.

This is the first time this question has been to this Court. It is of great importance to the municipalities and landowners of the State. It deals with property rights and health, and we have gone into the matter more extensively than usual.

We have gone carefully over the charge of the court below, and commend it for its fairness. The record shows that the charge was clear

and accurate, giving the law applicable to the facts in the case and the contentions of the parties. We have gone over the prayers for instructions and the other assignments of error, and can find no prejudicial or reversible error.

We have considered only the main and material assignments of error. No error.

STACY, J., dissents.

AMERICAN EXCHANGE NATIONAL BANK v. B. R. LACY, TREASURER, AND D. B. STAFFORD, SHERIFF OF GUILFORD COUNTY.

(Filed 21 June, 1924.)

1. Constitutional Law—Statutes, Unconstitutional in Part—Interpretation—Taxation—Automobiles—Sales—Trades—Privilege Tax.

Where a tax statute offends against the commerce clause in the Federal Constitution in discriminating against nonresident manufacturers and dealers in automobiles, according to investment of capital stock in this State, and it clearly appears that the statute is severable as to its constitutional and valid parts, the latter will be upheld, especially when the statute itself so declares, and it appears that the intent of the Legislature was not to render the entire provisions of the statute unconstitutional on that account.

2. Same—Banks and Banking—Contracts—Vendor and Purchaser—Conditional Sales—Collateral Security—Trusts—Principal and Agent.

Where a dealer in automobiles has sold to the bank, to which he was indebted, his automobiles on hand, for the purpose of securing the debt, under further provisions that he was to sell and collect and hold the proceeds in trust for the purpose stated, and has thereafter left the State, and the bank has assumed to continue the sales and make collection therefor, the bank may not avoid payment of the tax upon the ground that it was not a dealer, etc., in contemplation of the statute, and thus evade the practical efficiency of the statute and reduce it to a nullity.

APPEAL by defendants from a judgment of *Shaw, J.*, continuing to the hearing a temporary order restraining the collection of a license or privilege tax for the sale of automobiles.

The facts appear in the judgment, which is as follows:

This cause coming on to be heard, upon notice to the defendants to show cause why the preliminary restraining order heretofore granted in said cause should not be continued in full force until final judgment and decree in this suit, and it being admitted by counsel for the plaintiff and defendants that the pertinent facts are as follows:

The plaintiff is a corporation, engaged in the banking business in Greensboro, and prior to 31 December, 1920, in the course of its busi-

ness, loaned to J. M. Waynick, who was a dealer in Jackson automobiles and trucks, large sums of money, and on the said 31 December, 1920, said Waynick was indebted to the plaintiff in the sum of $25,246.05, and on said day, as collateral security for said debt, executed a bill of sale to said plaintiff, in words and figures as follows:

31 December, 1920.

NORTH CAROLINA—Guilford County.

This bill of sale, made this 31 December, 1920, by and between Mr. J. M. Waynick, of Greensboro, N. C., party of the first part, and the American Exchange National Bank, party of the second part, witnesseth:

That in consideration of $1.00 and other good and valuable consideration paid by the party of the second part to the party of the first part, the receipt of which is hereby acknowledged, the said party of the first part does hereby sell and assign to the said party of the second part, the following automobiles: 1 Model 638 Semi-sport, No. 25910; 1 Model 638 Semi-sport, No. 24916; 1 Model 638 Touring, No. 25392; 1 Model 638 Touring, No. 25905; 1 Model 638 Touring, No. 25712; 1 Model 638 Touring, No. 25417; 1 Model 638 Touring, No. 25638; 1 Model 638 Sport Model, No. 25380; 1 Model 638 Sport Model, No. 25809; 1 Model D Truck, 215; and with standard equipment.

I agree to sell and collect for the said cars above described in trust for the said bank, and to account to the bank, and settle in full for each car immediately upon sale.

J. M. WAYNICK MOTOR COMPANY.
By J. M. WAYNICK.

During the fiscal year 1921-'22 J. M. Waynick abandoned his business, and the plaintiff took possession of said automobiles and trucks, and sold all of said automobiles during the fiscal year 1921-'22 and applied the proceeds of said sales to the payment of Waynick's debt to it; that it offered for sale the Jackson truck during the fiscal years 1921-'22, 1922-'23, and 1923-'24, and is still offering same for sale. The plaintiff has paid no license or privilege tax for selling said automobiles during any of the fiscal years aforesaid. On 1 October, 1923, defendants B. R. Lacy, Treasurer, and R. A. Doughton, Commissioner of Revenue, caused the other defendant, D. B. Stafford, sheriff of Guilford County, to levy upon said truck for the privilege and license tax of $500.00 and $250.00 for each of said fiscal years, and to advertise the same, to satisfy said tax, penalty and costs.

And the court being of the opinion that the plaintiff is not liable to the State of North Carolina for a license or privilege tax for the sale

of automobiles, it is ordered, adjudged and decreed that the restraining order heretofore granted in this action be and it is hereby continued in full force until final judgment and decree in this action.

T. J. SHAW, *Judge Presiding.*

Defendants excepted and appealed.

Hoyle & Harrison for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendants.

ADAMS, J. In 1920, J. M. Waynick was engaged in selling automobiles, and on 31 December executed and delivered to the plaintiff the written instrument described in the judgment as a bill of sale. There is no pretension that he paid the license tax prescribed by law, and it is found as a fact that the plaintiff paid no such tax during either of the fiscal years set out in the record. In 1921 or 1922 Waynick abandoned his business, and the plaintiff took possession of and sold all the automobiles, and now has the truck, which he has repeatedly offered for sale. The only question for decision is whether the plaintiff is liable for the license tax.

At the session of 1919 the General Assembly enacted a statute providing that every person, firm, or corporation engaged in selling automobiles or automobile trucks in this State, the manufacturer of which has not paid the license tax imposed by law, before selling or offering for sale any such machine, shall pay to the State Treasurer a tax of $500, and shall procure a license for such business annually in advance on or before 31 May or before engaging in the business for which the tax is levied, and shall keep it posted in a conspicuous place where the business is carried on. Public Laws 1919, ch. 90, secs. 72, 85, 87; Public Laws, 1920, Ex. Ses., ch. 65; C. S., 7851. The substance of these provisions is continued in the Revenue Act of 1921 and of 1923 (Public Laws 1921, ch. 34, secs. 72, 85, 87; Public Laws, 1923, ch. 4, secs. 78, 92, 94), the tax under the act of 1923 being payable to the State Commissioner of Revenue. The record presents no controversy, however, either as to the parties to the action or as to the amount of the taxes claimed to be due and unpaid.

The plaintiff contests its liability for the tax on several grounds.

1. It is contended that the statute imposing the tax is inoperative on the ground that it unlawfully discriminates against nonresident manufacturers and unlawfully interferes with interstate commerce. Considering the bases of these contentions—the first, that the corporations are discriminated against and the second that their products are—the Supreme Court of the United States construed the statute as discriminat-

ing against nonresident manufacturers doing business in the State by reducing the tax from $500 to $100 if the manufacturer of automobiles has three-fourths of his entire assets invested in the bonds of the State or any of its counties, cities, or towns, or in other property situated therein and returned for taxation, and as discriminating in favor of the product of resident manufacturers by attempting to regulate interstate commerce. *Bethlehem Motors Corporation v. Flynt*, 256 U. S., 421, 65 Law Ed. 1029.

The plaintiff contends that by reason of its discriminative provision the statute is void. This is not our understanding of the decision. We do not think it goes so far. The invalidity of one part of a statute does not nullify the remainder when the parts are separable and the invalid part was not the consideration or inducement for the Legislature to enact the part that is valid. In *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540; 46 L. Ed., 679, 692, *Mr. Justice Harlan* said: "If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and the valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative." In the first of the Employers' Liability Cases, 207 U. S., 463, 52 Law Ed., 297, 310, *Chief Justice White* expressed the same principle in these words: "Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy."

That part of the statute which offends the 14th Amendment if the nonresident corporations are doing business in the State or attempts to regulate interstate commerce if they are not is a proviso which is severable from the other provisions; and we have legislative declaration that the statute would have been enacted with the obnoxious section eliminated. The statute in question and the following section are a part of the Revenue Act: "If any clause, sentence, paragraph, or part of this act shall, for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its opera-

tion to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. No caption of any section or set of sections shall in any way affect the interpretation of this act or any part thereof." Public Laws 1921, ch. 34, sec. 900. This act was ratified 8 March, 1921; the *Bethlehem Motors case, supra*, was decided 1 June, 1921; during the fiscal year 1921-22 Waynick abandoned his business and left the State, and the plaintiff then took possession of the cars and the truck. Under these circumstances we cannot approve the suggestion that the entire statute is void. *Field v. Clark*, 143 U. S., 649; 36 Law Ed., 294; *Presser v. Illinois*, 116 U. S., 252; 29 Law Ed., 615; *Packet Co. v. Keobuk*, 95 U. S., 80; 24 Law Ed., 377; *Trademark Cases*, 100 U. S., 82; 25 Law Ed., 550; *Bial v. Penniman*, 103 U. S., 714; 26 Law Ed., 602; *Minton v. Early*, 183 N. C., 199; *Comrs. v. Boring*, 175 N. C., 105; *Keith v. Lockhart*, 171 N. C., 451; *Gamble v. McCrady*, 75 N. C., 509. In addition, if the entire statute is not void and the objectionable section discriminates against nonresidents we do not perceive how the plaintiff, a resident corporation, can avail itself of the wrongful discrimination.

2. The plaintiff contests its liability for the tax upon the further ground that it is engaged in the business of banking and is neither a manufacturer of automobiles nor a firm or corporation engaged in selling automobiles or automobile trucks. It may be granted that the primary object of the Legislature was the imposition upon manufacturers and sellers of a license tax for the privilege of carrying on the business or doing the act named in the statute. The tax may be collected from any manufacturer engaged in the business of selling automobiles in the State *or* from any person or corporation selling cars or trucks in the State. Public Laws 1917, 1919, 1921, cited above. Apart from the invalidity of the section which antagonizes certain provisions of the Federal Constitution, the plaintiff, as we understand, does not contend that Waynick did not become liable for the tax and remain so up to the time he abandoned his business and departed from the State. That he will never pay the tax may be assumed. The question is whether the plaintiff shall pay it or whether the State shall suffer the entire loss.

We deem it unnecessary to discuss the distinction between "selling" and "the business of selling" automobiles. That the Legislature intended such distinction may probably be inferred from the wording of the statute. Public Laws 1921, ch. 34, sec. 72. The business of selling seems to be confined to the manufacture, but "selling" applies to every person or corporation. With reference to class, the determinative words are "manufacturer," "person or persons or corporation," and "applicant." The word "dealer" is descriptive of second-hand dealers engaged in the business. As indicated above, the tax is paid for the privilege of

carrying on the business or doing the act named. Public Laws 1921, ch. 34, sec. 26. We do not think the question before us is similar to that in *S. v. Chadbourn,* 80 N. C., 479, or in *S. v. Barnes,* 126 N. C., 1063, cited in the plaintiff's brief. The written instrument executed by Waynick to the plaintiff on 31 December, 1920, is upon its face a bill of sale; it is so denominated in the complaint and in the judgment, although it was given as collateral security for a debt. It was signed by Waynick and contains this agreement: "I agree to sell and collect for the said cars above described, in trust for the said bank, and to account to the bank, and settle in full for each car immediately upon sale."

By the terms of this agreement Waynick became the plaintiff's agent to sell the automobiles and the truck and to hold the proceeds in trust for the plaintiff. Waynick "sold and assigned" to the plaintiff the automobiles and the truck, and it is evident that the sales were to be made for the plaintiff's benefit, at least until the amount secured was fully paid; and if by an arrangement of this kind the tax can be collected, neither from Waynick nor from the plaintiff, payment may finally be evaded and the practical efficacy of the statute reduced to a nullity.

Reversed.

SIDNEY SPITZER & CO. v. COMMISSIONERS OF FRANKLIN COUNTY.

(Filed 21 June, 1924.)

1. Highways—Road Districts—Counties—Statutes—Sinking Fund—Mandamus.

It is peculiarly within the province of the Legislature, in authorizing a local road district within a county to require that the county commissioners levy a special tax, in conformity with the organic law on the subject, to provide for the interest and principal on the bonds to be issued therefor as they may become due and payable; and where the statute has so provided, whether the appropriation to the payment of the principal be called a sinking fund or not, the effect is the same, and it must be pursued, or otherwise a mandamus against the county commissioners will lie. *Cooper v. Comrs.,* 183 N. C., 231, overruled.

2. Same—Stare Decisis—Appeal and Error—Second Appeal—Rehearing—Rules of Court.

The doctrine of *stare decisis* has no application, especially when no rule of property is involved, when it clearly appears that error has been committed in the decision of the former case by the Supreme Court; and where the exceptions present, on the second appeal, under different and somewhat similar statutes, the question as to whether a mandamus will lie for the failure of the county commissioners to make a special levy for

the payment of the principal of the sinking funds for road bonds of a certain district, and the Supreme Court has erroneously decided that it was unnecessary as to another road district within the same county, on the appeal in the later case the position is untenable, that it was an attempt to obtain a rehearing contrary to the rules on the subject.

CLARKSON, J., concurring.

APPEAL by plaintiff from *Calvert, J.*, at August Term, 1923, of FRANKLIN.

Application for writ of mandamus, heard upon facts admitted in the pleadings; and from a judgment denying the writ, plaintiff appeals.

William H. & Thomas W. Ruffin, and J. L. Morehead for plaintiff.
S. A. Newell for defendants.

STACY, J. In this action, or proceeding, plaintiff makes application for a writ of mandamus to compel the defendants, commissioners of Franklin County, by order of court, to lay and collect a special tax annually of not less than 25 cents and not more than 75 cents on the $100.00 assessed valuation of all property subject to taxation within the limits of Harris Township, Franklin County, for the purpose of paying the interest, as it accrues, upon certain road bonds, and to provide a sinking fund to pay the principal of said bonds at maturity, as required by the following provisions in chapter 74, Public-Local Laws 1919, as amended by chapter 40, Public-Local Laws, Extra Session 1920, under which the bonds now held by plaintiff were issued and sold by the defendants:

"That for the purpose of providing for the payment of said bonds and the interest thereon, and for the construction, improvement and maintenance of the roads of said township, the board of county commissioners of said county shall, annually, and at the time of levying the county taxes, levy and lay a special tax on all persons and property subject to taxation within the limits of said township, or not less than twenty-five cents and not more than seventy-five cents on the one hundred dollars assessed valuation of property," etc.

Plaintiff is the purchaser and holder of bonds issued by the defendants in 1919 and 1920, under and by virtue of elections held in Harris Township, Franklin County, as authorized by the two acts above mentioned; and the defendants duly levied a tax in 1920 and 1921, sufficient in amount and within the limits fixed by the statutes for the purposes now in question, but in deference to the decision of this Court in the case of *Cooper v. Comrs.*, 183 N. C., 231, they have now declined to levy a greater tax than is necessary to meet the interest on said bonds as it falls due. The court below placed its judgment upon the recent

decision of this Court in the *Cooper case,* and declined to grant the relief sought, and dismissed plaintiff's petition or application for writ of mandamus. It is conceded that if the *Cooper case* is to be followed, the judgment below must be affirmed; otherwise not.

There is no doubt as to the validity of the bonds held by plaintiff; they are not in dispute. The single question presented by the appeal is whether the defendants may be required by mandamus to lay and collect an annual tax, sufficient in amount not only to pay the interest on said bonds as it becomes due, but also to provide for the payment of the principal of the bonds at maturity. This would seem to be the plain meaning of the statute, and the contrary holding in *Cooper v. Comrs.*, 183 N. C., 231, is disapproved.

Much was said on the argument in favor of adhering to this recent decision, but the doctrine of *stare decisis* is not to be observed with inflexible strictness, especially where no rule of property is involved, and it should never be employed to perpetuate an error. 15 C. J., 956; *Lowdermilk v. Butler,* 182 N. C., 502. "The rule of *stare decisis* is entitled to great weight and respect where there has been, on a point of law, a series of adjudications all to the same effect; but when we are presented with a single decision which we believe to have been inadvisedly made, it is encumbent on us to overrule it if we entertain a different opinion on the question submitted." *Morphy, J.,* in *Griffin v. His Creditors,* 6 Rob. (La.), p. 228. There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right. To quote the late *Chief Justice Clark,* "There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." Indeed, the doctrine of *stare decisis et non quieta movere* has been quite accurately and correctly stated, as follows:

"A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where 'the very point' is again in controversy; but the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible."

In the well-considered case of *Jones v. Comrs.*, 137 N. C., 579, fortified, as it is, by numerous authorities cited therein, it was held that where the Legislature had passed an act authorizing and empowering a county to fund its existing indebtedness, incurred for necessary expenses,

by issuing bonds therefor, mandamus was the proper remedy to compel the county commissioners to issue the bonds as required by the act of the Legislature. Here, we think, the act sought to be enforced is clearly mandatory. The commissioners are required to levy a special tax, *annually,* within the limits specified in the act, for the purpose of providing for the payment of said bonds and the interest thereon. This language admits of but one construction, and, in our opinion, the plaintiff has a clear legal right to demand that the provisions of the statute be observed. *Person v. Doughton,* 186 N. C., p. 724, and cases there cited.

It can make no difference whether the statute contains an express designation of a sinking fund or not; it provides for the annual levy and collection of such special taxes as may be necessary to meet "the payment of said bonds and the interest thereon." This language is sufficiently explicit to require no judicial interpretation. It imposes a duty on the county commissioners to levy *annually* a special tax, within the limits fixed by the statute, for the purpose of providing for the payment of said bonds and the interest thereon.

What other meaning can this language have? Call it a sinking fund, or what not, the command of the Legislature is that, if the bonds are sold, provision shall be made for their payment by levying an annual tax, sufficient in amount to meet the interest as it falls due, and to pay the bonds at maturity. It is not for us to say that some future generation should pay for the roads built and enjoyed by the present generation. The question before us is, What provision has the Legislature made for the payment of these bonds? The lawmaking body, in our judgment, has spoken in unequivocal terms. The commissioners of Franklin County are directed to levy each year a tax sufficient to pay the interest on said bonds as it becomes due, and to provide for a sum sufficient to retire the bonds at the maturity. *Spruill v. Davenport,* 178 N. C., 364; *Manly v. Abernethy,* 167 N. C., 220; *Comrs. v. Henderson,* 163 N. C., 114; *Asbury v. Albemarle,* 162 N. C., 247. This necessarily implies the laying aside periodically of a sum which, when invested at interest and when the interest is added to the annual payments, will amortize the bonds at maturity. Such a fund is usually called a sinking fund. But if the name be distasteful, let it be nameless, as the Legislature has chosen to leave it without a name in the present statute.

It is suggested that this appeal is simply an attempt to secure a rehearing of the *Cooper case,* which is now *res adjudicata.* We do not so understand the record. The *Cooper case* dealt with a special levy for roads in Sandy Creek Township, Franklin County, made under chapter 173, Public-Local Laws, 1919. The present case deals with a

special levy in Harris Township, Franklin County, authorized by chapter 74, Public-Local Laws, 1919, as amended by chapter 40, Public-Local Laws, Extra Session, 1920. The two acts are separate and distinct. True they contain similar provisions with respect to the levying of a special tax, and in each it is required that the board of county commissioners *shall annually levy and lay a special tax*, in the designated township, for the purpose of providing for the payment of the road bonds issued in connection with the building of the roads in said township and for the payment of the interest thereon. This is the extent of their similarity; they relate to different things and are wholly disconnected. The doctrine of *res adjudicata* has no application to the instant facts and is foreign to the case.

In *Hicks v. Cleveland,* 106 Fed., 459, it was held that where the Legislature of a State has authorized a municipality to issue bonds, and provided in the same act for the annual levy of taxes to pay the interest thereon as it accrues and the principal at maturity, such provision becomes a part of the contract on the issuance of the bonds, and may not be repealed by subsequent legislation unless some other adequate method is substituted in its place; and a Federal court which has rendered a judgment against the municipality on such bonds or their coupons may compel the levy of a tax for its payment by mandamus. *Simonton, Circuit Judge,* delivering the opinion, took occasion to observe: "The provisions of law existing at the time of issuing the bonds, providing for a tax, form a part of the contract, which cannot be impaired by any subsequent law. *Butz v. City of Muscatine,* 8 Wall., 575; 19 L. Ed., 490. Where at the time of issuing said bonds there existed an act authorizing an annual tax for their payment, it was beyond the power of the Legislature to repeal it, so far as concerned the bonds in question, unless some other adequate remedy was substituted in its place. *City of Galena v. Amy,* 5 Wall., 705; 18 L. Ed., 560."

To like effect is the decision of the United States Supreme Court in the case of *East St. Louis v. U. S.,* 120 U. S., 600; 30 L. Ed., 798, where *Chief Justice Waite,* delivering the opinion of the Court, said:

"The judgment is for interest in arrear and a small amount of principal. The law required a tax to be levied annually, sufficient to pay all interest as it accrued, and the principal when due. This was neglected, and consequently there is now a large accumulation of debt, which ought to have been paid in installments. Thus far the inhabitants have been allowed to escape taxation at the time it ought to have been made, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation. Such being the case, we see no reason why it was not in the power of the court to order a single levy to meet the entire judgment, which

was all for past-due obligations." See, also, *Holt County v. Nat. Life Ins. Co.*, 80 Fed., 686, and *Darlington v. Atlantic Trust Co.*, 78 Fed., 596.

The wisdom or impolicy of providing "sinking funds" for the payment of bonds at maturity is not a matter for us to decide. This is a legislative and not a judicial question. One of the outstanding features of the legislation under which North Carolina is building and financing her State highways is the fact that a sinking fund has been provided for the payment of the road bonds which, like other funds for highway construction and maintenance, is derived from a source that does not impose any direct tax on the people of the State and which at the same time affords a certain income. Under the provisions of chapter 188, Public Laws of 1923, there is set aside an annual fund of $250,000 from the revenue derived from the 3-cent tax on gasoline and from the revenue on motor vehicle licenses, and in addition, $250,000 is to be drawn from the general fund of the State Treasurer, making a total annual sinking fund of $500,000 for retiring the highway serial bonds. Besides this fund, which is specifically set aside, any surplus which remains from the above-mentioned revenue after deducting the interest on outstanding highway bonds, cost of maintaining the State Highway System, and the operating expenses of the commission, reverts to a sinking fund for the retirement of outstanding bonds issued for purposes of highway construction.

In the *Cooper case*, 183 N. C., p. 235, the quotation, "Without legislative authority a sinking fund could not be created," ostensibly taken from *Hightower v. Raleigh*, 150 N. C., 571, is not an exact quotation from the opinion in the *Hightower case*. In that case the Court said: "Without legislative authority a special tax could not be levied or a sinking fund created." The authority to levy a "special tax," where no special tax has been authorized, was the question involved in that case. In the reference there made to the creation of a sinking fund, the Court said, and intended to say, that no special tax, where none had been authorized, could be levied for a sinking fund. It did not mean to say, for the question was not presented, that moneys could not be appropriated annually into a sinking fund if there were surplus sums which could be used for such purpose. "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it is delivered." *Marshall, C. J.*, in *U. S. v. Burr*, 4 Cr., 470.

In *Gastonia v. Bank*, 165 N. C., 507, it was held that, although there was no provision of law for a special levy of taxes to pay the interest and to create a sinking fund, nevertheless the city did have the power to pay the interest and create a sinking fund for the bonds if the general revenue derived under the limit fixing its taxing power was sufficient to do so. Indeed, the authority to levy a special tax annually to be

applied to the payment of the principal and interest of a public debt, such as is contained in the statute now before us, comes within the very definition of a "sinking-fund tax." A sinking fund is defined to be a fund derived from particular taxes, imposts, or duties, which is to be appropriated toward the payment of the interest due on a public loan and for the payment of the principal. 36 Cyc., 460; 7 Words and Phrases, 6522. The object of every sinking fund is to diminish the debt whose existence warranted its foundation. *N. Y. Sav. Bk. v. Grace,* 102 N. Y., 313. And "a 'sinking-fund tax' is a tax raised to be applied to the payment of the interest and principal of a public loan." *U. P. R. R. Co. v. Buffalo Co.,* 9 Neb., 449.

The only valid tax authorized to be levied by the present statute is an annual tax of not less than 25 cents nor more than 75 cents on the $100 assessed valuation of property. Unless provision is made, as contemplated by the statute, the county will not be in position to pay these bonds at maturity out of the funds derived from the tax now being levied. In *Proctor v. Comrs.,* 182 N. C., 60, it was said: "The authority to issue bonds or to pledge the faith and loan the credit of a subordinate political subdivision of the State is limited by its ability, under the law, to provide for the ultimate payment of said obligations." And further, it is the accepted position with us that where bonds are issued or other acts done, under special sanction of legislative authority, the statutory provisions on the subject are controlling. *Comrs. v. Webb,* 148 N. C., 120; *Robinson v. Goldsboro,* 135 N. C., 382.

In dismissing plaintiff's application for writ of mandamus, the learned judge of the Superior Court who heard the case below placed his judgment squarely upon the decision of this Court in *Cooper v. Comrs., supra,* which contained our latest expression on the subject. In this he was right; but, after earnest reflection, we are convinced that the *Cooper case* must be overruled, and this necessarily carries with it a reversal of the judgment of the Superior Court, entered in the present case.

Error.

CLARKSON, J., concurring. I was not a member of this Court when the case of *Cooper v. Comrs.,* 183 N. C., 231, was decided.

The section of the statute under consideration (Public-Local Laws 1919, ch. 74, sec. 10) is as follows:

"That for the purpose of providing for the payment of said bonds and the interest thereon, and for the construction, improvement and maintenance of the roads of said township, the board of county commissioners of said county shall annually, and at the time of levying the county taxes, levy and lay a special tax on all persons and property subject to taxation within the limits of said township, of not

less than twenty-five cents and not more than seventy-five cents on the one hundred dollars assessed valuation of property," etc.

The statute could have been more explicit, as they usually are, in regard to creating a "sinking fund," but I think it is sufficient and concur in the interpretation given it. The mandate of the Legislature must be followed, whatever may be the individual view as to the evil of sinking funds. I do not think it amiss to state that I heartily agree with the late lamented *Chief Justice Walter Clark* as to his view in reference to sinking funds:

A "sinking fund is not essential to the validity of the bonds, and indeed was unheard of until suggested by Sir Robert Walpole, whose name recalls neither peculiar financial ability nor political honesty. He was the man who originated the expression 'Every man has his price.' Something over a century and a half ago he originated the sinking fund idea also, and procured Parliament to adopt it by suggesting that it would aid in securing better prices for the bonds. But in twenty years he procured another act perverting the sinking fund to his own use for other purposes. A half century later Pitt revived the idea of a sinking fund as an alluring hope for the extinguishment of the public debt by financial legerdemain. But the result was so unsatisfactory that the experiment was abandoned finally by the British Parliament in 1829 and has been ever since a condemned experiment. Browne on Sinking Fund.

"Sinking funds have so often become, as this Court has heretofore said, 'a sunken fund,' that they have become much discredited, and Massachusetts, and probably other States, have a provision prohibiting them. Bouvier Law Dictionary, Sinking Fund.

"There has been no sinking fund authorized in England since 1829, as already stated, and only once has a statute of the United States authorized a sinking fund for any part of our indebtedness, and that was allowed to become a dead letter until at the instance of Mr. Boutwell, then Secretary of the Treasury, it was repealed. It is a device which in practice has not proven successful and is considered by financial writers not advisable.

"Financial writers in works on the subject all point out that the sinking fund has not proven successful. If a pro rata part of the principal is to be collected each year it is conceded that the simplest and safest way is to issue serial bonds and pay one each year. There is no risk in this, whereas, with a sinking fund, the instances in which the fund has been diverted have been notoriously numerous. If a sinking fund is invested in other bonds of the debtor it can be no additional security to the creditor, for it is just the same paper, and if it is composed of purchases of other bonds the fund may be lost by one reason

or another and has very frequently been appropriated by later legislative action to other purposes. These increase the burden on the taxpayers without any real benefit to the bondholders."

"Provision for the payment of public debt is sometimes made by the establishing of a sinking fund. A sinking fund contemplates the gradual extinction of a debt, provided by the law authorizing the debt, and while it has been discarded in the practice of the more advanced nations, is sometimes used by the nations of weaker credit." New Inter. Ency., Vol. 7, p. 382—Finance.

In the opinion of *Mr. Justice Stacy*, in reference to the Legislature creating a sinking fund for retiring the highway serial bonds, chapter 188, Laws 1923, it is expressly provided in the act how the sinking fund is to be invested, as follows:

"That moneys in the sinking funds herein shall not be loaned to any department of the State, but shall be invested by the State Treasurer in bonds of

(*a*) The United States;

(*b*) The State of North Carolina;

(*c*) Bonds of any other State whose full faith and credit are pledged to the payment of the principal and interest thereof;

(*d*) Bonds of any county, city, town, township or school district of North Carolina which are general obligations of the subdivision or municipality issuing the same, and for the payment of which, both principal and interest, there is no limitation of the rate of taxation;

(*e*) Bonds of any county having population of thirty thousand or more by the last preceding Federal census and of any city having a population of twenty thousand or more by such census, in any State of the Union, which are general obligations of the county or city issuing the same, and for the payment of which, both principal and interest, there is no limitation of the rate of taxation."

Section 6 goes further into detail.

Every safeguard is put around the investment of the sinking fund. The vice complained of by the late *Chief Justice* in the *Cooper case* was that the act was too confined in scope and did not in language create the sinking fund or provide for a sinking fund in plain language, or how the sinking fund should be invested to save it from being a "sunken fund." It will be noted that the act providing for the State Highway sinking fund, *supra*, was an emergency act. The State Highway System Road Act, Laws 1921, ch. 2, part of sec. 39, provides for serial bonds, etc., and is as follows:

"The State Treasurer is hereby authorized, empowered, and directed to issue and sell serial bonds of the State, payable in not less than ten nor more than forty years from the date of issue, and aggregating," etc.

The extraordinary large and unexpected fund realized from the automobile and gasoline tax made this sinking fund imperative until the *serial highway bonds* commenced to mature. Therefore the act of 1923, *supra*, was passed. The original idea of the Legislature, no doubt, was that it would take ten years to complete the then contemplated road program, and the serial bonds were issued to commence to mature in ten years and would be thirty-year serial bonds. The policy of the Legislature was to provide for State Highway serial bonds, not a sinking fund.

The Municipal Finance Act, C. S., ch. 56, subsec. 3, and amendments thereto, its purpose is serial bonds, and the determining period for bonds to run is the probable period of usefulness of an improvement or property for which the bonds are issued.

The new school laws, ch. 136, Public Laws 1923, Part 8, part of sec. 258, is as follows:

"The bonds shall be serial bonds, and each issue thereof shall so mature that the aggregate principal amount of the issue shall be payable in annual installments or series, beginning not more than three years after the date of the bonds of such issue, and ending not more than thirty years after such date."

So could be cited other legislative acts showing that the policy of the legislative branch of the Government representing the popular will is that when these undertakings for the betterment of all the people are undertaken, and a debt created for such as schools, roads, water supply systems, sewer systems, etc., that these investments for the benefit of the public should be paid back so much each year until the indebtedness is discharged. This is safe public and private financing.

CLYDE S. REED, L. D. MANEY AND J. T. ROBERTS, BOARD OF TRUSTEES OF THE EAST BILTMORE SANITARY SEWER DISTRICT v. HOWERTON ENGINEERING COMPANY.

(Filed 21 June, 1924.)

1. Sanitation—Sewerage—Constitutional Law — Necessaries — Bonds — Taxation.

Where, under the provisions of a statute to establish a county-wide system of sewerage according to districts, a district has been established and its lines defined: *Held*, sewerage as contemplated by the act is a necessary county expense, and bonds may be issued for the purposes of the district without submitting the question of their issuance to the voters of the district. Constitution, Art. VII, sec. 7.

2. Same—Government—Boundaries—State Agencies—Statutes—Special Acts—Counties.

The courts may not declare a statute unconstitutional unless clearly and manifestly so: *and held*, where a statute authorizes the formation of sanitary sewerage districts within county-wide limits, the boundaries of these to be fixed by certain designated local authorities in a specified manner, and done without previous notice to the voters, the statute will not be construed as unconstitutional on that account, or as a "local, private or special act relating to health, sanitation," etc. Recent amendment to Constitution, Art. II, sec. 29.

THIS is a civil action tried before *Ray, J.*, at April Term, 1924, of BUNCOMBE. Appeal by defendant.

The material facts are:

This action was instituted in the Superior Court of Buncombe County to compel the defendant to comply with the terms of sale of $25,000 of sewer bonds issued on behalf of the East Biltmore Sanitary Sewer District, Buncombe County, North Carolina.

The East Biltmore Sanitary Sewer District was duly created pursuant to an act entitled "An act to create sanitary districts in Buncombe County, and describing their purposes and powers," being chapter 341, Public-Local Laws, 1923.

A petition was duly presented to the board of county commissioners, signed by J. P. Kitchin and 97 others, same being a majority (nearly all) of the qualified voters of such proposed sanitary sewer district, requesting the board of county commissioners to create the East Biltmore Sanitary Sewer District. The petition is as follows:

"Petition of a majority of the qualified voters under H. B. 1179, S. B. 730, ratified 1 March, 1923, to create a sanitary district in Buncombe County to be known as East Biltmore Sanitary Sewer District.

"To the Chairman and Commissioner of Finance and Board of Commissioners of the County of Buncombe:

"Gentlemen:—We, the undersigned, constituting a majority of the qualified voters of the proposed sanitary district, do hereby petition your board to create a sanitary district in said county to be known as 'East Biltmore Sanitary Sewer District,' said district to be created for the purpose of promoting the health of the community and especially of the proposed sanitary district, said sanitary district situate, lying and being in the county of Buncombe, State of North Carolina, in Asheville Township, east of the Asheville-Hendersonville Highway, and south of South Biltmore, and more particularly described as follows:" (The territory is described by metes and bounds.)

Pursuant to said petition, the Board of Commissioners of Buncombe County entered an order creating the territory described in said petition as the East Biltmore Sanitary Sewer District, and appointed Clyde

S. Reed, L. D. Maney, and J. T. Roberts as a board of trustees of said East Biltmore Sanitary Sewer District, the plaintiff in this action. The said board of trustees properly organized and adopted a resolution reciting that it is necessary for said district to build and construct a sanitary sewer system, and that in order to raise sufficient funds to build said sewer system it is necessary to issue negotiable coupon bonds in the sum of $25,000, said bonds to be the full, direct and valid obligations of said district, and to be payable, both principal and interest, out of special *ad valorem* taxes to be levied by the county commissioners upon all the taxable property embraced within the limits of said district. The bonds in question are being issued under sections 7 and 8 as direct obligations of the district, and payable out of *ad valorem* taxes.

The bonds were duly sold to the defendant at the price of par and accrued interest.

The defendant now refuses to accept and pay for said bonds, contending that the said bonds are illegal and void, and when delivered would not constitute the valid and binding obligations of said district, and would not be supported by an *ad valorem* tax to pay the principal and interest thereof. The defendant's contentions can be grouped that the said bonds are illegal and void:

1. That the said sewer system is not a necessary expense within the meaning of Article VII, section 7, of the Constitution, and the bonds are therefore illegal and void because they are not sanctioned by a majority of the qualified voters of said district.

2. That said bonds are illegal and void for the reason that no notice was given, nor opportunity afforded to the property owners whose property is affected by or included in said district, of a hearing on said matters, and that no hearing was had, and that the boundary lines of said district are not fixed by the General Assembly, but that the power to fix said boundary lines was delegated to a majority of the qualified voters of such proposed sanitary district who set forth a description of the territory to be embraced in the proposed sanitary district to the County Commissioners of Buncombe County.

3. That the said bonds are illegal and void for the reason that the act authorizing the same is a special and private act, and is prohibited by Article II, section 29, of the Constitution.

There is no controversy between the plaintiffs and the defendant as to the facts, nor is it contended by the defendant that the plaintiffs and the county commissioners have not complied with the provisions of the legislative act. No irregularities are alleged, and the sole questions presented to the Court are the three questions above set forth.

The matter was heard in the court below, and from a judgment declaring the bonds to be legal, valid and binding obligations, the defendant excepted, assigned error, and appealed to the Supreme Court.

Chas. N. Malone for plaintiffs.
J. W. Haynes for defendant.

CLARKSON, J. The first contention cannot be sustained. Article VII, section 7, of the State Constitution, is as follows:

"No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

This Court has uniformly held that a sewer system was a necessary expense within the meaning of the Constitution, and unless so prescribed by the Legislature, a vote of the majority of the qualified voters is not necessary. *Greensboro v. Scott,* 138 N. C., 181; *Bradshaw v. High Point,* 151 N. C., 517; *Underwood v. Asheboro,* 152 N. C., 641; *Gastonia v. Bank,* 165 N. C., 507.

The second contention cannot be sustained. The judiciary can only interfere with the legislative acts when those acts are in violation of the Constitution.

In *S. v. Perley,* 173 N. C., 790, it was said: "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." *Coble v. Comrs.,* 184 N. C., 348; *S. v. Kelly,* 186 N. C., 377; *Person v. Doughton,* 186 N. C., 725.

Allen, J., in *Skinner v. Thomas,* 171 N. C., 100, says: "The police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. 6 R. C. L., 183. 'It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation appropriate to that end.' 9 Ency. of U. S. Reports, 473. 'Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.' *Slaughterhouse cases,* 16 Wall., 36; 21 L. Ed., 394. The exercise of this power is left largely to the discretion of the law-making body, and the authority of the courts cannot be invoked unless there is an unnecessary interference with the rights of the citizens, or when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished. 6 R. C. L., 236."

The act in question providing for sewer districts in Buncombe County and the method is similar to the "Fence Law Acts," "Drainage Acts" and "Town and City Extension Acts," which have universally been held constitutional in this State. *Manly v. Raleigh*, 57 N. C., 370; *Cain v. Comrs.*, 86 N. C., 8; *Newsome v. Earnheart*, 86 N. C., 391.

In the *Cain case, supra* (Fence Law Act), *Smith, C. J.*, said: "We can scarcely conceive a case more clearly within the compass of the rule than that now under consideration. The general law requires a sufficient fence to be built and kept up around all cultivated land to protect it from the depredations of stock, at a very great and unceasing expense, becoming the more onerous as the material used in its construction becomes scarcer and more costly. The enactment proposed to dispense with separate enclosures for each man's land, and substitute a common fence around the county boundary to protect all agricultural lands from the inroads of stock from abroad, and the fencing in of stock owned within its limits. It creates a community of interest in upholding one barrier in place of separate and distinct barriers for each plantation, and thus in the common burden lessens the weight that each cultivator of the soil must otherwise individually bear. As the greater burden is thus removed from the landowner he, as such, ought to bear the expense by which this result is brought about. The social interest benefited by the law is charged with the payment of the sum necessary in securing the benefit. This and no more is what the statute proposes to do, and in this respect is obnoxious to no just objection from the taxed land proprietor, as it is free from any constitutional impediments."

In *Sanderlin v. Luken*, 152 N. C., 741, *Hoke, J.* (now *C. J.*), citing numerous authorities, said: "The power of the Legislature to create special-taxing districts for public purposes, separate and distinct from the ordinary political subdivisions of the State, such as counties, townships, etc., was declared and approved in the case of *Smith v. School Trustees*, 141 N. C., 143, and like power to create special assessment districts has been upheld by the Court in several well-considered decisions. . . . The principle has been frequently extended and applied to the creation of these drainage districts, and while certain statutes may have been declared void, this as a rule was because the rights of persons affected had not been in some way sufficiently safeguarded; and, so far as we have examined, the power of the General Assembly to enact legislation of this character has not been successfully questioned."

Brown, J., in *Lutterloh v. Fayetteville*, 149 N. C., 69, said: "Consequently it follows that the enlargement of the municipal boundaries by an annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate

subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety or justice we have nought to do. It has, therefore, been held that an act of annexation is valid which authorized the annexation of territory, without the consent of its inhabitants, to a municipal corporation, having a large unprovided-for indebtedness, for the payment of which the property included within the territory annexed became subject to taxation."

The third contention cannot be sustained. Article II, section 29, of the Constitution, is as follows: "The General Assembly shall not pass any local, private, or special act or resolution . . . relating to health, sanitation and the abatement of nuisance."

While the act may use the words "sanitary district," yet when taken as a whole it is not a local, private or special act relating to health, sanitation and the abatement of nuisance. The act does not state that its purpose is to regulate sanitary matters, or to regulate health or abate nuisances. A careful perusal of the entire act, and the entire act must be considered, clearly shows that the main purpose of the act and, in fact, the only purpose of the act, is to provide districts in Buncombe County wherein sanitary sewers or sanitary measures may be provided in rural districts.

Since the above amendments to the Constitution, which took effect 10 January, 1917 (1915, ch. 99), this Court has frequently declared acts similar to the one under consideration, constitutional. *Brown v. Comrs.*, 173 N. C., 598; *Mills v. Comrs.*, 175 N. C., 215; *Comrs. v. Pruden*, 178 N. C., 394; *Comrs. v. Bank*, 181 N. C., 347; *In re Harris*, 183 N. C., 633; *Kornegay v. Goldsboro*, 180 N. C., 446; *S. v. Kelly*, 186 N. C., 365.

In *Kelly's case, supra*, we said: "It was held in *Armstrong v. Comrs.*, 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." We do not think the *Armstrong case, supra*, applicable to the case at bar.

"Nor do we think the law is subject to the objection that it is local or special. A law which applies generally to a particular class of cases is not a local or special law. *Hymes v. Aydolott*, 26 Ind., 431; *Palmer v. Stumph*, 29 Ind., 329." 15 L. R. A., 508.

We think the present act is one of great benefit to rural communities. With good roads in the State, many are moving from the crowded cities and towns to the country. Water and sewer is of great value to a home, and is a necessity. The expense is often more than the individual can afford, but a community or group, under the present law as applicable to Buncombe County, can all join in one sewer system and lessen the cost to the individual home owners. It is of vital importance to improve rural conditions and encourage, by every means possible, living conditions in the country. It was not the intention of the framers of the constitutional amendments and those who voted for them to prohibit such beneficent and constructive legislation applicable to an entire county.

For the reasons given, the judgment of the court below is

Affirmed.

S. H. HEARNE v. STANLY COUNTY AND R. N. FURR, Q. E. C. COBLE, AND W. H. CULP, BOARD OF COUNTY COMMISSIONERS OF STANLY COUNTY.

(Filed 21 June, 1924.)

1. Counties—Municipal Corporations—Change of Site of Courthouse—Statutes—Powers—Government—Agencies.

There being no provision of law to the contrary, it is not required that a contract for the purchase of a new site for its courthouse should be presently put upon the minutes of the board of county commissioners to be binding, and in an action brought directly against a county or its commissioners involving this question, it may be shown by parol, in proper instances, that the defendants had duly and regularly enacted a proper order and the minutes omitting this, may be corrected to show the fact.

2. Same—Express or Implied Powers.

Municipal corporations, as agencies of local government of the State, are subject to almost unlimited legislative control, except when otherwise provided by the organic law, and cannot exercise powers not expressly given by statute or necessarily implied for the proper exercise of the duties expressly imposed upon them.

3. Same—Anticipated Power—Conditional Purchase of Site—Status Quo.

C. S., 1297, limits the power of the county commissioners to abandon an existing courthouse and acquire a new site therefor to the methods therein stated, by a unanimous vote of the members of the board of county commissioners at their annual December meeting, and due notice given throughout the county that a final vote would then be taken, so that the proposition, before final action, may be examined into; and where the county commissioners, in anticipation of the change, upon the recommendation of the grand jury, have conditionally purchased the new site, have given their note for the purchase price, upon which payments

have subsequently been made, and this note and deed to the lands so to be acquired have been placed in escrow, compliance with these conditions is a positive statutory requirement, and the seller of the lands acquires no rights otherwise; and upon the failure of such legal requirements both the deed and note are void and unenforceable, leaving the parties *in statu quo*.

4. Same—Damages—Actions.

Where the county commissioners and the owner of lands have agreed for the purchase of a new site for its courthouse, conditioned upon the future compliance with the statute relating thereto, which had failed of compliance, and the county had made certain payments upon the purchase price, the county may recover the partial payments it had so made, with the legal interest thereon, subject to deductions as against the interest for its reasonable rental value, while in the possession and control of the county authorities.

5. Same—Injunction.

Pending the continuance of an injunction against the county commissioners purchasing a new site for the county courthouse, the action of the commissioners in attempting to validate their former action is unlawful, and can have no effect; nor can proceedings under a later statute to submit the question of the change to the voters have a different effect, when this proposition has been rejected by them.

CIVIL ACTION heard before *Shaw, J.*, and a jury, at February Term, 1924, of STANLY.

The action is to recover on a note purporting to have been executed by Stanly County on 30 August, 1921, signed officially by the chairman of the board and attested or countersigned by the clerk of said board, and with certain payments thereon, in terms as follows:

"Albemarle, N. C., 30 August, 1921. One day after date the County of Stanly, North Carolina, promises to pay to the order of S. H. Hearne the sum of forty-eight thousand seven hundred two and 50 /100 dollars, with interest on the same at the rate of six per cent per annum until paid. This note is given for the purchase price of a lot of land known as the Hearne Grove, bought by the county of Stanly for the purpose of erecting a new courthouse thereon, after legal formalities can be complied with. The deed to this lot of land is this day deposited in the Stanly Bank and Trust Company, to be delivered to the County Commissioners of Stanly County when this note is paid in full.

"Done by order of the Board of County Commissioners of Stanly, day and date above written.

EXHIBIT A. R. G. MABRY, *Chairman,*
Board of County Commissioners, Stanly County, N. C.

GEO. P. PALMER,
Clerk Ex Officio to the Board."

Upon the face of said paper is an impression of the seal of the Board of Commissioners of Stanly County, N. C.

On the back of the note are the following credits:

"Received on this note two thousand and no/100 dollars. This 31 October, 1921.

"Received on this note twenty-five hundred and no/100 dollars. This 22 November, 1921."

In reference to the circumstances leading up to and attending the execution of the above note, it appears that prior to said dates, to wit, at November Term, 1917, July Term, 1920, and at April Term, 1921, the grand juries had reported the existent courthouse as unsanitary and inadequate for the transaction of the court and county business, and recommended that a new and up-to-date courthouse be provided for. That, influenced by said action of the grand jury, and in approval of their report, the commissioners bought the property in the town known as the Hearne Grove, a suitable and commodious lot, executed the note in question at the date specified, and plaintiff and wife formally executed to defendants a written deed for the property and deposited same in escrow with the bank cashier to be delivered on payment of the purchase price. The payments were made thereon at the dates named and approved by the commissioners at November meeting, 1921. That at the regular December meeting, 1921, advertisement having been made, it was then unanimously resolved by the commissioners that the courthouse be moved to the Hearne lot, etc. That prior to the last meeting certain taxpayers had instituted an action to restrain the removal of the courthouse and had duly obtained a preliminary restraining order forbidding such action, on facts leading to show that the proposed removal and building of a new courthouse and contracting a debt therefor was illegal, which said order had been duly served on the board and each member, and was alive and in force when said resolution was passed. That in due course and practice of the court, the preliminary order was heard before his Honor, J. L. Webb, holding the court of said county, at February Term, 1922, and the restraining order was continued to the hearing on a finding of facts tending to show the proposed moving the courthouse was illegal, etc. The closing paragraph of said judgment being in terms as follows:

"It is, therefore, ordered and adjudged that the temporary restraining order heretofore granted in this cause by his Honor, J. Bis Ray, is hereby continued in full force and effect until the election be held as provided by the act of the Legislature referred to above, and until the final hearing of this cause at term time, and in the meantime that the defendants, their agents and attorneys are further enjoined and restrained from taking any further steps or action in their attempt to

change the present site of said courthouse and jail, to purchase and pay for the proposed new site, or to issue any bonds or other obligations of the county for the said purpose, or to enter into any contract attempting to bind the county in any way in the premises."

Pending the existence of these inhibitive orders, the General Assembly, on 19 December, 1921, enacted a statute purporting to validate a proposed bond issue for the purpose of carrying out the scheme and plan to remove the courthouse, but providing that the question be referred to a popular vote of the county; and on said vote had, the issue of bonds for the purpose of buying the new site and erecting a courthouse was decisively defeated. The facts in evidence also tended to show that the resolution of the commissioners of August, 1921, looking to the purchase of the Hearne property and the execution of the note, had not been entered on the minutes of the board. There was denial of liability on the part of defendants, chiefly because of failure to enter the resolution for purchase on the minutes of the board. Second, for lack of power in the former board of commissioners to make a binding contract of purchase for the purpose designated, and a counterclaim for the money paid on the note in question, on the ground that same was made without warrant of law. The cause was submitted on the following issues:

Is the defendant Board of Commissioners of Stanly County indebted to plaintiff, and if so, in what amount? Ans. Yes, $48,702.50, with interest on same from 31 August, 1921, subject to payment of $2,000 31 October, 1921, and $2,500 22 November, 1921.

Is the plaintiff indebted to defendant by reason of its counterclaim as alleged, and if so, in what amount? Ans. Nothing.

The court charged the jury that on the facts in evidence, if accepted by them, they should answer the first issue the amount of the note, less credits entered, and the second nothing.

Judgment on the verdict for plaintiff, and defendants excepted and appealed, assigning errors as indicated.

James A. Lockhart and Parker, Stewart, McRae & Bobbitt for plaintiff.

Cansler & Cansler, Brown, Sikes & Turner, and R. L. Smith & Son for defendants.

HOKE, C. J. In the absence of some provision of law that in order to the validity of their action an order of a board of commissioners, or contract made by them, should be presently put upon the minutes or duly entered thereon, such an entry is not to be regarded as essential, and mere failure of the clerk of the board to keep the minutes properly

is not a fatal defect. Under ordinary circumstances the minutes may be perfected by the proper officer *nunc pro tunc,* and when a contract or authority to make it is not otherwise required to be in writing, and in suits where the commissioners are parties, their action can be proved by parol and the minutes made to show the facts of the matter. *Charlotte v. Alexander,* 173 N. C., 515; *Houser v. Bonsal,* 149 N. C., 51. In *R. R. v. Reid,* 187 N. C., 320, to which we are cited by counsel, there was an effort to make substantial alterations of the minutes of the board of county commissioners in a suit between third parties, and holding that this could not be done except on application to the board to correct their minutes or in a suit where the said board, being parties, were given opportunity to be heard and would be bound by the decree, the cause was remanded to the end that the commissioners be made parties. Here, however, the suit is against the commissioners, and the court has full jurisdiction to award relief and direct an amendment of the minutes so as to show what their action truly was. The court below, therefore, correctly ruled that parol evidence of the resolution of the commissioners touching this matter should be received and appellant's first exception is disallowed. As to defendant's second objection, that the board of commissioners at the time was without power to make an absolute contract of purchase, it is accepted law with us that county governments, as a rule, are merely agencies of the State, constituted for the convenience of local administration in designated portions of the State's territory, and in the exercise of ordinary governmental functions, and unless protected by constitutional provisions, they are subject to almost unlimited legislative control. *Trustees v. Webb,* 155 N. C., 379, and authorities cited. Our decisions are to the effect, further, that boards of county commissioners are possessed only with those powers which have been expressly conferred or which are necessarily implied for the proper exercise of the duties imposed upon them. *Fidelity Co. v. Fleming,* 132 N. C., 332; *Vaughn v. Comrs.,* 118 N. C., 636; *S. v. Webber,* 107 N. C., 962; C. S., 1290. In *Fidelity Co. v. Fleming, supra, Associate Justice Walker,* for the Court, said: "The board of commissioners in the several counties possess only those powers which have been prescribed by statute and those necessarily implied by law, and no others. This is the general rule, and it has also been expressly declared by statute to be the rule which ascertains the true scope and limit of their power and authority." And in *Vaughn v. Comrs., supra,* "Corporations which exercise delegated governmental authority, such as counties, must be confined to a strict construction of the statutes granting their powers. There is nothing in the nature of their duties to give rise to the implication that the State intends to clothe them with any other power than that expressly conferred, and

the further right to do what is necessary to the complete exercise of the express powers." Considering the record in view of these recognized positions, the statute conferring powers chiefly involved in this inquiry, and existent at the time of the alleged purchase, is C. S., 1297, subsection 10, subsection 16. By the former it is provided that the board of commissioners shall have power "To remove or designate a new site for any county building, but the site of any county building already located shall not be changed unless by a unanimous vote of the members of the board at the regular December meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there is one, and posted in one or more public places in every township in the county for three months next immediately preceding the annual meeting at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the General Assembly." And in subsection 16: "To purchase real property necessary for any public county buildings, and for the support of the poor, and to determine the site thereof, where it has not already been located; and to purchase land at any execution sale, when it is deemed expedient to do so, to secure a debt due the county. The deed shall be made to the county, and the board may, in its discretion, sell any lands so purchased." From a perusal of these legislative provisions it clearly appears that, while a board of county commissioners, as a general rule, are empowered to buy such real property as is necessary for any public county building, when the purchase involves and contemplates the removal from the site of a county building existent and already located, this can only be done by a unanimous vote of all the members of the board at their annual December meeting, and after due notice given throughout the county that a final vote on the proposition would then be taken. This power to change the site of an existent public building is required to be exercised at a fixed time and after due notice, to the end that both the desirability and legality of the proposition should be fully examined into and determined, and operates as a limitation on the power of the commissioners to make an absolute purchase for the designated purpose. It could not be fairly said that the power to purchase property for such a purpose was a necessary county expenditure or investment, when the power to make it might never come into existence. Being a body of restricted authority as stated, they could only bargain in the tentative, that is, on condition that the power to carry out the expressed purpose should be acquired in due course of law. The parties were evidently aware of these limitations and made their contract in reference to it, for they inserted on the face of the note the following: "This note is given for

the purchase price of the land known as the Hearne Grove, bought by the county of Stanly for the purpose of erecting a new courthouse thereon, after legal formalities can be complied with." And furthermore, the deed was not delivered outright but deposited in escrow, and it may be a permissible view that this contract on its face is a conditional one; but however this may be, the limitation on the power of the commissioners appearing in public statute, appertaining to the subject, enters into and controls any and all contracts coming under its provisions and constitutes the same but a tentative bargain, valid only on condition that the power to use the lot for the designated purpose should be thereafter acquired in accordance with law.

Such contemplated powers never having been lawfully acquired, the obligation is thereby avoided and the parties thereto are released. *House v. Parker,* 181 N. C., 40; *White v. Kincaid,* 149 N. C., 415; *O'Kelly v. Williams,* 84 N. C., 281; and the position as stated is clearly approved in principle in *McPeeters v. Blankenship,* 123 N. C., 651; *Bridge Co. v. Comrs.,* 111 N. C., 317; *Cotton Mills v. Comrs.,* 108 N. C., 678; *Bennett v. Norton,* 171 Pa. St., 221; *Nickerson v. San Bernardino,* 179 Cal., 518; *Winn v. Shaw,* 87 Cal., 631; *Chamber of Commerce v. Essex County* (N. J.), 114 Atl., 426. Plaintiff is evidently conscious of the strength of this objection, and cites in answer thereto the action of the board at their December meeting, ordering a removal of the courthouse to the designated site, but the order was in violation of an existent injunction duly served, and, being therefore unlawful, cannot avail the plaintiff. And it is no answer to this position that the injunction may have been erroneously issued. This does not at all appear and, as a matter of fact, it was continued to the hearing, and so far as the record discloses is still existent. But if it were otherwise, where a court has full jurisdiction of the cause, the questions presented therein and the parties, an erroneous injunction binds, unless or until it is vacated or modified by valid orders in the cause. The act of the commissioners, therefore, in violation of an injunction then alive and in force, was, as stated, an unlawful act, and on the facts of this record cannot be allowed to affect the rights of the parties or those who take and hold with notice. *Farnsworth v. Fowler,* 1 Swain, 1 (Tenn.); *Ward v. Billups,* 76 Texas, 466; *Collins v. Frasier et al.,* 27 Ind., 477; *Southard v. Latham,* 138 Pac., 205; Beach on Injunctions, sec. 281; 14 R. C. L., pp. 170-171, note Injunctions, sec. 170-171; 22 Cyc., pp. 1017-1018. In addition, before any lawful orders were made, the Legislature, taking up the matter, passed an act, in effect, submitting the question of removing the courthouse, and incurring liability therefor, to a popular vote, and the measure was therein disapproved, and the contract, as stated, being only on condition, the power to perfect it and

carry out the measure was thereby authoritatively withdrawn, and the parties have no further right to proceed therein. *Spitzer v. Comrs., ante,* 30, citing *Jones v. Comrs.,* 137 N. C., 579, and other cases. Applying these principles, and on the facts as they now appear, his Honor should have charged the jury that if these facts were accepted they should answer the first issue "Nothing," for the contract of purchase, as stated, being only on condition that a lawful order should be made for the removal of the courthouse, and no such order having ever been obtained, and the right to make it authoritatively withdrawn, the contract is thereby avoided, and the parties should be placed *in statu quo.* This, in our opinion, being the correct position on the first issue, defendants are entitled to a counterclaim for the money paid on the contract, with interest from date of payment; subject, however, to a deduction against interest for a fair rental for the property if the same has been turned over to defendants. These payments having been made prior to the time when the commissioners were to act in the matter, or were allowed to do so, same were without warrant of law, and suit therefor may be maintained by the proper officials of the county, whether they be the same or a succeeding board. *Brown v. R. R., post,* 52; *Burgin v. Smith,* 151 N. C., 561. For the reasons stated, defendants are entitled to a new trial of the cause, and it is so ordered.

New trial.

F. A. BROWN, FOR HIMSELF AND ALL OTHER TAXPAYERS OF THE TOWN OF SYLVA, v. JAMES E. WALKER, TUCKASEEGEE AND SOUTHEASTERN RAILROAD COMPANY, DAN TOMPKINS, FORMERLY MAYOR; T. O. WILSON, SECRETARY AND TREASURER OF SYLVA, ET AL.

(Filed 21 June, 1924.)

1. Municipal Corporations—Cities and Towns—Diversion of Funds—Railroads—Individual Liability.

The action of the governing body of an incorporated town in taking money from its treasury for the payment of lands for a right of way of a proposed railroad as an inducement for it to make the town one of its *termini,* without legislative sanction or a vote of its citizens, is an unlawful appropriation of the town's funds, in the nature of a trespass, for which the individual members may be held personally liable in a proper action.

2. Same—Limitations of Actions—Appeal and Error.

And where, in such instances, the railroad company, through its agents, have participated in this manner in the unlawful appropriation of the town's funds, and the railroad accordingly has thereafter been built and is operating over the right of way thus acquired, the mere fact that the

trial court has dismissed the action as to the members of the municipal board participating in the commission of the wrongful act, under the plea of the statute of limitations, C. S., 443 (1), the correctness of this ruling not being appealed from, will not likewise or necessarily bar the action against the railroad company, under the same plea, under an alleged privity between them.

3. Same—Torts.

Where, in violation of duty, the municipal authorities of a town have wrongfully diverted its funds, without consideration moving to the town, by aiding in the building of a railroad, such breach of duty by the municipal authorities is a tort, for which any and all the participants, both the municipal authorities and the railroad participating therein and receiving the benefits therefrom, may be held jointly and severally liable.

4. Same—Trespass.

The statute of limitations, C. S., 443 (1), is properly restricted to unlawful acts done by a public officer, under color of his office, to the person and property of another, by violence of force, direct or imputed, and does not apply to a breach of official duty in reference to the officials of a town as employees thereof, in wrongfully diverting the funds of the town to a railroad company in acquiring a right of way for it.

CIVIL ACTION, tried before *Bryson, J.*, and a jury, at Fall Term, 1923, of JACKSON.

A very satisfactory statement, showing the nature of the controversy and the position of appellant as to the conduct of the trial, appears in the case on appeal, as follows:

This was a civil action, brought by the plaintiff on behalf of himself and other taxpayers of the town of Sylva against the appellant, Tuckaseegee and Southeastern Railway Company, James E. Walker, Blackwood Lumber Company, Inc., Dan Tompkins, Mayor; T. O. Wilson, Secretary and Treasurer; Claud Allison, F. N. McLain, George L. Painter, and C. Z. Candler.

The defendant James E. Walker and his associates, at the time referred to in the pleadings, had become the owners of a large boundary of timber in the upper end of Jackson County, and were proposing in the summer of 1920 to build a public-carrier railroad from some point on the Southern Railway Company's line up Tuckaseegee River to East LaPorte, a distance of some fourteen miles. At the time referred to, it had not been determined whether the starting point from said road should be Sylva, the county (site) of Jackson County, or Dillsboro, a town on the Southern, to the west of Sylva. The people of Sylva, in order to induce these parties to make Sylva the starting point for their road, about 12 July, 1920, held a mass-meeting, when the mayor and board of aldermen of the town of Sylva were present and in session, and passed the resolution appearing in the record, authorizing the town of Sylva to appropriate $5,000 for the purpose of purchasing rights of

way to be donated to the said Walker and his associates as an inducement to them to make Sylva the starting point for their said road.

The defendant James E. Walker was invited to attend said meeting; and thereafter, after the town had passed the resolution appearing in the record, he and his associates agreed that, by reason of said inducements, they would make the said town of Sylva the starting point for said road; and thereupon the said James E. Walker signed the agreement appearing in the record, binding himself to reimburse the said town of Sylva for any moneys that might be expended by them in payment for rights of way in case said railroad should not be built from the said town of Sylva. Thereafter, the said railroad was built, and from the time the same was completed, has been and is now being operated through Jackson County as a common carrier.

It appears from the testimony that the passage of said resolution and the donation therein called for, to be expended for rights of way, was the material inducement which caused the said Walker and his associates to determine upon the town of Sylva as the starting point for said road.

Such rights of way as were paid for by the town of Sylva were conveyed to the said James E. Walker, as trustee, and thereafter the same were conveyed by him to the defendant Tuckaseegee and Southeastern Railway Company, the appellant in this case.

The plaintiff was present and participated in the mass-meeting referred to. Neither the plaintiff nor any other citizen of the town of Sylva made objection to said appropriation; and thereafter — some twenty-two months after the money so donated had been expended and said railroad built—the plaintiff instituted this action, to wit, on 18 August, 1922. The defendants, the mayor and the board of aldermen, answered the complaint, and pleaded, among other things, the statute of limitations, as provided in subsection 1 of section 443 of the Consolidated Statutes, on the ground that if the donation of said money was an unauthorized act, such as was a trespass under color of office, and that, therefore, an action on account thereof must have been commenced within one year after the acts complained of.

The defendants, other than the defendants mayor and board of aldermen, duly filed their answer, and pleaded, among other things, the statute of limitations, as provided by subsection 1 of section 443 of the Consolidated Statutes, therein, and on the trial insisting that if the appropriation of said money by the defendants mayor and board of aldermen of the town of Sylva was a trespass under color of office, and, therefore, barred by the one-year statute of limitations, as provided in said section of Consolidated Statutes, the said defendants were in like manner entitled to avail themselves of such plea of the statutes, for that

they accepted the rights of way purchased with the money so donated as an inducement to make the said town of Sylva the starting point for their said railroad, and for that they were in privity with the defendants mayor and board of aldermen.

At the conclusion of the evidence, on motion of the defendants, James E. Walker and Blackwood Lumber Company, Inc., his Honor sustained a nonsuit as to them, whereupon his Honor directed a verdict in favor of the defendants, mayor and board of aldermen, on the plea of the statute of limitations, and thereupon directed a verdict against the defendant, Tuckaseegee and Southeastern Railway Company, on said statute of limitations, to which said charge the defendant Tuckaseegee and Southeastern Railway Company excepted.

Upon the conclusion of the trial it was agreed in open court that his Honor might find certain of the facts and render his findings and judgment out of term and outside of Jackson County; whereupon, to wit, on 7 January, 1924, he filed in the office of the clerk of the Superior Court of Jackson County the findings and judgment appearing in the record.

That among the pertinent facts found by his Honor pursuant to the agreement of the parties are the following:

"Ninth: That, pursuant to said resolution, the board of aldermen of the town of Sylva, during the months of July, August, September, and October, 1920, diverted the said sum of $5,000 from the treasury of said municipality and from the public funds thereof, and expended or caused the same to be expended in the purchase of rights of way necessary for the construction of a railroad from the line of the Southern Railway, near Sylva, to the Tuckaseegee River, making such expenditures in accordance to the resolution aforesaid, and duly assigned the same to James E. Walker, as trustee, or caused them to be executed to him in such capacity.

"Tenth: That the said James E. Walker, as trustee, in turn, assigned said rights of way so secured, and paid for the 'Tuckaseegee and Southeastern Railway Company,' which immediately entered upon the construction of said railroad, and continued in the construction thereof until the same was completed from Sylva to East LaPorte, some time less than one year prior to the institution of this action, on 18 August, 1922.

"Eleventh: That in passing said resolution and applying said sum of $5,000 to the purchase of the said rights of way and assigning the same to James E. Walker, trustee, the board of aldermen were acting without authority of any special act of the Legislature and without submitting the same to a vote of the qualified voters of the town of Sylva, and the said sum was not expended for a public necessity.

"Twelfth: That the donation of the said rights of way was a material inducement to the Tuckaseegee and Southeastern Railway Company to build its railroad from the said town of Sylva and not from some other point.

"Thirteenth: That the act of the said aldermen in the purchase of the said rights of way, and their assignment, was, without consideration, paid to them by the defendants Walker or the Tuckaseegee and Southeastern Railway Company or the Blackwood Lumber Company, or any one for them, being a donation.

"Fourteenth: That benefits may be said to have accrued to the business interest situated in the town of Sylva in the sense of individual benefit, not municipal, by the construction of said road.

"Fifteenth: That the defendant, the Blackwood Lumber Company, never did at any time have any connection with any of the acts of its codefendants in reference to the purchase of said rights of way, and has not now any interest in or connection with the same.

"Sixteenth: That James E. Walker, individually, has now no interest in said rights of way, other than as an officer of, and stockholder in, the Tuckaseegee and Southeastern Railway Company, a corporation.

"Seventeenth: That on 3 July, 1922, plaintiff made demand, in writing, of the board of aldermen that they institute action for the recovery of said money.

"Eighteenth: That the board of aldermen, at a meeting on 6 July, 1922, passed a resolution declining to institute said action as demanded by plaintiff.

"Nineteenth: That the Tuckaseegee and Southeastern Railway Company, when it accepted the assignment of the said rights of way, had full knowledge of all the acts of its codefendants in connection therewith and the procurement thereof."

In addition, and on questions reserved for the jury, the following verdict was rendered:

1. Is the plaintiff's right of action as against Dan Tompkins, mayor; T. O. Wilson, secretary and treasurer; Claud Allison, F. N. McLain, George L. Painter, and C. Z. Candler, aldermen, barred by the statute of limitations, C. S., subsec. 1, sec. 443? Answer: Yes.

2. Is the plaintiff's right of action against the Tuckaseegee and Southeastern Railway Company barred by the statute of limitations, C. S., subsec. 1, sec. 443? Answer: No.

Upon this verdict and the facts found by the court, pursuant to said agreement, there was judgment that the former mayor and board of aldermen go without day, and plaintiff recover of the railroad company $5,000, with interest, to be paid into the office of clerk Superior Court, and by him paid into the town treasury.

The defendant railroad company excepted and appealed, assigning for error chiefly that the court ruled that the appellant was not protected by the one-year statute of limitations, C. S., sec. 443, clause 1, the same which had been made available for its codefendants, the former mayor and board of aldermen.

Walter E. Moore, S. Brown Shepherd, and Sutton & Stillwell for plaintiff.

Alley & Alley for defendant.

HOKE, C. J. The defendants, the former mayor and board of aldermen, having been exonerated by the verdict and judgment below, and the result not being questioned by appeal or any exception noted, it is not necessary or desirable to dwell at any length on the rule and extent of liability of these defendants, nor to the statutes of limitations applicable as to them, which may vary in different cases according to the form of action and the nature of the default charged against them. Considering the record, then, as to the liability of the railroad company, appellant, it appears that in the latter part of 1920, under a formal resolution of the board of aldermen, public funds of the town of Sylva, a municipal corporation, were wrongfully taken from the treasury of the corporation and applied to the purchase of certain rights of way for the railroad company, a private enterprise, without any vote of the people and without any statute authorizing said expenditure, and that the defendant, the railroad company, through its agents and representatives, suggested and aided in such course, obtained the rights of way with full notice and knowledge of the wrongful appropriation of these funds, and is now in the use and enjoyment of these rights of way so purchased and procured. Being entirely without warrant of law, and knowingly and wilfully done, authority is to the effect that the funds may be recovered by action against the individuals composing the old board, who are responsible and participated in the misappropriation, against others who aided and abetted them in the wrong, and more especially against those who, having been aiders and abettors, are now enjoying the benefits of the same. *Ketchie v. Hedrick*, 186 N. C., 392; *Aldrich v. Bank*, 176 U. S., 618; *Hope v. City of Alton*, 214 Ill., 102; *People v. Fields*, 58 N. Y., 491; *Hill Dredging Company v. Venton City*, 77 N. J. Eq., 467; *Jones v. Comrs. of Lucas County*, 57 Ohio State, 189; *Tuxera v. Jonesboro*, 83 Ark., 275; 19 R. C. L., p. 928, note under sec. 229; 19 R. C. L., p. 1142, secs. 418 and 1167, sec. 441; 28 Cyc., p. 469. And the decisions hold further that when the officials of the corporation refuse or, being thereto required, neglect to sue, action for the funds may be maintained by resident taxpayers for the

benefit of the municipality. *Waddill v. Masten*, 172 N. C., 582; *Tukey v. Omaha*, 54 Neb., 370; 19 R. C. L., 1169, *supra*. In the *Waddill case* it is suggested as the better course that the officials of the corporation entitled to the care and custody of the funds in question should be made a party to the suit by taxpayers, but this matter is sufficiently and perhaps properly guarded in the present instance by incorporating in the judgment that the money recovered be paid into the clerk's office for the use of the proper authorities of the town. These principles are not seriously contested by counsel; in fact, liability for the default as a basic proposition is admitted in appellant's brief. As we understand the argument, however, it is insisted for appellant that the board of aldermen having been exonerated by verdict and judgment, the railroad is thereby relieved on account of an alleged privity between them. 2d. That appellant is protected by the same statutes of limitations that has been adjudged a protection for its codefendant (C. S., sec. 443, subsec. 1), and by which an action is barred in one year "against a public officer for a trespass under color of his office," but, in our opinion, neither proposition can be maintained. As to the first, the default imputed here is for a pronounced breach of public duty, wilfully and knowingly committed, and constitutes a tort. True, in certain instances, the tort may be waived and the injured party be allowed to sue in contract, but the breach of duty is none the less a tort, for which any and all the participants may be held severally liable for the whole amount, and under these circumstances there is no such privity recognized as will render the exoneration of one a protection to the other. *Stevens et al. v. Smathers*, 124 N. C., 571; *Raulf v. Light Co.*, p. 176 N. C., 691; *Hipp v. Farrell*, 169 N. C., 551, 554; *Hough v. R. R.*, 144 N. C., 692; *Banking and Trust Company v. Boone*, 162 Ga., 202; Cooley on Torts (3 ed.), 223-254; Hale on Torts, 124; 6 Cyc., 683, 684. And as to the effect of the statute cited, we are clearly of opinion that the same has no application to a case of this character. True, in its more general sense, a trespass is sometimes said to include any wrongful invasion of the rights of another, but in its more natural and usual meaning it is properly restricted to unlawful acts done to the person or property of another by violence or force, direct or imputed. 28 Am. & Eng. Cyc. (2 ed.), 551. It is to acts of trespass in this sense that the one-year statute of limitations applies—that is, a trespass committed by a public officer under color of his office and constituting a wrongful invasion of the rights of third persons by force shown or imputed, and the statute does not and was never intended to apply to a breach of official duty in reference to the principal and employer—in this case the municipality. Such an interpretation would enable public officials to misapply public money *ad*

libitum, and by keeping same secret for the one year, which they could usually do, entirely escape a reckoning, except by indictment for crime. It is not necessary to determine what is the specific statute applicable, which, as heretofore stated, may vary according to the form of action or the nature of the default, and which might be either the three-years statute, C. S., sec. 441, subsecs. 1 and 2, or if not included in either of those, the ten-years statute, section 445; but we are well assured that the statute relied upon, section 443, has no application; and the suit having been instituted in August, 1922, within three years, the defendants are not protected.

We find no reversible error in the record, and the judgment below is Affirmed.

HICKORY NOVELTY COMPANY v. D. W. ANDREWS.

(Filed 21 June, 1924.)

1. Contracts—Debtor and Creditor — Debt of Another — Statutes — Guaranty.

C. S., 987, requiring a writing signed, etc., by the party to be charged to make him legally responsible for the debt of another, applies to contracts of guaranty.

2. Same—Consideration—Continuing Credit.

The promise to answer for the debt of another (C. S., 987), if made after the credit has been given, without new consideration, is *nudem pactum*, and unenforcible; but if made before, it is founded upon the consideration existing between the principal parties; and where the promise is to pay out of the debtor's funds in the possession of the promissor, or is in the nature of his original obligation, the statute has no application.

3. Same—Evidence—Nonsuit.

Where the promise to pay the debt of another is sufficient under the statute (C. S., 987), as to a continuing credit to be extended to the principal debtor, the intent of the promissor to become so bound may be shown by the surrounding circumstances and other transactions or written communications between the creditor and the promissor; and *held*, under the evidence of this case, it was reversible error for the trial judge to grant defendant's motion as of nonsuit.

CIVIL ACTION, heard before *Webb, J.*, at September Term, 1923, of CATAWBA. From a judgment of nonsuit plaintiff appealed.

The facts material are:

The plaintiff is a corporation, doing business in Hickory, N. C., prior to and since 1 January, 1920. The defendant is a citizen of Durham, N. C., residing there prior to and since 1 January, 1920. On 3 January,

1920, and prior thereto, C. W. Andrews & Bros. were doing business in Durham, N. C., and, in connection with their business, purchased lumber, boxes and other lumber products, and also sold to the trade such products. The Hickory Novelty Company deals in lumber of various kinds, manufacturing moulding and other wood products for the trade.

The firm of C. W. Andrews & Bros. was composed of C. W. Andrews and several other sons of the defendant D. W. Andrews.

Plaintiff contends that D. W. Andrews was a member of this firm, which was denied by him. This firm, prior to 3 January, 1920, was doing business with plaintiff and Hutton & Bourbonnais Company, and had become indebted to Hutton & Bourbonnais Company, and contends that "the defendant D. W. Andrews, desiring that the said firm of C. W. Andrews & Bros. should continue to do business with the said plaintiff, and with a view of making the then existing debt secure, did, on 3 January, 1920, guarantee to the Hutton & Bourbonnais Company, the then existing and outstanding account of $3,509.68, as well as to guarantee to the plaintiff and the Hutton & Bourbonnais Company the payment of all debts and obligations of C. W. Andrews & Bros. that might be created or become due in the future by reason of business transactions to be conducted between the firms."

The defendant, in answer, says:

"The defendant admits that C. W. Andrews and two of his other sons, under the firm name of C. W. Andrews & Bros., had been doing business with plaintiff and Hutton & Bourbonnais Company prior to 3 January, 1920, and had become indebted to plaintiff and said company in the sum of $3,509.68, did write the firm of Hutton & Bourbonnais a letter, under date of 3 January, 1920." The letter is as follows:

"This will advise that I am interested in C. W. Andrews & Bros., and will personally see that all business transactions between C. W. Andrews & Bros. and Hutton & Bourbonnais Company and Hickory Novelty Company are settled and adjusted satisfactorily entirely with your concerns.

"I am enclosing herewith a letter from the Home Savings Bank of Durham, N. C., which will show you that I am personally responsible for all outstanding accounts up to this date, and all accounts which will follow.

"If this is not entirely satisfactory with you, I will forward, as soon as you advise, other letters or credentials, which I am sure will be entirely satisfactory with you.

"The outstanding account, which amounts to $3,509.68, will be paid 11 January, 1920, and from now on if there is anything pertaining to this business which is questionable, please advise me personally at once, and I will straighten out the matter entirely to your satisfaction.

"We have in view a large volume of business for the future, and trust that you will give it your personal attention upon receipt of same.

"Thanking you for past favors, and trusting that you are enjoying the best of health, Yours very truly,

D. W. ANDREWS."

The Home Savings Bank letter enclosed is as follows:

"MESSRS. HUTTON & BOURBONNAIS,
Hickory, N. C.

"GENTLEMEN: We wish to advise you in regard to the financial standing of Messrs. C. W. Andrews & Brothers, of this city. We have been doing business with these gentlemen for a number of years, and have always found them to be prompt, reliable and fully able to carry out their financial obligations. They stand well in our community and can get any reasonable amount of credit they desire. You will be safe in extending them a line of credit to $10,000 for thirty or sixty days, should they ask it. Mr. D. W. Andrews, of the firm, is worth over $30,000. Should you care to have further information regarding these gentlemen, will be glad to have you write me.

"Very truly yours,
HOME SAVINGS BANK,
T. B. PRICE, *Cashier.*"

The plaintiff further contends: "That after said letter of credit, or guarantee, of D. W. Andrews, along with a letter of the Home Savings Bank of Durham, N. C., was received by plaintiff and the Hutton & Bourbonnais Company, the said firm of C. W. Andrews & Bros. continued to do business with plaintiff during the remainder of the year 1920, and continued on through 1921 and for a portion of the year 1922." That about 10 June, 1922, the firm of C. W. Andrews & Bros. owed plaintiff a balance of $3,924.12 and interest. The total sales of goods to C. W. Andrews & Bros. after the letter of 3 January, 1920, of D. W. Andrews was $15,939.89, with credits left on 10 June, 1922, above amount ($3,924.12) due. A. B. Hutton testified that the amount of the old account mentioned in D. W. Andrews' letter of $3,509.68 had been paid.

The record shows that A. B. Hutton was interested in the plaintiff, Hickory Novelty Company, and was acting for plaintiff. The amount sued on has never been questioned as being inaccurate, as far as the amount is concerned. C. W. Andrews & Bros. delayed making payment, and plaintiff wrote D. W. Andrews, reminding him of his obligation.

On 21 July, 1922, D. W. Andrews wrote from Durham, N. C., the following letter to A. B. Hutton at Hickory, N. C.:

"I am in receipt of your letter again calling my attention to the account of C. W. Andrews & Bros., and have discussed the matter with C. W. Andrews, and feel that they will be in a better position within a short time to cancel this indebtedness. They are to mail you a check for $500, so that you will have it not later than the first of August, and, too, they will mail you a check every fifteen days after August 1st to take care of this account. In the event that they do not carry out the above plans, kindly notify me and I will see that they are carried out to your satisfaction. This plan will enable them to cancel this indebtedness sooner than the note plan would. I believe and feel that it would be more satisfactory in the long run for them. With kind personal regards, I am very truly yours."

On 1 July a check for $500 was paid on the account by C. W. Andrews & Bros., and on 5 August a check for $250 was paid on the account, reducing the indebtedness to $3,174.12 and interest.

On 1 August, 1922, A. B. Hutton wrote to D. W. Andrews a letter to Durham, N. C., as follows:

"Your esteemed favor of July 21st has been received, and I thank you for satisfactory reply.

"I note in your letter that the firm of C. W. Andrews & Bros. is to send the Hickory Novelty Company $500 August 1st and $500 every fifteen days thereafter until the account is paid and discharged in full. I further note that you will be responsible for this agreement being carried out to my satisfaction, which is in accordance with your former guarantee to us, made on 3 January, 1920, to which I referred in my former letter to you.

"I wish to assure you that I have, and our firms have, the kindest feeling for you, and wish you and your business the greatest success, but you appreciate that we must ask that the arrangement suggested by you be carried out, as we really need the money.

"I will expect the $500 you say will be paid 1 August, by tomorrow, the 2d; so please see that I am not disappointed, as up to this time we have not had remittance.

"With kind personal regards, I am yours very truly."

The plaintiff contends that, "by reason of the guarantees of defendant to plaintiff, and that by reason of the guarantees made by defendant, causing plaintiff to delay in the collection of its debt, all of which, taken together and singly, the plaintiff alleges, makes defendant liable for its debt against C. W. Andrews & Bros., and it asks judgment against defendant accordingly."

The defendant contends that the firm copartnership doing business under the name of C. W. Andrews & Bros. was dissolved on 1 February, 1921; that C. W. Andrews, being chief stockholder, and several of his brothers, with D. W. Andrews, organized a corporation as C. W. Andrews & Bros., Inc., and the corporation is due the sum contended for by plaintiff and not the defendant, and that the corporation, at the time of the institution of this suit, was in the hands of a receiver and has since been put into bankruptcy; that he never guaranteed to plaintiff "any indebtedness due it by said corporation, and is advised, believes and alleges that the letter written by him on 3 January, 1920, does not in any way make him responsible for the debts or obligations of said corporation."

The articles of incorporation were filed in the office of the Secretary of State, 29 January, 1921, and in the clerk's office at Durham, N. C., 9 February, 1921.

C. W. Andrews & Bros., and the corporation formed, have become insolvent.

It was admitted that the entire account is filed in the bankruptcy proceedings against C. W. Andrews & Bros., Inc.

C. H. Cline, secretary of Hickory Novelty Company, and bookkeeper and office man, testified: "I thought all the time I was dealing with C. W. Andrews & Bros., the people we started with. I had no information of any change in the firm. I ran the account in that way—charged everything to C. W. Andrews & Bros., and credited everything as of the date of the check I received; everything was entered on this book that way."

D. W. Andrews testified, in part: "After I wrote that letter to the head of the Hutton & Bourbonnais Company, I never received any reply. I have been knowing Mr. Hutton for quite a number of years. I bought boxes and lumber of different kinds while I was with the American Tobacco Company. I never knew anything about the Hickory Novelty Company until this suit was brought."

"Q. Did you ever have any notice from the Hickory Novelty Company that they had acknowledged this letter here, and that they were extending credit on that letter?"

"A. I did not. To my personal knowledge, the first I ever knew that the Hickory Novelty Company sold C. W. Andrews & Bros. or C. W. Andrews & Bros., Incorporated, was when this suit was entered. I didn't know there was a Hickory Novelty Company until this suit was brought. There was not any copartnership by the name of C. W. Andrews & Bros. after 1 February, 1921. I never saw Mr. Johnson or Mr. Hutton when they came down about that indebtedness."

At the close of all the evidence, defendant renewed motion for judgment as of nonsuit, which motion was allowed, the court being of the opinion that there was not a guarantee, as contended for by the plaintiff; that the letter addressed to Hutton & Bourbonnais Company shows that if the defendant be liable at all, he is liable by reason of the fact that he was a member of the firm of C. W. Andrews & Bros., and not as a guarantor.

Plaintiff excepted, assigned error to this ruling, and appealed to the Supreme Court.

Council & Yount for plaintiff.
Brawley & Gantt and W. A. Self for defendant.

CLARKSON, J., after stating the facts: The only question presented on the entire record is: Did the defendant guarantee to plaintiff the account sued on, $3,174.12 and interest? We are of the opinion that he did.

C. S., 987, is as follows: "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."

The statute applies to contracts of guaranty. *Gilmer v. Improvement Co.*, 170 N. C., 452; *Partin v. Prince*, 159 N. C., 555.

A written promise by one to pay the debt of others, that "just as soon as the dry kiln gets in operation, I will see that your bill is paid," is not a continuing guaranty, but, by fair implication, refers to an account already made and stated. *Supply Co. v. Finch*, 147 N. C., 106.

In *Green v. Thornton*, 49 N. C., 232, *Battle, J.*, said: "It is not and cannot be denied that a guaranty in writing, made at the time of a contract between two or more persons, is binding upon the guarantor, because it is founded upon the consideration which exists between the principal parties. But if it be made afterwards, without any new consideration, then it is not obligatory, and putting it in writing, if not under seal, will not help it. *Rann v. Hughes*, 7 Term Rep., 350, note *a*. The statute of frauds does not require the consideration to be in writing, and it may therefore be proved by parol. *Miller v. Irvine*, 1 Dev. and Bat. Rep., 103." *Partin v. Prince, supra.*

The statute does not apply to a promise to pay the debt of another out of the debtor's property in the promissor's hands. *Mercantile Co. v. Bryant,* 186 N. C., 553.

The statute does not apply where it is in the nature of an original obligation of the promissor. *Marrow v. White,* 151 N. C., 96; *Partin v. Prince, supra.*

In 12 R. C. L., 1053, it is said: "A guaranty has been defined by statute to be 'a promise to answer for the debt, default, or miscarriage of another person.' This definition substantially conforms to the judicial conception of a guaranty, which may fairly be summed up as a promise to answer for the payment of some debt or the performance of some obligation, on default of such payment or performance, by a third person who is liable or expected to become liable therefor in the first instance." *Grocery Co. v. Early,* 181 N. C., 460; Enc. Dig. of N. C., Vol. 14, "Guaranty," p. 275 *et seq.*

"If the object of the guaranty is to enable the principal to have credit over an extended time, and to cover successive transactions, it is a continuing one; but if the intention of the guarantor, as indicated by the language used, is that but one transaction is to be covered by the guaranty, it is a limited one." Childs on Suretyship and Guaranty, sec. 23, p. 20. See 12 R. C. L., 1061.

In 12 R. C. L., 1062, part of section 11, it is said: "There seems to be no general rule for determining whether a guaranty is continuing; each must be construed according to its terms and the surrounding circumstances, to show which parol evidence is admissible. If the parties treat an instrument as a continuing guaranty, and its terms are not inconsistent with such construction, the courts will adopt that view."

In *Scovill Mfg. Co. v. Cassidy,* A. & E. Anno. Cases (1898 E.), 611 (275 Ill., 462), under "Continuing Guaranties," it is said: "Where by the terms of the guaranty it is evident that the object is to give a standing credit to the principal to be used from time to time, either indefinitely or for a certain period, it is generally deemed a continuing guaranty. . . . It was said in *Chester County Nat. Bank v. Thomas,* 220 Pa. St., 360; 60 Atl., 813, 'Whether a contract of guaranty is a continuing undertaking is a question of intention which must be gathered from the instrument itself, or from the course of dealings between the parties or from both.' If it appears that a future course of dealing for an indefinite time, or a succession of credits to be given, was contemplated by the parties, the contract will be construed to be a continuing guaranty," citing a wealth of authorities.

In *First Nat. Bank v. Waddell* (74 Ark., 241), 4 A. & E. Anno. Cases, 822, under "Continuing Guaranties," it is said: "In like manner, a guaranty will be held to be continuing if it is made in lan-

guage which shows that the parties intended that it should cover not only present transactions, but also future transactions for an indefinite length of time," citing many authorities.

We think the case of *Newcomb v. Kloeblen*, 77 N. J. L., 291, in point. The head-notes to that case are as follows:

"The plaintiffs were commission merchants; they refused to make any further sale to the defendant's son unless his account was guaranteed by defendant. Defendant wrote to the plaintiffs, 'I will be responsible for any bill that my son James will make': *Held*, that use of the word 'any' did not limit the guarantee to the one bill of goods delivered when the guarantee was given, but that it was a continuing guarantee.

"In an action on a guarantee, where the issue is whether the guarantee is a continuing one, conversations between the guarantor and his son at the time of executing the guarantee are inadmissible for the purpose of showing the meaning of the guarantee.

"In construing a contract of guarantee, whatever may be the limitations as to time or amount, the rule of construction is to take the words of the contract together with the surrounding facts as the exponent of the meaning of the parties."

The Court, in that case, said: "The fact of the previous dealing between James Kloeblen and the plaintiffs there appeared, and the absolute necessity on his part for a general credit for the future, as the plaintiff refused to make him further sales unless his father, the defendant, would guarantee his account with them. Under these circumstances the defendant guaranteed to be responsible for 'any bill that my son James will make,' and this leads inevitably to the conclusion that the guarantee was to remain continuing until revoked."

Similar cases are as follows: "Thus, a guaranty, without limitation as to time or amount, of the payment 'of all bills of goods sold or that may be sold,' is a continuing one." *Conduitt v. Ryan*, 3 Ind. App., 1. See, also, *Doyle v. Nichols*, 15 Colo. App., 458; *Boehne v. Murphy*, 46 Mo., 57. "A letter of credit stating that 'I will guarantee their engagements, should you think it necessary, for any transaction they may have with your house,' is a continuing guaranty." *Grant v. Ridsdale*, 2 Har. & J. (Md.), 186.

We think that the letters and undisputed facts, as appear from the record, disclose that the transaction was a "continuing guaranty." The guaranty was in writing, as required by the statute, "To answer the debt, default or miscarriage of another person." The question of the consideration of the promise or implied promise of the defendant to pay the outstanding account, which amounted to $3,509.68, does not arise on the record, as that amount has been paid. If it did arise, the fact

that the defendant stated that he was interested in C. W. Andrews & Bros., and the letter of 3 January, 1920, taken in its entirety, would imply that he was a partner with his sons in the business and create liability as a partner. The Home Savings Bank letter, enclosed in D. W. Andrews' letter of 3 January, 1920, says: "Mr. D. W. Andrews, *of the firm,* is worth over $30,000."

We think the letter of 3 January, 1920, was a continuing guaranty by defendant to both Hutton & Bourbonnais Co. and Hickory Novelty Co., for the future debts or obligations that were incurred by C. W. Andrews & Bros. The letter is an effort to get a line of credit for C. W. Andrews & Bros., and enclosed a letter from the bank showing his financial standing. He stated in the letter: *"I am personally responsible for all outstanding debts up to this time, and all accounts that will follow."* He says: "We have in view a large volume of business for the future," showing that he expected C. W. Andrews & Bros. to continue to do business with the two firms, including the plaintiff. He knew that the plaintiff knew his sons were members of the firm of C. W. Andrews & Bros., and in the course of business would probably become indebted to it, and he was using every expression he could in his letter to have plaintiff satisfied that the defendant would be responsible for the obligations of C. W. Andrews & Bros. then existing and to be incurred in the future. "I am interested in C. W. Andrews & Bros., *and will personally see that all business transactions between C. W. Andrews & Bros. and Hutton & Bourbonnais Co.* and *Hickory Novelty Company* are *settled and adjusted satisfactorily entirely with your concerns."* The letter is addressed to Hutton & Bourbonnais Co., but defendant knew that the Hickory Novelty Company was closely allied with them, that the same interests were in charge of the two companies. The language in the first part of the letter in which the two firms are referred to as "your concerns."

In considering the letter of 3 January, 1920, and that of the Home Savings Bank, bearing upon the intention and construction, we should consider the surrounding circumstances and should take into consideration the letters of 21 July, 1922, and 1 August, 1922, which indicate that the defendant understood the liability he had created and incurred. These letters all speak for themselves, and a more extended analysis we deem unnecessary to show a "continuing guaranty." The record shows plaintiff had no notice of the partnership changing to a corporation. The evidence shows the account was made in the name of C. W. Andrews & Bros. We do not think that the language of the letter of 3 January, 1920, calls for notice to be given the defendant. The facts in this case are different from cases cited by defendant in his brief. This was an unfortunate business venture on the part of the defendant's sons.

Humanly, and rightly, the defendant was trying to help his sons to success, and allowed them his credit. The defendant says in his evidence: "I stated in my answer that the reason I signed the letter of guarantee was because I wanted to help the boys; I was interested in the boys; any father is in his sons, I presume. I feel that way about mine."

This statement is laudable on the part of the defendant and, under the facts in this case, he made the "continuing guaranty" to help his boys. They have become insolvent; he must fulfill his obligation.

For the reason given, the judgment of nonsuit is

Reversed.

JACKSON COUNTY BANK v. A. F. HESTER AND W. H. McELWEE, PARTNERS, TRADING AS HESTER & McELWEE, THE FIDELITY & CASUALTY COMPANY OF NEW YORK, AND CULLOWHEE NORMAL AND INDUSTRIAL SCHOOL.

(Filed 21 June, 1924.)

Removal of Causes—Federal Courts—Jurisdiction—Severable Controversies—Necessary Parties.

Where a local bank has loaned money to a contractor for the erection of a local school building under an agreement entered into by which the local school committee should reserve for the plaintiff bank, as collateral, certain moneys to be retained by them from the specified amounts to be retained as the building progressed, a nonresident defendant surety of the contractor for the completion of the building may not remove the cause from the State to the Federal court upon the ground that the resident defendants were not necessary parties to the determination of the controversy. C. S., 455, 456. *Morganton v. Hutton*, 187 N. C., 738, cited and applied.

PETITION for removal to District Court of U. S. for Western District of North Carolina by defendant Fidelity & Casualty Co. of New York. Heard before *McElroy, J.*, at Spring Term, 1924, of JACKSON.

Appeal by defendant Fidelity & Casualty Company of New York.

The material facts are:

The defendants, Hester & McElwee, contractors and builders, entered into a contract with the Cullowhee Normal and Industrial School for the erection of a power plant and laundry building at the plant of said school at Cullowhee, North Carolina, and procured the defendant Fidelity & Casualty Company of New York to execute a guaranty or indemnity bond, therein guaranteeing the fulfillment of the said contract of Hester & McElwee in so far as it related to the construction to completion of said power plant.

In the course of their operations, Hester & McElwee borrowed the sum of $5,000 from the plaintiff bank, for which they executed their demand note. It was provided in the contract between Hester & McElwee and the defendant school that from time to time in the progress of the work the defendant school would have special estimates prepared showing the amount then due the contractors. Hester & McElwee agreed to assign and did assign to the plaintiff bank the amount represented by said estimates, with directions to the school to apply the payments represented thereby to the several notes owing by the contractors to the plaintiff bank, and this assignment and directions were accepted and assented to by the defendant school.

About 21 January, 1924, the school had a special estimate prepared and turned over to Hester & McElwee, amounting to $5,090.44. By virtue of their agreement it was the duty of Hester & McElwee to turn this assignment back to the school, with directions to apply the sum represented thereby to the plaintiff. Instead thereof they turned it over to the Fidelity & Casualty Company of New York, and it has refused to turn said estimates over to the school or to the plaintiff. The plaintiff has demanded payment of the school, and it refused to make payment in pursuance of said assignment.

The plaintiff asked judgment against the contractors and school for $5,000 and interest, for a mandatory injunction directing the school to pay the sum represented by said estimate, and that the surety company be restrained from interfering with the collection of said note. Hester & McElwee are in a very precarious financial condition and practically insolvent.

The Jackson County Bank is a North Carolina corporation. Hester & McElwee and the Cullowhee Normal and Industrial School are residents of North Carolina, but the defendant, the Fidelity & Casualty Company of New York, is a foreign corporation.

In apt time appellant gave notice and filed its petition to remove this cause to the District Court of the United States, for the reason that the controversy, in so far as it was concerned, was severable, and that its rights could be determined independently of the other interested parties, *i. e.*, Hester & McElwee and the Cullowhee Normal and Industrial School, the latter being merely a stakeholder, and having no interest in the amount involved, except holding the same to abide the judgment of the court, as between the other parties.

The petition was heard before the clerk and the motion to remove denied. Appeal was then taken to the judge in term, and heard by consent at Murphy, N. C., and the order of the clerk affirmed and motion to remove denied.

Appellant's exceptions and assignments of error are directed to the refusal of the court below to grant the motion to remove on appeal from the clerk and signing the order denying the motion. The two assignments of error are treated as one.

Sutton & Stillwell and Alley & Alley for plaintiffs.

A. J. Fletcher and S. W. Black for Fidelity & Casualty Company of New York.

CLARKSON, J., after stating the facts: The sole question presented for us to consider: Was Hester & McElwee and the Cullowhee Normal and Industrial School "indispensable parties" to the action for a complete determination of the controversy; were they "necessary parties"; was it a "separable or joint controversy?" They were defendants, residents of North Carolina, and joined with the nonresident defendant, Fidelity & Casualty Company of New York. The plaintiff bank is a North Carolina corporation. If Hester & McElwee and the Cullowhee Normal and Industrial School were indispensable parties, and this is not a separable but joint controversy, the court below committed no error in refusing to remove the cause, and in this we think the court correct.

C. S., 455, is as follows: "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs except as otherwise provided."

C. S., 456, is as follows: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate may be made party plaintiff or defendant, as the case requires, to such action."

In 23 R. C. L., 672, part of sec. 68, it is said: "The act of 1866 authorized removal by a defendant 'if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause.' This clause was repeated verbatim in the second subdivision of section 639 of the Revised Statutes. In the Judiciary Act of 1875 removal was allowed 'when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them.' This clause was repeated word for word in the Judiciary Act of 1887-1888, and again in Judicial Code, sec. 28. In no case has a court detected any difference in meaning between the clause as first enacted and the clause now in

force. The Federal Supreme Court virtually declared that Congress intended to preserve in the Judiciary Act of 1875 this substantial feature in the act of 1866, which proceeded plainly upon the ground, among others, that a suit may, under correct pleading, embrace several controversies, one of which may be between the plaintiff and that defendant who is a citizen of a state other than the state in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties. . . . If the relief asked by the plaintiff and obtainable in the case alleged in his pleading cannot be granted unless all who are made defendants are parties, there is no separable controversy, and this is perhaps the most practicable and most frequently decisive test applied."

In 23 R. C. L., 660, part of sec. 57, it is said: "In an action against principal and surety on an official bond, the fact that the principal was financially irresponsible and the surety would be obliged to meet practically the whole claim, should judgment be rendered against the defendants, did not make the principal a nominal party."

Mr. Chief Justice Fuller, in *Cochran v. Montgomery Co.,* 199 U. S., 272, says: "In the present case, suit was brought in the plaintiff's State against Cochran, a citizen of the same State, who was a necessary party, and the surety company, a citizen of Maryland."

The facts in that case were: "Action was brought 21 January, 1902, in the city court of Montgomery, Alabama, by the county of Montgomery, one of the counties of the State of Alabama, against John J. Cochran, a citizen of that county and State, and the Fidelity & Deposit Company of Maryland, a corporation of the State of Maryland, Cochran being the treasurer of the plaintiff county and the Fidelity & Trust Company of Maryland being the sole surety on the official bond of said Cochran as such county treasurer, to recover damages for certain alleged breaches of said official bond. Cochran was charged with the conversion of amounts belonging to the general fund of the county, and of amounts belonging to the road and bridge fund."

This matter has been fully discussed recently by the lamented late *Chief Justice Walter Clark* in *Morganton v. Hutton,* 187 N. C., 740: "The question of the nature of the controversy is governed by the complaint. Whether there is separable controversy is determined by the complaint. *Staton v. R. R.,* 144 N. C., 135; *Hollifield v. Tel. Co.,* 172 N. C., 714; *Patterson v. Lumber Co.,* 175 N. C., 92. And the plaintiff is entitled to have his cause of action considered as stated in complaint. *Hough v. R. R.,* 144 N. C., 700-702; *Smith v. Quarries Co.,* 164 N. C., 338; *Powers v. R. R.,* 169 U. S., 92; 179 U. S., 135; 200 U. S., 206. In *Powers v. R. R.,* 169 U. S., 92, it is said: 'A separate defense cannot

create a separate controversy or deprive the plaintiff of the right to prosecute his own suit to a final determination in his own way, for the cause of action is the subject-matter of the controversy and is what the plaintiff alleges.' Cited in 194 U. S., 138. Also, in *R. R. v. Ide,* 114 U. S., 52, it is said: 'A defendant cannot make an action several which a plaintiff has elected to make joint.'"

For the reason given, on the facts in this case, we think the judgment of the court below conforms to the statute of the United States in reference to removals. The judgment is

Affirmed.

STATE v. HUBERT RILEY AND ROSE STEELMAN.

(Filed 21 June, 1924.)

1. Courts—Discretion—Trials — Criminal Law — Larceny — Appeal and Error.

Exception by defendants, in a criminal action, that they were so hurried into the trial that they were deprived of the opportunity to get or prepare their evidence, is to a matter within the legal discretion of the trial judge, and is untenable on appeal in the absence of its manifest abuse, which must be made to appear to be available on appeal.

2. Criminal Law—Evidence—Recent Possession—Nonsuit—Statutes—Trials.

Evidence that the stolen automobile was in the recent possession of both defendants, with other circumstances tending to show guilt of them both, is sufficient to deny a motion as of nonsuit, under the statute, and declaration of identity of a defendant, made in the presence of both, were held to be competent as to each under the facts of this case.

3. Courts—Discretion—Recent Possession—Evidence—Matters of Law—Jury—Appeal and Error—Harmless Error.

The question as to whether the admissions of defendant, in a criminal action, were under disqualifying threats of the officers of the law, is in this jurisdiction a matter of law to be determined by the judge; but where he has ruled that the evidence is competent, his later submitting it to the jury is not prejudicial to the defendant, and will not be considered as reversible error on appeal.

4. Criminal Law — Larceny — Evidence — Recent Possession — Instructions—Appeal and Error.

Where the judge has correctly charged the jury on the evidence of recent possession of the stolen article, and has erroneously further charged thereon, a broadside exception is not available to the defendant on appeal, in the absence of a special request, especially if the further instruction is not to his prejudice.

STACY, J., dissenting.

STATE *v.* RILEY.

INDICTMENT for larceny of an automobile, tried before *Shaw, J.*, and a jury, at December Term, 1923, of GUILFORD.

Defendants were convicted, and from judgment of the court on the verdict appealed, assigning errors.

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

Robert H. Frazier and Wilson & Frazier for defendants.

HOKE, C. J. Defendants excepted, first, that they were ruled to a trial of the cause at the same term the bill of indictment was found and so soon after the alleged theft that they were, in effect, denied the right to obtain necessary evidence; but our decisions are to the effect that this is a matter within the discretion of the trial judge and not the basis of a valid exception, unless there has been manifest abuse, and, on the facts presented, we are of opinion that no such abuse has been made to appear. *S. v. Burnett*, 184 N. C., 783; *S. v. Sultan*, 142 N. C., 569.

Defendants excepted further for the refusal of the court to allow their motion to nonsuit, made in apt time at the close of the evidence for the State, renewed at the close of the entire evidence. There were facts in evidence on the part of the State tending to show that the automobile in question, the property of B. H. Mitchell, an Essex coach, was stolen from one of the streets of Greensboro on "Saturday, 3 December, 1923," and was recovered on 13 December. Saturday seems to have been 1 December, and to that extent the evidence is confused; in any event it was found in possession and control of the defendants on Monday, 10 December, and both their conduct and their declarations concerning it tended to show their guilt. It was not seriously contended that there was a sufficient failure of proof to sustain a nonsuit as to defendant Riley, but it was very earnestly urged that the motion should have been allowed as to defendant Steelman, who was not examined nor shown at any time to have been in control of the car, but we do not so interpret the record. On the contrary, the witnesses who testified as to the possession on several occasions spoke of its being in possession of both defendants. Among other evidence admitted as against Riley and Steelman, it was shown that the two had the stolen car at the home of Riley's father, who lived near Pleasant Garden in said county, on Monday, 9th, or Tuesday, 10 December, 1923, and that defendant Steelman had there falsely introduced himself as a Mr. Brown of High Point. This testimony being from the police officer, S. J. Current, and John T. Carter, an agent, who testified that Steelman, having denied knowing anything about the stolen car, at

the request of Mr. J. H. Riley, the latter was taken to the jail to see if he knew Steelman and could identify him as being the man who was with his son, had the car at the home of the witness, and on the meeting Mr. Riley, the father, said: "Yes, sir; you are the man that was at my house and introduced yourself as Brown from High Point." True, this was declaration of Riley, but being made in the presence of Steelman, who made no denial, it became a fact in evidence relevant to the issue. *S. v. Jackson,* 150 N. C., 831. On the record we must hold that the motion for nonsuit was properly denied as to both defendants.

Again it is objected that there was error in his Honor's charge in leaving to the jury the question whether certain confessions or inculpating statements made by defendants were voluntary. The question of the competency of these inculpating admissions was raised when they were first offered, and counsel for defendants was allowed to cross-question the witness concerning them. On the preliminary inquiry the statements were ruled competent and admitted, and later in the progress of the trial, and after testimony for defense had been admitted tending to show that there had been improper inducements offered, the court left the question of whether or not they were voluntarily made to the jury with the direction that if found by them to have been made by reason of disqualifying threats and promises they should be disregarded. There is much authority for the course pursued by his Honor in this matter. *S. v. Wells,* 35 Utah, 400; appearing also in 136 Am. St. Rep., 158, and citing, with many other authorities, *Wilson v. U. S.,* 162 U. S., 613; 193 Pa. St., 512; but the law as it prevails in this jurisdiction refers the question of whether confessions are voluntary or not, and other like questions, to the judge. *S. v. Maynard,* 184 N. C., 653; *S. v. Andrew,* 61 N. C., 205; *S. v. Dick,* 60 N. C., 440; *Munroe v. Stults,* 31 N. C., 49; Lockhart Handbook of Evidence, secs. 11-172-175. Doubtless if, in the progress of the trial, it should be made clearly to appear that the preliminary ruling admitting the evidence had been erroneous or unjustified, the court could change its first decision and withdraw the testimony, *Simon v. State,* 5 Fla., 285; but without such action, and where the preliminary order holds the declarations are evidence in the cause, and disqualifying facts and circumstances are to be considered by the jury only as affecting the weight that should be allowed them. It would seem, therefore, that on leaving the question to the jury after same had been admitted is not in accordance with our decisions, but it may not be held for reversible error, because if error be conceded, it was in defendant's favor. By the ruling of the court the admissions were in evidence, and in allowing the jury to reject them, if not voluntarily, this could not have worked to defendant's prejudice. An estimate approved also in *S. v. Dick, supra,* at p. 445 of 60 N. C.

Reports. Defendants except further, and urge for error, a portion of his Honor's charge as follows: "If you find beyond a reasonable doubt that the defendants were in possession of this car, and that it was a stolen car, Mr. Mitchell's car, then there is a rule of law that applies in cases of stolen property found in the possession of a third party. That rule is, gentlemen, that where property is stolen and recently thereafter said stolen property is found in the possession of a person, that person is presumed to be the thief of the property, and he is presumed to have stolen it; and that presumption, gentlemen of the jury, is stronger or weaker as it is nearer to the time of the larceny or farther removed from it. For instance, a car stolen on one night and found next day in the possession of a party, the presumption would be a strong presumption that he was the party who stole the property, but the farther removed the time the possession is found to be in the party from the time the property is stolen, the weaker the presumption becomes until it ceases to be a presumption at all, but only a circumstance." And again: "Now, the State contends that this car was stolen on 3 December, and that on the 10th or 11th these defendants had it in their possession, and that not more than a week or ten days had elapsed from the time the car was stolen. The State contends that cars are not property that is passed rapidly from person to person; that it takes some time to steal a car, and the State contends you ought to find beyond a reasonable doubt from the testimony that this was Mr. Mitchell's car which was stolen and which was found in the possession of these defendants recently after it was stolen, and that you ought to find they are the parties who stole the car." In the first of these instructions the court correctly lays down the law as it obtains in this jurisdiction as to the effect to be allowed generally to the recent possession of stolen property. *S. v. Lippard,* 183 N. C., 788; *S. v. Ford,* 175 N. C., 797; *S. v. Anderson,* 162 N. C., 571. And even if his Honor on the facts presented might have instructed the jury that no presumption was raised against defendants, the omission should not be held for reversible error in the absence of a specific prayer to that effect. *Simmons v. Davenport,* 140 N. C., 407. And more particularly is this true since the second of these excerpts in effect treats such possession as a mere inculpating circumstance.

On careful consideration of the entire record, we are of opinion that no reversible error has been shown, and the judgment below must be affirmed.

No error.

STACY, J., dissenting.

MRS. LOUISE E. GEROW, ADMINISTRATRIX OF HERBERT W. GEROW, DECEASED, *v.* SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 21 June, 1924.)

1. Verdict—Judgment — Commerce — Employer and Employee — Negligence—Statutes.

In an action to recover damages from a railroad company for the negligent killing of its employee in interstate commerce by reason of defective engine, appliances, etc., the finding by the jury for the plaintiff, interpreted with reference to the pleadings, evidence and instructions in this case, that the defendant's negligence proximately caused the death, is broader than the verdict upon the finding for the defendant, that it was not caused by a violation of the Federal statute enacted for the safety of such employees, and it was not error for the trial judge to render the judgment for damages for the plaintiff.

2. Railroads—Employer and Employee—Negligence—Commerce—Federal Statutes—Evidence—Interstate Commerce Commission.

While the Federal statute applicable excludes from evidence the reports made by the inspector of boilers in the employ of the Interstate Commerce Commission, it does not prohibit the testimony of the inspector upon the trial of an action to recover of the railroad damages for the wrongful death of its employee in interstate commerce, when he is properly qualified and testifies to facts that have come within his personal observation, and which are otherwise competent.

3. Railroads—Employer and Employee—Damages—Commerce—Federal Statutes—Appeal and Error—Instructions.

The damages recoverable for the wrongful death of a railroad company's employee engaged in interstate commerce is confined to the loss of the pecuniary benefits to the persons designated by the Federal statute reasonably to be expected from the continued life of the deceased; and it is reversible error for the trial judge to instruct the jury thereon in accordance with the measure of damages otherwise allowable in the State court, that it was the pecuniary net worth of the deceased to his family, based upon his earnings and expectancy of life, etc.

CIVIL ACTION to recover for death of intestate by the alleged killing by negligence of defendant engaged at the time in interstate commerce, heard before *Calvert, J.*, at November Term, 1923, of WAKE.

The intestate, an engineer in employment of defendant company, and engaged at the time in interstate commerce, was fatally injured and shortly thereafter died from an explosion of his engine near Youngsville, N. C., on 26 November, 1921, the negligence imputed being a defective engine and appliances, as well as defective tender and water tank and improper and inadequate water supply, etc. There was denial of liability by defendant company, plea of contributory negligence, assumption of risk, etc. On issues submitted, the jury rendered the following verdict:

1. Was the plaintiff's intestate, Herbert W. Gerow, injured and killed by the negligence of the defendant, as alleged in the complaint? Ans. Yes.

2. Did a violation of a Federal statute enacted for the safety of employees contribute to the injury and death of the plaintiff's intestate, Herbert W. Gerow? Ans. No.

3. Did the plaintiff's intestate, Herbert W. Gerow, by his own negligence, contribute to his injury and death, as alleged in the defendant's answer? Ans. Yes.

4. Did the plaintiff's intestate, Herbert W. Gerow, assume the risk of injury and death, as alleged in the defendant's answer? Ans. No.

5. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Ans. $25,000.

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

R. N. Simms, R. L. McMillan, and Douglass & Douglass for plaintiff.
Murray Allen for defendant.

HOKE, C. J. Defendant objects to the validity of the recovery had against it, first, because the verdict on the second issue having been found in the company's favor, the defendant is thereby exonerated or, in any event, there is such inconsistency in the verdict that no judgment thereon can be properly entered, but we do not so interpret the record. It is the accepted principle with us that a verdict when ambiguous may at times be construed and allowed significance by reference to the pleadings, the evidence and the charge of the court, *Donnell v. Greensboro,* 164 N. C., 330, and so considered, a perusal of the record will disclose that the finding of the jury on the first issue is broader in its scope and meaning than their verdict on the second, and that there is not such a necessary repugnancy between the two as to vitiate the verdict. Appellant excepts further and assigns for error the refusal of the court to allow defendant to examine and put before the jury the proposed testimony of R. M. Williams, a witness present and under subpœna, who was a boiler inspector in the service of the Interstate Commerce Commission and found to be an expert, and who, in the line of his duties, made a personal examination of the exploded engine and its condition within two or three days at most after the occurrence, on objection by plaintiff, the jury having been sent out, the witness answered the questions propounded, which answers tended, in part, to disclose that the explosion had been brought about because the water had been allowed to get too low in the boiler, and that the appliances provided to enable an engineer to discover this were appar-

ently in good working order, etc., the evidence being clearly relevant to the issues and making in favor of defendant. It is ordinarily true that a witness under subpœna present, having personal knowledge of pertinent facts, is competent and compellable to testify, and a litigant is entitled to the benefit of his evidence unless forbidden by constitutional provision or a valid statute or some recognized principle of public policy. The plaintiff does not question the general principle, as stated, but bases his objection on a Federal statute providing for an examination and report of such occurrences by the Interstate Commerce Commission itself, or its duly authorized agents, and also providing for certain other reports, etc. 36 Statutes at Large, 350; 8 Federal Statutes, Annotated (2 ed.), 1420. In section 4 of the statute it is also provided "That neither said report nor any report of said investigation, nor any part thereof, shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation." It will be noted that this inhibitive section of the statute in its terms and purpose is restricted to the user of the report as evidence, and it does not seem to us that the inhibition in its effect or policy permits a construction forbidding an eye-witness, an expert and otherwise qualified, from giving evidence pertinent to the issues and as to facts coming under his personal observation. Such evidence was admitted without objection in *Virginia Railway Co. v. Andrews,* 118 Va., 482, and neither the reason nor policy of such a statute forbidding the use of such reports, which in any event would be rarely competent in a trial in court, would tend to exclude the testimony of an eye-witness speaking, as stated, under oath to relevant facts coming under his personal observation, and in our opinion the ruling should be held for reversible error. Again, on the question of damages, the court instructed the jury as follows: "Now, gentlemen, in considering this issue, you will first consider the pecuniary injury and damage, if any, suffered by the widow and children of the deceased. As to this matter, the measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting cost of his own living and expenditures from gross income, based upon his life expectancy.

"As a basis on which to enable the jury to make their estimate, you should consider the age of the deceased, his prospects in life, his character and his industry and skill, and the ability he had to make money, and the business in which he was employed, the end being to enable the jury to find the net income which might be reasonably expected in arriving at the present net pecuniary worth of the deceased to his family." In this instruction the court, in substance, and almost in terms, lays down the rule of assessing the damages as it prevails under

our State law—the present net pecuniary value of the deceased's life; but under the Federal statute, as construed by the established decisions interpreting the same and controlling on the facts of the record, the rule is different and is restricted to the pecuniary benefits to the designated persons to be reasonably expected from the continued life of the deceased. *Chesapeake and Ohio R. R. Co. v. Kelly, Admr.*, 241 U. S., 485; *Kansas City Southern R. R. Co. v. Leslie*, 238 U. S., 599; *Horton v. R. R.*, 175 N. C., 477; *Kenney v. R. R.*, 165 N. C., 99; *Irvin v. R. R.*, 164 N. C., 5; *Dooley v. R. R.*, 163 N. C., 454. Speaking to the distinction in *Horton's case*, *Associate Justice Walker* said: "Under our statutes the damages are based upon the present worth of the net pecuniary value of the life of the deceased. Under the United States statute the damages are based upon the pecuniary loss sustained by the beneficiary." In *Irvin's case*, *supra*, a very discriminating charge on the subject by the Superior Court judge, the Honorable C. M. Cook, is approved as an accurate and helpful statement of the law which controls as to this element of the damages assessable under the statute. It may be well to note that by an amendment to the Federal statute of April, 1910, 36 U. S. Statutes at Large, ch. 143, an additional recovery is allowed for the benefit of the widow, etc., for the conscious pain and suffering endured by the deceased from the time of the fatal injury to his death; but this, while it is to be sued for in the same action, is said to be an entirely different element of damages from the recovery allowed for the pecuniary loss, etc., suffered by the beneficiaries of the deceased. In *Great Northern Ry. Co. v. Trust Co.*, 242 U. S., 144-147, *Associate Justice McReynolds*, speaking to the two items of damage, quoting from 237 U. S., 655-658, said: "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One for the wrong to the injured person, and is confined to his personal loss and suffering before he died; while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong." This matter is referred to only by way of precaution in applying some of our former decisions on the subject and is not of moment here, as the charge of his Honor recognized and dealt with the additional element of damages, but he committed prejudicial error in the rule of liability as to the loss suffered by the beneficiaries.

For the errors indicated, we are of opinion that there should be a new trial of the cause, and it is so ordered.

New trial.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, v. N. Y. GULLEY.

(Filed 21 June, 1924.)

1. Carriers—Railroads—Title—Order, Notify Consignor—Bills of Lading Attached to Draft.

In a shipment by common carrier, the title is ordinarily in the consignee upon delivery for transportation; and where the shipment is order, notify consignor, and bill of lading is sent through the bank attached to draft, upon the payment of the draft by the consignee and delivery of the bill of lading to him, the title to the shipment is in him.

2. Same—Vendor and Purchaser—Actions—Shortage in Shipment.

Where the consignee of an interstate shipment, bill of lading attached to draft, has paid the draft and presents the bill of lading to the carrier, pays the freight, and obtains the shipment, in the carrier's action to recover the proper freight charges as established by the Interstate Commerce Commission, he is liable therefor.

3. Same — Commerce — Interstate Commerce Commission — Discrimination—Freight Rates—Contract of Carriage.

The rates established by the Interstate Commerce Commission on interstate shipments are controlling, and to prevent discrimination, and where the carrier has collected a less amount on the shipment from the consignee than that so prescribed, the carrier in its action may recover the difference from the consignee, he being bound by the rates lawfully established.

CIVIL ACTION, heard before *Calvert, J.*, at September Term, 1923, of WAKE. From judgment for plaintiff, defendant appealed.

The following is the "case agreed" on appeal to this Court:

"In the above entitled action it is agreed that the material facts are as follows: That in August, 1919, Dyer & Co., of Kansas City, Mo., sold to the defendant, N. Y. Gulley, a carload of hay to be delivered at Franklinton, N. C., at the price of $37 per ton. On 20 August, 1919, Dyer & Co. shipped a carload of hay from Omaha, Neb., to Franklinton, consigned to Dyer & Co., order notify N. Y. Gulley. That the carload of hay was transported by the railroads at the weight of 21,400 pounds, and freight charged on that basis. At the time of shipment, Dyer & Co. sent a bill to the defendant charging him with 23,260 pounds of hay and deducting for freight charges $127.60. They drew a draft, attached it to the bill of lading, and sent it to the Bank of Wake, Wake Forest. The defendant paid the draft, and thus procured the bill of lading and went to Franklinton to pay the freight. The railroad agent there said the freight was $87.55, which was paid by the defendant and the car unloaded and the hay carefully weighed by the official cotton weigher at Franklinton, and it showed a shortage of 2,500 pounds, which

did not occur on railroad, making a charge for the hay $46.25 too large, while the sum deducted as freight was $40.05 more than was paid by defendant, leaving a balance due the defendant from Dyer & Co. of $6.20. Under these circumstances the defendant made no claim for shortage in hay, fully believing he had paid the freight in full and would lose only the $6.20. This was done 12 September, 1919. About April, 1920, defendant was notified by the railroad agent that a claim was made for $42.84; that the correct freight charges on the car of hay from Omaha, Neb., to Franklinton, N. C., at the time of this shipment, as shown by tariffs on file with the Interstate Commerce Commission, was $127.19, and the war tax on $41.89 amounts to $1.28.

"This defendant thereupon notified Dyer & Company of the situation, and they refused to make good any shortage because of the delay in making claim for same. The defendant denied any liability to the railroad company, and refused to pay claim, and plaintiff began this action.

"Upon the foregoing facts agreed, the plaintiff contends that he is entitled to recover of the defendant the sum of $41.89 and war tax, $1.28, being the difference in the freight paid by the defendant and the correct freight charges, as shown by tariffs on file with the Interstate Commerce Commission. The defendant contends that he is not indebted to the plaintiff in any amount."

The court below rendered the following judgment:

"This cause coming on to be heard, upon case agreed, a jury trial having been waived by plaintiff and defendant, it is now, upon consideration of the facts set forth in said case agreed, ordered and adjudged that the plaintiff recover of the defendant the sum of $42.84, with interest thereon from 13 September, 1919, and the costs of this action, to be taxed by the clerk."

To the foregoing judgment the defendant excepted, assigned error, and appealed to the Supreme Court.

Murray Allen for plaintiff.

J. G. Mills and N. Y. Gulley, in propria persona, for defendants.

CLARKSON, J. In *Early v. Flour Mills*, 187 N. C., p. 345, it is said: "It is the general rule in mercantile law that the risk of loss follows the title to the property. *Joyce v. Adams*, 8 N. Y., 291; note 26, L. R. A. (N. S.), 10. It is also the general holding that when a seller ships goods 'order notify,' and draws draft for purchase price, with bill of lading attached, the title and right of possession to the property are reserved by the seller until the draft is paid. No title passes to the purchaser, and any loss in transit, as between the buyer and the seller, must

be borne by the latter. *Collins v. R. R.*, 187 N. C., 141; *Watts v. R. R.*, 183 N. C., 12; *Penniman v. Winder*, 180 N. C., 73; *Richardson v. Woodruff*, 178 N. C., 46; 35 Cyc., 332."

From the agreed state of facts, the hay was shipped to Franklinton, N. C., consigned to Dyer & Company "order notify" N. Y. Gulley. The title to the hay was in Dyer & Company until the defendant paid the draft, with the bill of lading attached, to the Bank of Wake, at Wake Forest. Immediately upon the payment of the draft, he obtained the bill of lading. The title to the hay then passed to the defendant. He became the owner of the hay, subject to the payment of the freight charges. The freight charges, including war tax, was $130.39, and the agent by mistake collected only $87.55 from the defendant. This suit is for the balance of the freight charges, $42.84, due for transportation from Omaha, Neb., to Franklinton, N. C. (The amounts are inaccurately stated in the case agreed, and we make figures to correspond with judgment.) We think the defendant liable for the amount sued for. The agreed case admits that Dyer & Company had deducted the freight charges, $127.60, from defendant's bill for the hay. Between the shipper, Dyer & Company, and the defendant, it is conceded by the record that the defendant was to pay the freight charges.

In *R. R. v. Latham*, 176 N. C., 417, the *syllabus* of the decision is given as follows: "The rates of transportation allowed carriers of freight are those established by the Interstate Commerce Commission, under the Federal statutes as to interstate commerce, and by the State Corporation Commission, under the State statutes as to intrastate commerce, which may not be affected by any agreement to the contrary between the carriers or their agents or employees and the shipper; and, notwithstanding such agreement, the carrier may demand and enforce the rates established by law."

An interstate carrier is not estopped from recovering the balance due for a shipment by the unauthorized act of its agent in quoting an illegal freight rate.

Hoke, J. (now *C. J.*), in *R. R. v. Latham*, *supra*, at p. 420, said: "It is coming to be more and more recognized that, with a minimum of official interference, a government is required at times to establish regulations to afford its citizens equal opportunity in their industrial and commercial life—a requirement that is nowhere more imperative than in preventing discrimination among the shippers of freight with our public-service companies. These statutes, enacted for this purpose, and the rules and regulations thereunder, designed to effect as far as possible an equal charge for like service among all shippers, permit no deviation by agreement or attempted adjustment of the parties."

James C. Davis, as agent, etc., v. R. L. Cornwell, U. S. Supreme Court Advance Opinions, p. 473 (decided 21 April, 1924). This was an action in a State court of Montana to recover damages for failure to supply the cars. The plaintiff sued on an express contract to furnish them on the day named. It was not shown or contended that the published tariffs governing the contemplated shipment provided in terms for such a contract. *Mr. Justice Brandeis* said: "The obligation of the common carrier implied in the tariff is to use diligence to provide, upon reasonable notice, cars for loading at the time desired. A contract to furnish cars on a day certain imposes a greater obligation than that implied in the tariff. For, under the contract, proof of due diligence would not excuse failure to perform. *Chicago & Alton R. R. Co. v. Kirby,* 225 U. S., 155, settled that a special contract to transport a car by a particular train, or on a particular day, is illegal, when not provided for in the tariff. That the thing contracted for in this case was a service preliminary to the loading is not a difference of legal significance. The contract to supply cars for loading on a day named provides for a special advantage to the particular shipper, as much as a contract to expedite the cars when loaded. It is not necessary to prove that a preference resulted in fact. The assumption by a carrier of the additional obligation was necessarily a preference. *The objection is not only lack of authority in the station agent. The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery.*" (Italics ours.)

Pittsburgh, etc., R. R. Co. v. Fink, 250 U. S., 577, we think on "all-fours" with the case at bar. In that case it was held: "Under the Act to Regulate Commerce, it is unlawful for a carrier to accept less than the tariff as compensation for the interstate transportation of goods. A consignee accepting delivery of goods must be presumed to have understood this. The carrier has a lien for the lawful charges until they are tendered or paid, and a consignee who obtains the goods at destination upon payment of less, due to a misunderstanding by himself and the carrier of the rate lawfully applicable, must be deemed to have assumed the obligation of paying the full lawful rate, and is liable to the carrier accordingly. An agreement with the consignor that title to the goods shall not pass to the consignee until delivery cannot alter the situation. Nor can the hardship to the consignee, resulting from his misunderstanding and subsequent change of situation in reliance on it, since the requirements of the statute cannot be avoided by estoppel."

The *Fink case, supra,* is approved in *Louisville & Nashville R. R. Co. v. Central Iron & Coal Co.,* in U. S. Supreme Court Advance Opinions, p. 503 (decided 5 May, 1924), where the whole matter is fully discussed

by *Mr. Justice Brandeis,* and in conclusion the opinion says: "For, under the rule of the *Fink case,* if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery or not until later. His liability satisfies the requirements of the Interstate Commerce Act."

The agreed case admits, "And it (the hay) showed a shortage of 2,500 pounds, *which did not occur on railroad,* making a charge for the hay (by the shipper) $46.25 too large," etc. The defendant's remedy is against Dyer & Company, who did not comply with their contract with him and ship the quantity of hay agreed on.

We have carefully considered the case, and can find no error. The judgment below is

Affirmed.

BENEHAN CAMERON ET AL. v. STATE HIGHWAY COMMISSION ET AL.

(Filed 21 June, 1924.)

1. State Highways—Roads and Highways—Appeal and Error—Review of Findings.

The findings of fact, as well as the conclusions of law, are reviewable by the Supreme Court, on appeal, in passing upon the judgment of the Superior Court judge in a suit involving the validity of the order of the State Highway Commission in determining a proper route for the State Highway between two county seats, etc.: and exception that the facts were not sufficiently found is untenable.

2. State Highways—Roads and Highways—Commission—Discretionary and Restricted Powers—Statutes.

Construing the Public Laws of 1921, ch. 2, creating a State Highway Commission to take over for the State, as therein provided, the highways or public roads, change, alter or construct them so as to form a State-wide system, connected with such systems of other states: *Held,* section 10, giving the commission broad and comprehensive discretionary powers in the adoption of routes, should be construed *in pari materia* with section 7 thereof, the latter limiting the discretion conferred in the former, among other things, in respect to routes between county-seats, "principal towns," according to a map referred to and attached to the act; and as to those matters particularly mentioned in section 7, the discretion was taken away from the commission by express statutory provision.

3. Same—Routes of Highways—Principal Towns—Courts—Questions of Law and Fact.

Held, the map referred to in the act as a "proposed" route of the State Highway system, by placing certain towns along its proposed route, does not affect the discretionary authority of the Highway Commission in locating the highway between county-seats, or prevent the commission

from changing the route from them, but its determination is reviewable by the courts as a mixed question of law and fact, whether the change decided upon goes by the principal towns as required by the statute.

4. Same—Absence of Discretion—Evidence.

Held, in this case there was no evidence of abuse of discretion by the State Highway Commission in changing the route of the State Highway between two county-seats and leaving out a certain small town appearing on the map and shown as on the "proposed" route.

5. Same—Constitutional Law—Due Process.

Those who have acquired property along the "proposed" route, as shown in connection with the consideration by the Legislature of the bill which became enacted into the Public Laws of 1921, ch. 2, establishing under the State Highway Commission a method for building a State system of highways, acted with implied notice of the powers conferred upon the commission in changing the route, and cannot maintain the position that they have been deprived of the due-process-of-law provision in the Constitution, whether of a vested right or otherwise.

STACY, J., concurring; CLARKSON, J., concurring, in part.

APPEAL by plaintiffs from a judgment of *Sinclair, J.*, vacating a restraining order.

A. W. Graham & Son, F. W. Hancock, R. O. Everett, and Brawley & Gantt for plaintiffs.

Attorney-General Manning, Assistant Attorney-General Nash, W. L. Cohoon, John W. Hester, L. P. McLendon, and W. W. Sledge for defendants.

ADAMS, J. The chief purpose of this action is to enjoin the defendants from building a highway between Durham and Oxford via Creedmoor. Between these *termini* there is a public road which passes through the town of Stem, and is now, and for about three years has been, under the control of the State Highway Commission. The former is referred to in the record as the Creedmoor route, and the latter as the Stem route. In 1923 the plaintiffs and others filed with the commissioner of the Fourth District a petition that the Stem route be laid with a hard surface, and in pursuance of such request the commissioners caused both routes to be surveyed. The engineers made reports, and the commissioner finally recommended that the defendants adopt the Creedmoor route as the permanent highway between the two county-seats. After due consideration, the defendants concluded that the Creedmoor route was the "practicable and feasible location," and ordered that it be adopted as the permanent line of the highway, and that maintenance of the Stem route be continued pending the construction of the new road. The plaintiffs subsequently obtained a temporary order restraining the

construction of the Creedmoor route, and the motion to continue it until the final hearing was considered by Judge Sinclair upon complaints filed respectively by the original plaintiffs and by the town of Stem, which was made a party after the action had been brought, the answer of the defendant, the record evidence and several affidavits. After argument, his Honor rendered a formal judgment, vacating the temporary order, and the plaintiffs excepted and appealed, assigning as error the judgment given and his Honor's failure to find the facts upon which the judgment was based.

The second assignment is not sufficient ground for reversal. In the first place, his Honor found such facts as he deemed essential, and embodied them in the judgment. Moreover, in a suit of this nature the appellate court may review the evidence and determine questions of fact as well as of law. *Jones v. Boyd,* 80 N. C., 258; *Mayo v. Comrs.,* 122 N. C., 5; *Hooker v. Greenville,* 130 N. C., 472; *Hyatt v. DeHart,* 140 N. C., 270; *Lee v. Waynesville,* 184 N. C., 565; *School Committee v. Board of Education,* 186 N. C., 643.

The outstanding question is whether there is reversible error in the judgment. The plaintiffs contend that the State Highway Commission is an administrative body, clothed only with such discretionary powers as are essential to the performance of its prescribed duties; that it may change, alter, or discontinue parts of roads to avoid grade crossings and curves, to lessen distance, and generally to take advantage of topographical conditions, but that it is not authorized to abandon a designated road connecting county-seats and build another elsewhere between the same *termini.* They insist that the map referred to in the act by which the commission was created contains an outline of the particular roads which the Legislature designated and approved, and that a material departure therefrom would constitute a breach of the spirit and purpose of the law.

In view of these contentions, it becomes necessary to examine both the map and the act to which it is appended. The act was passed in 1921. Public Laws 1921, ch. 2. Its purposes were defined. The State was to lay out, take over, establish, construct, and assume control of certain highways, to make a hard surface for them as rapidly as possible, and to maintain the entire system, the maximum mileage of which was to be approximately fifty-five hundred miles. Sections 2, 3, 4. In section 7 appear also the following provisions: "The designation of all roads comprising the State Highway system, as proposed by the State Highway Commission, shall be mapped, and there shall be publicly posted at the courthouse door in every county in the State a map of all the roads in such county in the State system; and the board of county commissioners or county road-governing body of each county, or street-

governing body of each city or town in the State, shall be notified of the routes that are to be selected and made a part of the State system of highways; and if no objection or protest is made by the board of county commissioners or the county road-governing body of any county, or street-governing body of any city or town in the State, within sixty days after the notification before mentioned, then and in that case the said roads or streets to which no objections are made shall be and constitute links or parts of the State highway system. If any objections are made by the board of county commissioners or county road-governing body of any county, or street-governing body of any city or town, the whole matter shall be heard and determined by the State Highway Commission in session, under such rules and regulations as may be laid down by the State Highway Commission, notice of the time and place of hearing to be given by the State Highway Commission at the courthouse door in the county and in some newspaper published in the county at least ten days prior to the hearing, and the decision of the State Highway Commission shall be final. A map showing the proposed roads to constitute the State Highway system is hereto attached to this bill and made a part hereof. The roads so shown can be changed, altered, added to, or discontinued by the State Highway Commission: *Provided,* no roads shall be changed, altered or discontinued so as to disconnect county-seats, principal towns, State or National parks or forest reserves, principal State institutions, and highway systems of other states."

By section 10 the commission is vested with certain powers, among which are these: "To take over and assume exclusive control, for the benefit of the State, of any existing county or township roads, and to locate and acquire rights of way for any new roads that may be necessary for a State highway system, with full power to widen, relocate, change, or alter the grade or location thereof; to change or relocate any existing roads that the State Highway Commission may now own or may acquire."

We think it will appear, from a careful reading of these sections, that the roads outlined on the map were intended as a tentative and not as a completed or final system of highways. *Road Commissioners v. Highway Commission,* 185 N. C., 56. They were referred to in the act as comprising a system "proposed" by the commission, and again as roads "proposed" for the State Highway system. They were not intended to be unalterable. In section 7 the commission was given express power, subject to limitations, to change, alter, add to, and discontinue roads; and, apparently, with a view to removing all doubt as to the scope of this power in relation to the question under consideration, it was vested with the specific right "to change or relocate any existing roads that it

may now own or may acquire." These definite and significant provisions convince us that the map cannot reasonably be accepted as a legislative fiat to construct a system of highways in strict conformity with the roads "proposed," and that the roads may be changed, altered, relocated, and discontinued in the sound discretion of the commission, subject to the limitations prescribed by law.

What are these limitations? The defendants contend that constructing, changing, relocating, and discontinuing highways are matters peculiarly within their discretion and are not subject to judicial review, except in case of abuse. In *Road Commission v. Highway Commission, supra*, it was said that the Highway Commission is an administrative body; and, as suggested in the defendant's brief, it has been held, in an unbroken line of decisions extending over more than half a century, that the courts may not control the discretion exercised by a local administrative board unless its action is so clearly unreasonable as to amount to oppressive and manifest abuse. We adhere to this doctrine. We accede to the answer implied in the question, "Who made us judges over such matters?" *Supervisors v. Comrs.*, 169 N. C., 548. We do not controvert the proposition that the defendants are clothed with certain discretionary powers; but, as we interpret the act, these powers do not include changing, altering, or discontinuing all roads in the exercise of a discretion which can be reviewed only in case of oppression or bad faith. We think the changing, the alteration, or the discontinuance by the defendants of the roads defined in the proviso of section 7 is subject to judicial review, without regard to the question of an abuse of discretion. The terms of the proviso are positive and mandatory, and not uncertain or discretionary. Section 7 provides that the roads shown on the map may be changed, altered, added to, or discontinued by the commission. Nothing else appearing, this clause would probably be construed as conferring powers to be exercised in the discretion of the defendants; but immediately following are the words: *"Provided*, no roads shall be changed, altered, or discontinued so as to disconnect county-seats, principal towns, State or National parks or forest reserves, principal State institutions, and highway systems of other states."

One of the functions of a proviso is to qualify or restrain some preceding matter, or to exclude some possible ground of misinterpretation of it as extending to cases which the Legislature did not intend to bring within its purview. 25 R. C. L., 984, sec. 231; Potter's Dwarris on Statutes, 118 *et seq.: Supply Co. v. Eastern Star Home*, 163 N. C., 513. As we understand it, the very purpose of this proviso was to exclude the construction that, as to the roads therein described, the defendants should have the discretionary power upon which they now insist. In the exercise of a legal discretion they may determine whether a road

shall be changed, altered or discontinued if they observe the mandate of the proviso. But this mandate must be observed; and if it be granted that county-seats, State parks, National parks, and forest reserves may be identified *ex vi termini*, it is not so with respect to "principal towns" or "principal State institutions." As there is no recognized technical definition of "principal towns," we are of opinion that the Legislature used these words in a broad sense, to be determined by the conditions relatively appearing in each particular case, and in this sense they are the subject of judicial determination. This construction is essential to uniformity of decision, which would be defeated if the question were left entirely to the discretionary judgment of the commission. To hold with the defendants that the right to determine what are principal towns is to be referred to the commission itself, and that their action is final, except in case of manifest abuse, would be the proper interpretation of the act if there had been no proviso. It is clear, therefore, that the Legislature was not willing to confer such extended powers on the commission, but inserted the proviso with the view and purpose of making the decision as to what are principal towns within the meaning of the act a mixed question of law and fact, subject to judicial review as it ordinarily prevails in such cases. A contrary ruling would be to deprive the proviso, evidently intended as an important feature of the law, of any and all significance. Of course, section 7 and section 10, being *in pari materia*, must be construed together.

Our conclusion is not at variance with the decision in *Peters v. Highway Commission*, 184 N. C., 30, or *Road Commission v. Highway Commission, supra*. The former concerned a local act, and in the latter the construction of the proviso in section 7 was neither presented nor discussed.

The plaintiffs contend that the name of Stem appears on the map, indicating the route which they advocate, and that Stem is therefore a "principal town." We have disapproved this construction and have concluded, after a critical examination of the record, that Stem is not a principal town, within the meaning of the act.

It is further insisted on behalf of the plaintiffs that if Stem is not a principal town, and if the defendants exercised discretionary power which was not in conflict with the proviso, they acted oppressively or in bad faith. We do not concur. The defendants came to their conclusion after a patient hearing and a personal inspection of the proposed routes, and were impelled, as they declared, by their judgment as to "the best interest of the State."

The plaintiffs finally contend that land has been bought and homes have been built along the Stem route, and that while no vested rights have accrued, the adoption of the Creedmoor route was the determina-

tion of a public matter, which was void, in the absence of due process of law. No authority for the position is cited. Indeed, the plaintiffs have been given every reasonable opportunity to be heard in the courts, and their position and briefs have been duly considered. Those who have built homes or purchased property on the Stem route since the act of 1921 became effective have done so with constructive notice of the powers conferred upon the highway commission.

While we do not concur in his Honor's intimation that the powers conferred upon the defendants are altogether discretionary, we approve the result and affirm the judgment.

Affirmed.

STACY, J., concurring: Road-building is not a matter of drawing lines upon a map; it partakes of scientific, rather than legislative or judicial, engineering. The topography of the county must be considered. Knowing that the system of "proposed roads"—note the language—designated on the map attached to the act of 1921, must necessarily be tentative, and realizing that economy in building a network of State highways, as well as intelligent construction of said roads, would require expert engineering and scientific location, the Legislature created a State Highway Commission and wisely conferred upon it the authority to "change, alter, add to, or discontinue" any of the proposed roads so shown upon the legislative map, subject only to the following limitation: "*Provided,* no roads shall be changed, altered or discontinued so as to disconnect county-seats, principal towns, State or National parks or forest reserves, principal State institutions and highway systems of other states."

Upon the proper construction of this proviso the whole case pivots.

It will be observed that the phrase, "as shown on said map," is not inserted after the words, "principal towns," appearing in said proviso. These words, "principal towns," also appear in the caption and in section 3 of the act. Plaintiffs contend that as all the county-seats of the 100 counties in the State are shown upon the map, it follows as the legislative intent that the principal towns which may not be disconnected are those, and only those, which have been named on the map attached to the act of 1921. This, to my mind, is not only a *non sequitur,* but it imputes to the Legislature a purpose to limit the discretionary powers of the State Highway Commission, given in sections 7 and 10, in a manner wholly at variance with sound principles of engineering and economic construction of highways. Under this interpretation, the authority of the State Highway Commission to change, alter, add to, or discontinue any of the proposed roads shown upon the map is limited to the authority to change, alter, and add to the roads between the

towns designated on said map, and the word "discontinue," for all practical purposes, must be considered as stricken from the act or else confined to portions of roads lying between the principal towns as designated on the map; and if any road lying between any of said principal towns is discontinued, another must be established in its stead. In other words, under this construction, every town designated on said map is a principal town and must be connected, in some way, with the State's system of highways. But unless a given town appear by name on said map, though it be much larger than others shown thereon, the State Highway Commission would be under no obligation to connect it with the State's system of highways. The impolicy of result arising from such a construction is self-evident.

To my mind, the "principal towns," mentioned in the statute and which may not be disconnected from the State's system of highways, are to be determined by the State Highway Commission in the exercise of a sound, but not arbitrary, judgment. This position is strengthened by reference to the caption of the act, which is as follows: "An act to provide for the construction and maintenance of a State system of hard-surfaced and other dependable roads, connecting by the most practicable 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."

Where the meaning of a statute is doubtful, its title may be called in aid of construction. *Freight Discrimination Cases,* 95 N. C., 434; *S. v. Woolard,* 119 N. C., 779; *S. v. Patterson,* 134 N. C., 612.

The case before us presents a striking illustration of why this interpretation should be adopted. In locating the road between Durham and Oxford—two county-seats—the State Highway Commission was confronted with the question as to whether it should adopt the northern route, running by Stem, or the southern route, running by Creedmoor. The mileage of the two routes is practically the same; and Creedmoor is a larger town than Stem. The commission might have selected either route without doing violence to the provisions of the statute now under consideration. But to say that the northern route must be selected because Stem appears on the map and Creedmoor does not is to ignore every consideration of wisdom and expediency in determining the proper location. If this be the correct interpretation of the statute, then the location of all the roads in the State has been settled in advance by legislative fiat.

In a number of instances the towns appearing on the map have been disregarded as controlling by the State Highway Commission. The commission, on the other hand, has sought to connect the various county-

seats and other principal towns of every county in the State with hard-surfaced or other dependable roads "by the most practicable routes," in accordance with the purpose and spirit of the act as expressed in its title and otherwise.

If the meaning of a statute be plain and its provisions susceptible of but one interpretation, its consequences, if objectionable, can only be avoided by a change in the law itself. But where the purpose of the Legislature is not clearly expressed, it is always to be presumed that a statute was intended to have the most reasonable and beneficial operation permissible from the language used. And when a statute is ambiguous in terms or fairly susceptible of two interpretations, the injustice, hardship, or inconvenience which is likely to follow the one construction, or the other, may be considered, and a construction of which the statute is fairly susceptible may be placed upon it, so as to avoid all such objectionable consequences and advance what must be presumed to be its true object and purpose. 25 R. C. L., 1018. In short, it is well settled that if the language of a statute be obscure or ambiguous and its meaning not clearly designated, the effects and consequences of the one construction or the other may and ought to be resorted to as important aids in determining its true meaning and intent. 2 Lewis' Suth. Statutory Construction (2 ed.), secs. 488-490.

Again, in ascertaining the meaning of a doubtful statute, the courts may resort to what is sometimes called the practical construction given to it by those charged with its execution and application; and such construction, while not controlling, is entitled to respectful consideration. 25 R. C. L., 1043. Here the State Highway Commission and the Attorney-General have interpreted the act in question at variance with the construction contended for and urged by counsel on behalf of plaintiffs.

There is still another rule, with respect to the interpretation of provisos, which should not be overlooked; it is not unimportant in dealing with the subject of statutory construction. A proviso which operates to limit the application of the general provisions of a statute should be construed strictly so as to include no case not within the letter of the proviso. *U. S. v. Dickson*, 15 Pet., 141, 10 L. Ed., 689. And since the office of a proviso is not to repeal the main provisions of a preceding clause (to which, as a general rule, it is deemed to apply), but to limit their application, no proviso should be construed so as to destroy such general provisions. *Greely v. Thompson*, 10 How., 225, 13 L. Ed., 397. Effect should be given to all parts of a statute when this can be done in accordance with recognized rules of construction and without doing violence to the spirit of the act. Black on Interpretation of Statutes, pp. 35-36.

"The true rule for construing a statute, and we may say the only honest rule, for a court really seeking to observe the will of the Legislature, is to consider and give effect to the natural import of the words used. If they be explicit, and express a clear, definite meaning, then that meaning is the one which should be adopted, and no effort should be made by going outside of the words used, to limit or enlarge its operation. Above all, it is not to be presumed that the Legislature intended any part of a statute to be inoperative and mere surplusage," etc. *Ruffin, J.*, in *Pugh v. Grant*, 86 N. C., p. 47.

And to like effect is the language of *Walker, J.*, in *Comrs. v. Henderson*, 163 N. C., p. 119: "Where the language of a statute is free from ambiguity and conveys a definite and sensible meaning, the courts should not hesitate to give it a literal interpretation merely because they may question the wisdom or expediency of the enactment. In such a case, these are not pertinent inquiries for the judicial tribunal. If there be any unwisdom or injustice in the law, it is for the Legislature to remedy it. For the courts, the only rule is *ita lex scripta est*. If, though, the statute is ambiguous, so as to be fairly susceptible of more than one interpretation, then the courts may rightfully exercise the power of construing its language, so as to give effect to the intention of the Legislature as the same shall be ascertained and determined from relevant and admissible considerations. But it should be understood that the intention of the lawmaking power is to be ascertained by a reasonable construction of the act, and not one founded on mere arbitrary conjecture. And it is always the actual meaning of the Legislature which must be sought out and followed, and not the judge's own idea as to what the law should be. Finally, although every law must be construed according to the intention of the makers, as evidenced by the language employed to express it, that intention is never resorted to for any other purpose than to ascertain what, in fact, was meant to be done, and not for the purpose of ascertaining what they have done, with the view of determining whether it is politic or expedient, for with that we have nothing to do. We have reached the limit of our jurisdiction when we have certainly found and declared the meaning, as the object is to ascertain what the Legislature intended to enact, and not what is the legal consequence and effect of what they did enact."

Bearing in mind these general observations and applying the principles stated to the circumstances of the instant case, I am convinced that the judgment of the Superior Court, upholding the action of the State Highway Commission in selecting and adopting the Creedmoor route, should be affirmed. The question presented is one addressed, in the first instance, to the sound discretion of the State Highway Commission.

There is no evidence that this has been abused or exercised in an arbitrary and unreasonable manner. *School Com. v. Board of Ed.*, 186 N. C., 643; *Brodnax v. Groom*, 64 N. C., 244.

It is contended by Stem and Creedmoor respectively that each is a principal town, between Durham and Oxford, which, under the statute, may not be disconnected from the State's system of highways. Here, then, we have a controversy over the principality of two towns. Who is to decide the question? It must be decided by somebody before the road from Durham to Oxford can be built, or before it can be finally located. In my opinion, it must be determined by the State Highway Commission in the exercise of a sound discretion, subject to judicial review only in case of abuse of discretion or when the authority reposed in the commission has been exercised in an arbitrary and unreasonable manner. This, it seems to me, is in keeping with the legislative intent as expressed in the statute. The fact that Stem is shown on the map attached to the act of 1921, and Creedmoor is not, is an immaterial circumstance, which is neither controlling nor persuasive. It is the declared purpose of the law that the various county-seats and other principal towns should be connected "by the most practical routes," such practical routes to be determined and established by the State Highway Commission.

I recognize the curbing effect of the above proviso upon the plenary discretion of the State Highway Commission; and to the extent indicated therein, it must be understood as limited by the legislative declaration, but in the first instance the matter is primarily one for decision by the State Highway Commission. The determination of such matters is a part of the duties and responsibilities imposed upon it by the statute under which it was created. The commission may not establish and build roads without connecting the county-seats and principal towns of the State. To do otherwise, or to build roads without making such connections, would be an arbitrary and unreasonable exercise of its powers. Nothing of this sort appears on the present record.

The decision in *Road Com. v. Highway Com.*, 185 N. C., 56, accords with this position and is practically controlling on the question here presented. See, also, *Peters v. Highway Com.*, 184 N. C., 30.

CLARKSON, J., concurring, in part: I concur in so much of the opinion of *Mr. Justice Adams* as is germain to the main controversy here, in which he says: "It is clear, therefore, that the Legislature was not willing to confer such extended powers on the commission."

The plaintiffs, on behalf of themselves and other citizens and property owners of Durham and Granville counties, bring this action praying an injunction against the State Highway Commission from aban-

doning what is known as the "Stem Route" between the county-seats of Durham and Granville counties, the road regularly taken over by the State Highway Commission and used for several years as part of the State system and kept up by the State, and making an entirely new route, known as the "Creedmoor Route," between the two county-seats, and making the new road almost parallel to the old, some 3 to 10 miles distance apart from the old Stem Route and going by Creedmoor. Each route is about 29 miles and the hard-surfacing will cost about the same for each. This is an important matter, as the cost of hard-surfacing either road will be about $1,000,000. The only question involved is, Has the State Highway Commission the power and authority in its legal discretion to make this change? We must interpret the State Highway Road Act for the answer. In the interpretation, to get the intent of the Legislature—the polar star—we are permitted to examine the written documents that the Legislature had before it on the passage of the State Highway Act—not as binding, but persuasive. Especially is this so if the meaning of any word or phrase is ambiguous, as is contended in the case at bar—*principal towns.*

Mr. Justice Sanford, of the Supreme Court of the U. S., in *Everard v. Day* (opinion delivered 9 June, 1924), advance sheets, in construing whether an act of Congress was arbitrary and unreasonable, considered the public hearings before the Judiciary Committee of the House and the report of the committee founded on the hearings, as bearing on the act which the Court was called upon to construe. By analogy, to construe the present State Highway Act, it is legal and proper to consider what the Legislature had before them when they passed the present State Highway Act.

They had a bill entitled as follows:

"North Carolina Good Roads Association—Suggested Bill: To provide for the construction and maintenance of a State system of hard-surfaced and other dependable highways, together with map, outlining suggested construction districts for an equitable distribution of construction funds."

By a careful reading of this "suggested bill" and the State Highway Act, Laws 1921, ch. 2, the two bills are practically similar, with a few changes. The map in each bill is the same, except for some additional roads and the towns they went through added to the map in the act as passed. Each bill has the same towns named on the map and the additional towns added through which the roads to be taken over by the State were to run—from county-seat to county-seat. Each map had "Stem" and the road from the county-seat of Durham to the county-seat of Oxford to run through Stem.

Part of section 7 of the act of 1921, ch. 2, is as follows:

"Fifty-five hundred (5,500) miles shall be the approximate maximum limit of mileage of the State Highway System. The designation of all roads comprising the State Highway System as proposed by the State Highway Commission shall be mapped, and there shall be publicly posted at the courthouse door in every county in the State a map of all the roads in such county in the State system, and the board of county commissioners or county road-governing body of each county, or street-governing body of each city or town in the State, shall be notified of the routes that are to be selected and made a part of the State system of highways; and if no objection or protest is made by the board of county commissioners or the county road-governing body of any county, or street-governing body of any city or town in the State within sixty days after the notification before mentioned, then and in that case the said roads or streets, to which no objections are made, shall be and constitute links or parts of the State Highway System. If any objections are made by the board of county commissioners or county road-governing body, or any county or street-governing body of any city or town, the whole matter shall be heard and determined by the State Highway Commission in session, under such rules and regulations as may be laid down by the State Highway Commission, notice of the time and place of hearing to be given by the State Highway Commission at the courthouse door in the county, and in some newspaper published in the county, at least ten days prior to the hearing, and the decision of the State Highway Commission shall be final. *A map showing the proposed roads to constitute the State Highway System is hereto attached to this bill and made a part hereof. The roads so shown can be changed, altered, added to or discontinued by the State Highway Commission.*" Thus far both sections of the act as passed and the "suggested bill" were similar and the above in italics is the exact language in both bills.

The "suggested bill" gave the State Highway Commission discretion, and the courts could not interfere with the discretionary powers conferred unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of the discretion conferred. *Newton v. School Committee*, 158 N. C., 186; *School Committee v. Board of Education*, 186 N. C., 647, and numerous cases cited.

But the Legislature would not accept this "suggested bill," giving this discretionary power, but added in the bill as passed, in section 7, *supra*, this proviso: "*Provided, no roads shall be changed, altered, or discontinued so as to disconnect county-seats, principal towns, State or National parks or forest reserves, principal State institutions, and highway systems of other States.*"

The Legislature would take no chances. They had the map in the "suggested bill" before them, and on it were marked the towns through which the roads were shown to run—from county-seat to county-seat. They added to the map more roads and put down the towns through which the roads were to run. They used the words "principal towns." The legislators saw on the map these towns marked. Why put them on the map if they were not *principal towns?* They were responsible to their constituents for what they did, and they deliberately said in the proviso that *no roads shall be changed, altered or discontinued so as to disconnect principal towns.* What is the meaning of disconnect? Webster defines it as follows: "To dissolve the union or connection of; to disunite; to sever; to separate; to disperse."

If the towns marked on the map were not *principal towns* and the towns the Legislature had in mind, what would there be to disconnect, "to dissolve the union or connection of"; "to disunite"; "to sever," etc? If the construction here given was not the intention of the Legislature, the word *disconnect* is meaningless in the act. The word not only applies to the towns on the map, but to the State or National parks, or forest reserves, principal State institutions and highway systems of other States. Creedmoor was never connected on the system to disconnect, Stem was, and it cannot be discontinued without making a word, the meaning of which is well known in the English language, senseless.

Section 10 (b) of the State Highway Act, *supra,* does not in any way change the construction and meaning put on *principal towns* as being the towns marked on the map, and the Legislature so understood. That section is as follows:

"To take over and assume exclusive control for the benefit of the State of any existing county or township roads, and to locate and acquire rights of way for any new roads that may be necessary for a State highway system, with full power to widen, relocate, change or alter the grade or location thereof; to change or relocate any existing roads that the State Highway Commission may now own or may acquire," etc.

This section, construed with the proviso, *supra,* clearly means to change and relocate between the *principal towns* on the map. This means to change grades, to make shorter routes between the principal towns on the map, to avoid railroad crossings, to go under railroads, etc., so as to cheapen construction along the fixed route as mapped between the county-seats, but the State road must go through, or near to, the *principal towns* on the map.

The construction of that part of chapter 2 of the Laws of 1921, relative to this controversy, has only been before the Court in the case

of *Road Commission of Edgecombe Co. v. State Highway Commission*, 185 N. C., 56, but the facts are so dissimilar that the decision in that case cannot be considered as authority in the instant case. There the effort was made to shorten a link in the highway between Halifax and Tarboro, to wit, that part between Scotland Neck and Moore's Crossing. In this case it is a complete abandonment of the entire road from beginning to end as shown on the map from the county-seat of Durham to the county-seat of Granville, and in rerouting the highway between two points in different parts of the counties. There they did not disconnect a principal town, as Hobgood (on the map) is on that part of the highway system running from Halifax in Halifax County to Williamston in Martin County, and Speed was an unincorporated village (not on the map). In the instant case, the town of Stem, one of the principal ones of the county (and on the map) is disconnected.

The town of Stem was made a party plaintiff, and alleged:

"That said town of Stem was incorporated in the year of 1911, and now has a population of 300, and it is the second largest town in the county of Granville, with the exception of Oxford, the county-seat of said county, and is located on the present highway leading from Durham to Oxford, being twenty miles from Durham and eleven miles from Oxford, and is one of the principal towns of the county of Granville.

"That the defendants were without authority to make a decision to discontinue said highway through said town of Stem as a part of the State system of highways, and to lay out and construct a new route by the town of Creedmoor, which will cut the said town of Stem entirely off from the said highway and will cause a great loss to the citizens of said town, community and section in which it is located, who have bought land and built homes along said highway upon the faith that the same would be continued as a part of the State Highway system."

From all the facts as they appear from the entire record, I think the State Highway Commission did not have the legislative power or authority to run the State roads except through or near the towns as set forth on the map; that by legislative mandate the towns named on the map, by clear intent, were to remain on a highway running from a county-seat to a county-seat and were *principal towns*. I do not believe the bill would have been passed if the Legislature had thought that the map was a "scrap of paper," and the towns named on the map were put there with no meaning. The Stem Route was taken over as a part of the State Highway System, through Stem, by the State Highway Commission, in accordance with the statute, and the road maintained by the State. Counties can build all the roads they want to,

but this cannot be done at the expense of the State system, or by changing the legislative State Highway System Act to do so. If it can be done in this case, the legislative map is a nullity and should not have been put in the act.

The State Highway Engineer's report on this matter, which appears in the record, is in part as follows:

Conclusion: "The saving of cost in operation of vehicles on the Stem Route will outweigh the slightly greater cost of construction and small difference in distance. Moreover, flood conditions can be met with greater certainty on the Stem Route. *It is, therefore, my opinion that the engineering factors favor the Stem route.* (Italics mine.) The margin is not great, and other factors, such as local service, opening up a new section, and land values, which favor the Creedmoor route, should be balanced against the engineering features and the advisability of changing the State Highway from its present location on the Stem route."

W. C. Riddick made affidavit: "That in my opinion *it would not be safe to construct the bridge and embankment over Neuse River on the Creedmoor Route* (where the lowgrounds are low and broad), as was shown on the profile of the Highway Commission engineers. I further stated that should the Creedmoor Route be adopted *I did not believe the engineers of the Highway Commission, with the facts before them would take the risk of constructing the bridge and embankment as shown on said profile,"* and gave his reasons.

The Stem Route would cost about $20,000 less than the Creedmoor Route. The defendant's engineer, who surveyed these two roads, reported, *"It is, therefore, my opinion that the engineering factors favor the Stem Route."* Stem was, under the clear meaning of the law, a principal town (named on the map. Why?); so considered by the Legislature, and, in my opinion, neither this Court nor the State Highway Commission have the power to depart from the mandate of the Legislature and wipe from the road system of the State a road mapped as going through Stem (named on the map), taken over under the State Act, kept up by the State, and make an entirely new road and hard surface it at the cost of about $1,000,000. If it can be done in this case, it can be done anywhere in the State, and a great act may become a "football" between contending factions. Such was not the legislative purpose. The map and principal towns named on it were an orderly system, and if followed will make for peace.

On the entire record in this case and the findings of the court below, I go further than *Mr. Justice Adams*—that the Legislature was not only "not willing to confer such extended powers on the commission,"

but they did not—they limited them in going from county-seat to county-seat, to go by principal towns. The towns on the map were the principal towns in the minds of the Legislature when the act was passed.

The creator of this act, the Legislature, used language positive and unequivocal: "No roads shall be changed, altered or discontinued so as to *disconnect* principal towns." The only town on that route on the map was Stem. To disconnect Stem will make the act senseless and meaningless.

R. L. CARR AND W. D. TURNER, FOR THEMSELVES AND ON BEHALF OF ALL OTHER TAXPAYERS OF PITT COUNTY WHO MAY DESIRE TO MAKE THEMSELVES PARTIES TO THIS ACTION, *v.* J. L. LITTLE, J. E. WINSLOW, E. G. FLANAGAN, W. E. HOOKER, D. S. SPAIN, MRS. E. W. HARVEY, W. D. WHEDBEE, CONSTITUTING THE BOARD OF TRUSTEES OF THE GREENVILLE GRADED SCHOOL DISTRICT, AND D. M. CLARK, MAYOR; C. W. HEARNE, H. L. HASSELL, G. A. CLARK, P. L. CLODFELTER, R. E. SELLERS, Z. P. VANDYKE, F. J. ROBES, W. L. HALL, CONSTITUTING THE BOARD OF ALDERMEN OF THE TOWN OF GREENVILLE.

(Filed 21 June, 1924.)

1. Schools—Taxation—Bonds—Statutes—Contstitutional Law—Estoppel.

The Private Laws of 1903 created a school district coterminous with a city's limits or those which may thereafter be extended, giving the school authorities the power to permit children to go to the public schools who may reside outside of the corporate limits upon such terms as they may deem just and fair, and complied with the faith or credit clause of our Constitution, Art. VII, sec. 7, under the provisions of the statute, by submitting to the voters of the district, at an election duly and regularly held, the question of a special school tax, which was approved by them. Under later statutes the limits were extended beyond those of the town without authorization for the vote of the special tax and no election was held; and for nineteen years a special tax was also levied and collected for the additional or outlying territory, without protest or legal action taken by the taxpayers: *Held*, the voters' approval under the statute of 1903 was a sufficient compliance with the constitutional requirement; and the plaintiffs, in their action in behalf of themselves and other taxpayers, are estopped after nineteen years to question the constitutionality of the special tax levied and collected.

2. Same.

The Public-Local Laws of 1915, ch. 253, relating to the submission to the voters of the school districts in Pitt County the question of a special tax, is an enabling act, and has no application where the public schools were under a board of trustees and not a school committee.

3. Statutes—In Pari Materia—Schools—Constitutional Law—Taxation—Bonds.

A later statute, apparently in conflict with a former local one, will not be construed to repeal the local act for repugnancy when the two may be sustained by a reasonable interpretation to give effect to the legislative intent as gathered from the language employed; and where the school trustees, under the provisions of a later general act purporting to make uniform all general or local acts on the subject, have submitted the question of a special school tax or bond issue to the voters of a school district, and approved by them under the provisions of our Constitution, Art. VII, sec. 7, and the former local statute has also authorized the submission of this question to the voters: *Held*, construing the statutes *in pari materia*, a variance between them, with reference to the referendum and the body that issues the bonds, is immaterial and is a substantial compliance with the organic law.

4. Same—Trustees.

Construing *in pari materia* the Private Laws of 1903 and the Private Laws of 1911, relating to the issuance of special school-tax bonds for the district of Greenville, Pitt County: *Held*, the effect of the later act was to reduce the number of trustees for the district, and the constitutionality of the bonds issued under the facts of this case may not be successfully questioned.

THIS was a civil action for a perpetual injunction, heard, by consent of parties, before *Allen, J.*, at May Term, 1924, of PITT.

Appeal by plaintiffs.

The plaintiffs contend that they are residents and taxpayers of Pitt County, N. C. W. D. Turner resides in and owns property located within the corporate limits of the town of Greenville and within the territory referred to as the 1903 School District, and R. L. Carr resides and owns property located without the town of Greenville, but within the territory hereinafter referred to as the 1905 District. The defendants constitute, respectively, the Board of Trustees of the Greenville Graded School District and the Board of Aldermen of the town of Greenville.

(1) That by chapter 497, Public Laws of 1901, there was created a school district within the limits of the town of Greenville, known as "Greenville Graded School District No. 1." A school maintenance tax was authorized by said act, subject to a vote of the majority of the qualified voters of the district, which act was repealed by chapter 106, Private Laws 1903, entitled, "An act to establish a graded school in the town of Greenville."

(2) That the last-mentioned act, chapter 106, Private Laws of 1903, further provided that, subject to a favorable vote of a majority of the qualified voters within the town of Greenville, which vote was thereafter duly given in accordance with law at an election legally held, the

corporate limits of said town should constitute a school district for each race, under a board of trustees having general control and management of the schools therein, for the maintenance of which the board of aldermen was by said act authorized to levy a tax not exceeding 15 cents on the $100 value of property annually, which tax the board of aldermen has continued to levy and collect annually.

(3) That the General Assembly of North Carolina, at its regular session of 1905, passed an act entitled, "An act to extend and define the boundaries of the graded school district of the Greenville Graded Schools, and to amend chapter 106 of the Private Laws of 1903 establishing said schools," which act is chapter 132, Private Laws of 1905; that said act extended the boundaries of the graded school district so as to take in territory lying without the corporate limits of the town of Greenville; that said act did not require or make provision for a vote of electors upon the enlargement of said school district nor upon the question of the levy within the new territory of the tax theretofore voted and levied in the district created by the 1903 act, but did provide that in levying the taxes for support of said schools, the board of aldermen of the said town of Greenville should levy the same tax on all real and personal property within the boundaries of said school district, whether said property be within the corporate limits of said town or not; that no election has ever been held to secure consent of the voters within the portion of said alleged district lying outside the town limits as to whether a school maintenance tax should be levied upon their property outside such limits, notwithstanding which the board of aldermen has annually, since 1905, levied and collected, both within and without the corporate limits of the town of Greenville, but within the territory set forth in said act of 1905, a school maintenance tax, which tax outside of the corporate limits of said town plaintiffs claim is levied and collected in violation of Article VII, section 7, of the Constitution; and the plaintiffs further claim that said act of 1905 is void and of no effect for the reasons herein stated.

(4) That the General Assembly enacted chapter 386, Private Laws 1911, by which law the provisions of said law of 1903, relative to the election of trustees of said district, were expressly amended, and by which same law the boundaries of the town of Greenville, as set forth in chapter 261, Private Laws of 1907, are enlarged by express amendment of said chapter 261, which amendatory act of 1911 did not purport to amend said act of 1905, but ignored the same.

(5) That by the passage of chapter 222, Private Laws of 1915, the General Assembly purported to amend said law by further extending the boundaries of said school district and by providing that the tax for maintenance voted in said district under the 1903 law should be

levied and collected upon all taxable property within the limits of the enlarged district without requiring or providing for any vote of electors to authorize the spread of said tax upon any territory within the alleged extensions outside of the limits of the town itself, as constituted in 1903; that no election within said extended territory was ever held, notwithstanding which a maintenance tax was levied by the board of aldermen for two or three years after 1915 upon the property within the purported enlargement set forth by said act of 1915, which tax upon said purported enlargement was thereafter abandoned, without litigation or adjudication by any court of the validity thereof, and has not since been levied or collected save within the territory set forth in the said act of 1905, as hereinabove stated, and such extensions are not now considered a part of the school district, notwithstanding that said chapter 222 has never been repealed or amended.

It is contended by plaintiff: That the only law in force under which said school district, whether it contains only the territory set forth in said act of 1903 or that set forth in the said act of 1905 or that set forth in the said act of 1915, is empowered to issue bonds are chapters 253, Public-Local Laws 1915, and 38, Private Laws 1921, Extra Session, the former of which authorized certain school districts in Pitt County, including the said districts, to issue bonds in the manner therein set forth, and the latter of which, repealing as it does chapter 53, Private Laws of 1921, which had also authorized bonds of said school district, authorized not exceeding $130,000 bonds thereof for erecting and equipping schoolhouses, and additional bonds for other purposes, in the manner therein provided; that the provisions of said chapter 253 and said chapter 38 are in many important particulars inconsistent with the provisions by which bonds may be issued under the authority of chapter 136, Public Laws 1923, under which said district proposes to issue its said bonds; that said chapter 136 does not operate to repeal either of said chapters 253 or 38, nor even to modify the same or either of them, and it should be read as silently excluding from its operation the matter of bonds issue of the said district which have been authorized by said chapters 253 and 38, which two last-named chapters have not been repealed or amended by any law, and constitute an exception to the operation of said chapter 136, as has been held in a similar case by the Supreme Court of North Carolina in *Felmet v. Comrs.*, 186 N. C., 251.

The plaintiffs prayed that the defendants and each of them be perpetually enjoined, etc.

The defendant, on the other hand, contends:

That the Greenville Graded School District was duly created by special act of the Legislature, being chapter 132, Private Laws 1905,

which act defendants are informed and believe, and therefore allege, it was duly within the power of the Legislature to pass, and that the extension of the boundaries of the then existing Greenville Graded School District was valid, and it was not necessary to submit the question of the extension to the voters of the territory to be included in the school district.

That if there should be any irregularity in the levy of the tax in such enlarged territory, which defendants deny, defendants expressly allege that such irregularity does not in any way affect the validity of the $200,000 School Building Bonds of the district sought to be enjoined by plaintiffs, for that the question of a vote upon said tax does not enter into the question of the validity of the formation of the district, and that even if there should be such irregularity in the levy of said tax, same has been validated by chapter 135, Public Laws 1923, and the said district is a body politic and corporate, the tax heretofore levied having been approved by a part of the said graded school district, and having been continuously levied and collected since 1905, and no court of competent jurisdiction having held said vote or said annual tax, or the establishment or organization of said district, to be invalid.

Defendants expressly allege that chapter 136 of the Public Laws of 1923 repeals chapter 132, Private Laws 1905, and also chapter 222, Private Laws 1915, and is the only law under which said election could be called or the said bonds issued.

That these defendants admit that the Board of Trustees of the Greenville Graded School District have authorized the issuance of the said bonds, and fixed the form thereof, and have ordered that said bonds be signed by said chairman and secretary of the board of trustees of said district, and that the coupons shall bear the signature of said secretary, all of which defendants are informed and believe, and therefore allege, is proper and in strict conformity with section 263, subsection (b), the said chapter 136, Public Laws 1923, being the law the defendants allege made and provided for school districts not coterminous with an incorporated city or town.

Defendants are further informed and believe, and therefore allege, that should the court hold that the bonds should have been voted under chapter 253, Public-Local Laws 1915, or chapter 38, Private Laws 1921, Extra Session, still the procedure followed in calling and holding of the election of 1 April, 1924, was a sufficient compliance with such laws, and that the will of the qualified voters of said school district has been duly ascertained, since there were registered for said election 987 voters, of which number 696 voted in favor of the issuance of the bonds and a levy of the tax in payment thereof, and 74 voters voted against the issuance of said bonds.

The court below rendered the following judgment:

"This cause coming on to be heard before me by agreement of counsel, and it appearing to the court that summons has been accepted by all of the defendants, and counsel having been heard, and all matters referred to in the complaint and answer having been duly presented to the court, the court finds as a fact:

"1. That the boundaries of the Greenville Graded School District are those boundaries mentioned and described in chapter 132 of the Private Laws of 1905.

"2. That chapter 253 of the Public Laws of 1915, and chapter 38 of the Private Laws of 1921, Extra Session, are repealed by chapter 136 of the Public Laws of 1923, and the Greenville Graded School District is duly authorized by said chapter 136, Public Laws of 1923, to issue the bonds in question.

"3. That the election of 1 April, 1924, having been duly called and held in accordance with section 263, subsection (b) of said chapter 136, Public Laws of 1923, by the Board of Aldermen of the town of Greenville, and a majority of the qualified voters of said district having voted in favor of the issuance of the bonds, the said election is in all respects valid, and when the bonds shall be issued by the board of trustees and executed as they may direct, and sold by them after due advertisement, same will be valid and binding obligations of the Greenville Graded School District.

"It is now, therefore, ordered, adjudged and decreed that the injunction prayed for by plaintiffs be and the same is hereby denied, and this action is dismissed. Plaintiffs will pay the costs."

The plaintiffs excepted to the judgment, assigned error, and appealed to the Supreme Court.

J. L. Morehead for plaintiffs.

H. W. Whedbee for defendants.

CLARKSON, J. This is an action begun by injunction to restrain the issuance of $200,000 of bonds of the Greenville Graded School District, and the levy of tax for payment thereof. We have set forth fully the material facts and the contentions of the parties, as this action is to test the validity of the bonds and a levy of tax to pay the principal and interest and also the levy of the maintenance tax within the territory referred to as the 1905 School District, which is now known as the "Greenville Graded School District," and in which district the vote was taken to issue the bonds now in dispute.

We will consider what territory composes the Greenville Graded School District: The Legislature of 1903 passed an act, chapter 106,

Private Laws, creating the Greenville Graded School District and defining the boundaries as being coterminous with the then town of Greenville. In 1905, by chapter 132, Private Laws, the boundaries of the district were extended to take in additional territory, such extension not being submitted to the vote of the people, though taxes have been levied therein continuously since 1905. In 1915, Private Laws, ch. 222, the boundaries were again extended to include additional territory, but no vote was taken on the extension and no tax has been levied in such additional territory since the first two or three years following 1915. The caption of this act is "An act to enlarge the boundaries of the Greenville Graded School District." The election of 1 April, 1924, was submitted to the voters residing in the territory as defined by the 1905 act and excluded the 1915 addition.

It will be noted that in chapter 106, Private Laws 1903, in which the vote was taken in accordance with Article VII, section 7, of the Constitution, establishing the graded school in the town of Greenville, section 12 says:

"That all children within the corporate limits of said town as now constituted, *or as they may be hereafter extended,* who are entitled to attend the public schools, shall be admitted into said graded schools free of charge: *Provided, always,* that the whites shall attend the schools provided for them and the blacks the schools provided for them: *Provided further,* that the board of trustees shall have power to admit the children to either of the said schools who reside outside of the corporate limits of said town upon such terms as they may deem fair and just."

"Sec. 13. That the corporate limits of said town shall constitute a school district for each race, *but the trustees of the graded school and the persons charged by law with the duties of locating and managing the various school districts in the county of Pitt may extend the boundary of the graded school districts so as to take in territory and people not included within the corporate limits of said town.* (Italics ours.) And the board of trustees may enter into negotiations with the school committee of the district in which the said graded schools are situated and the county board of education, looking to acquiring the title to the lands and the school buildings for the white and for the colored races belonging to said school committee, on such terms as may be agreed upon, and the sale of these buildings and the investment of the proceeds in the graded school buildings for such races respectively. And the said board of trustees shall have full power and authority to receive, use or hold any donations, gifts, devises and bequests made for either or both of said graded schools."

The act of 1905 extended the corporate limits of the school district to take in additional territory outside of the limits of the town of Greenville. The act says:

"Sec. 5. That the person or persons appointed to take the list of taxable property in said town and to collect the same shall also take the tax list and collect the taxes for the support of the schools in said graded school district and pay over the same to the town treasurer, to be by him disbursed according to law for the benefit of said graded schools.

"Sec. 6. That in levying the taxes for the support of said graded schools the board of aldermen of said town of Greenville shall levy the same tax on all real and personal property within the boundaries of said school district, whether said property be within the corporate limits of said town or not, and in levying said tax the valuation fixed by the State and county assessments shall be taken as the valuation of this assessment."

The Private Laws of 1915, ch. 222, construed in connection with Private Laws 1905, ch. 132, only enlarged the boundaries as set forth in the latter act, but did not in any way repeal the then existing district. The caption of the act says: "Enlarge the boundaries." After levying the tax, two or three years following 1915, the levy was abandoned in the enlarged territory; but for 19 years, without objection from any taxpayer until this suit, the tax has been levied and collected in the territory under the 1905 act.

The plaintiff, R. L. Carr, who resides and owns property in the territory of the enlarged corporate school limits of 1905, and W. D. Turner, who resides and owns property in the corporate limits of the town of Greenville, and on behalf of all other taxpayers, etc., are parties to this injunction proceeding. The $200,000 bond issue was voted on in this 1905 district.

Constitution of N. C., Art. VII, sec. 7, is as follows:

"No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

The vote of the people, under Private Laws 1903, ch. 106, voted not only that the children in the corporate limits could get the benefit of the graded school, but provided in section 12 of the act "That all children within the corporate limits of said town as now constituted, *or as may be hereafter extended,* shall be admitted," and the method of admittance until the limits are extended, *"who reside outside of the corporate limits of said town upon such terms as they may deem fair and just."* This power was given to the board of trustees of the graded

school to fix the fair and just terms. When the school limits were extended, the maintenance tax was under sections 5 and 6, Private Laws 1905, ch. 132, made the same as the tax in the old corporate limits of the town of Greenville.

Under section 13, chapter 106, Private Laws 1903, again "May extend the boundary of the graded school district *so as to take in territory and people not included within the corporate limits of said town.*"

The people of the town of Greenville voted, under Private Laws 1903, ch. 106, to establish the graded school and to levy the tax not only for children in the corporate limits of the town of Greenville, as then constituted, but for the children in the limits that might be thereafter extended. They further under the said act, voted that the trustees of the graded school, under agreement with the county school authorities, could extend the boundary of the graded school district so as to take in territory and people not included within the then school district—the corporate limits of the town.

We think that Article VII, section 7, of the Constitution, *supra*, has been substantially complied with. The vote taken under the act made the town of Greenville contract a debt not only for those children in the town but for those in the extended district when the district was enlarged by legislative act 1905, *supra*, or under 1903 act, sec. 13, by agreement of the Trustees of Graded School of Greenville with the legal authorities of the proper county school district. After 19 years payment of tax, without protest from any citizen or taxpayer, including plaintiffs, it is presumed that the law has been complied with and the taxpayers and citizens of the district are estopped to question the validity of the tax.

"As in original creation, the law will indulge in presumptions in favor of the validity of changes of boundaries. Thus after public acquiescence for a considerable period presumptions in favor of the regularity of proceedings to attach territory to a municipal corporation will be indulged, and this is true although irregularities which would have defeated the annexation, if action has been taken in time, appears. So, where territory is annexed under a law which is unconstitutional because special in its character, and the city exercised municipal functions over the new territory for a period of four years without objection, and its operations would be seriously interfered with by holding annexation void, it was held that the complainant would be estopped from urging invalidity of the annexation." McQuillan on Municipal Corporations, sec. 289 (see cases cited); 20 A. & E. Enc. Law (2 ed.), 1155, and cases cited.

We do not think that chapter 135, Public Laws 1923, entitled, "An act validating the organization of special school districts," from the

position we take in this case, has any application. It legalized and validated the elections held under Article VII, section 7, of the Constitution, in relation to school districts, proposed school districts or portions of school districts.

Public-Local Laws 1915, ch. 253, is an enabling act, "An act to authorize the Board of County Commissioners of Pitt County to order an election in certain school districts in said county to issue bonds for certain purposes." There is no limit in this act as to the amount of bonds to be issued. What the certain school districts were is not clearly stated, but as one of the conditions imposed by the act was a petition from the school committee of any public school district in the county of Pitt, and as the Greenville District was under a board of trustees and not a school committee, we do not think this act applies.

The General Assembly enacted chapter 386, Private Laws 1911, by which law the provisions of said law of 1903 relative to the election of trustees of said district was amended, and by which same law the boundaries of the town of Greenville, as set forth in chapter 261, Private Laws of 1907, were enlarged by amendment of said chapter 261, the mandatory act of 1911 did not purport to amend said act of 1905. We think, from the position we take, that these acts had the effect only of reducing the number of trustees of the district as now constituted, known as 1905 District.

Private Laws, 1921, ch. 53, is "An act to authorize the Greenville Graded School District to issue bonds in an amount not exceeding $200,000, for the purpose of funding certain indebtedness and for the purpose of building, equipping or enlarging graded schools and teachers' home in said district."

It may be noted that in this act the territory known as Greenville School District (referred to as the 1905 School District in this opinion), which has paid maintenance tax for 19 years without objection, is fully recognized. Section 1 of the act is as follows: "That for the purpose and benefits of this act, the provisions of all laws governing assessment of real and personal property, the levy and collection of municipal taxes, and the holding of municipal elections in the town of Greenville, shall be and are hereby extended to that portion of the Greenville Graded School District lying without the corporate limits of said town as fully as if the same lay within said corporate limits, and to such other additions to said Greenville Graded School District as shall be lawfully made; and that for the purpose of levying and collecting taxes for the purpose of this act, and in all elections to be held under this act," etc. This act is repealed by chapter 38, Private Laws, Extra Session, 1921.

With these laws on the statute books, the Legislature of North Carolina, Public Laws 1923, ch. 136, passed the school law, the caption and preamble of which is as follows:

"An act to amend the Consolidated Statutes and to codify the laws relating to public schools.

"Whereas the acts of the General Assembly relating to public education are for the purpose of aiding all the people, and especially school officials, in maintaining and conducting a system of public schools and in providing revenue for the same; and

"Whereas a great need is apparent for collecting all the laws relating to public education and codifying them in such a way as to set forth as clearly as possible the legal duties, powers, and responsibilities of the several officials, in order to give them and all other friends of public education a clearer conception of their duties in maintaining and conducting public schools in accordance with the needs of the people and the provisions of the Constitution: Now, therefore."

The word "officials" in the above preamble is defined by section 5 of the act in the case of a special charter district to be "the Board of Trustees."

We think that chapter 38, Private Laws 1921, Extra Session, should be construed *in pari materia* with chapter 136, Public Laws 1923. This latter act, although being designated a public act, treats with the private or special school acts of the State. In this respect we have the two acts, both relating to private or special school acts. The act of 1921 limits the bond issue to $200,000, the amount of bonds voted for under act of 1923 being $200,000. Both acts provide that they must mature in 30 years. Under the act of 1921 the discretion, as we construe the act, gives the authority to issue serial bonds. The act of 1923 provides for 30-year serial bonds. In conformity with Constitution, Art. VII, sec. 7, both acts provide that the bonds cannot be issued unless a majority of the qualified voters of the school district vote in favor of the issuance. The board of trustees under both acts have to petition for the election. The act of 1921 requires the petition to the county commissioners; that of 1923 to the governing body of the town, which is the Board of Aldermen of the town of Greenville. The main conflict in the two acts relate to the body that submits the bonds to the vote of the qualified voters in the particular school district and the body that issues the bonds. Under the 1921 statute, *supra*, no bonds were ever voted. In the interpretation of statutes, the spirit and reason of the law should prevail—"For the letter killeth, but the spirit giveth life." The legislative intent in both the laws of 1921 and 1923, *supra*, was to give the qualified voters an opportunity to vote for bonds for school purposes in the particular districts like the one under consideration.

To carry out this intent, the acts should be so construed, if possible, as to reconcile them and effectuate each. If there is any conflict, the latter one repeals the former *pro tanto* to the extent of the repugnancy.

It was said in *S. v. Kelly,* 186 N. C., 372: "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. *Comrs. v. Henderson,* 163 N. C., 120; *Comrs. v. Comrs.,* 186 N. C., 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., 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."

In chapter 136, Public Laws 1923, sec. 378, the repealing clause is as follows: "All laws and clauses of laws, including all acts passed by the General Assembly of one thousand nine hundred and twenty-three in conflict with this act are hereby repealed."

We do not think the position here taken disturbs the principle laid down in *Felmet v. Comrs.,* 186 N. C., 251.

The only material conflict between the two acts is in reference to the referendum and the body that issues the bonds.

Laws of 1923, ch. 136, sec. 263, subsec. (b), is as follows: "In the case of special charter districts not coterminous with an incorporated city or town, the petition for the election shall be made by the board of trustees to the board of county commissioners, which board shall call, hold, and determine the result of the election as provided in this article, and the bonds shall be issued by the board of trustees: *Provided, however,* that in districts of the kind described in this subsection in which special school taxes are now levied by the principal governing body of a city or town situated within the district, the powers and duties conferred by this article on board of county commissioners shall be exercised and performed by said principal governing body. Bonds of districts of the kind described in this subsection shall be issued in the corporate name of the district if the district is incorporated, or in the corporate name of the board of trustees if the district is not incorporated."

This section must be construed with Private Laws 1903, ch. 106, establishing a graded school in the town of Greenville, and chapter 386, Private Laws 1911, reducing the number of trustees, etc. Under those acts, trustees were elected by the Board of Aldermen of the town of Greenville, and when their term expired it is provided that any

vacancy shall be filled by the board of aldermen, the governing body of Greenville. Subsection (b), *supra,* provides that the bonds of the district when the board of trustees (as in the present case) is not incorporated shall issue them "in the corporate name of the board of trustees if the district is not incorporated."

The facts in *Comrs. v. Prudden,* 187 N. C., 794, are different from this case, and that case is not in conflict with the case at bar.

We think that the procedure followed, in calling and holding the election of 1 April, 1924, was a sufficient and substantial compliance with the law, and that the will of the qualified voters of said district has been duly ascertained, since there were registered 987 voters, of which number 696 voted in favor of the issuance of the bonds and a levy of the tax in payment thereof, and 74 voters voted against the issuance of said bonds. We are of the opinion that the said election is in all respects valid, and when the bonds shall be issued by the board of trustees and executed as they may direct, and sold by them after due advertisement, same will be valid and binding obligations of the Greenville Graded School District in the territory that has been recognized for the last 19 years as the district, and taken in under the Private Laws of 1905, ch. 132.

We reach the same conclusion here as the court below—that the bonds are valid. The position here taken being, in our opinion, the law, the judgment of the court below is

Affirmed.

EDGAR RICHARDSON, BY HIS NEXT FRIEND, J. M. RICHARDSON, v. J. LIBES AND MARY LIBES.

(Filed 21 June, 1924.)

Husband and Wife—Statutes—Principal and Agent—Negligence—Explosives.

A wife may appoint her husband as her agent for doing in her behalf work which may be of such dangerous character as to be a menace to the safety of others, and is liable with him for his negligence that, while acting as her agent, he proximately caused an injury to a child who found explosive caps negligently left by him while causing her lot to be blasted and excavated on a bordering street. C. S., 2507. *Krachanake v. Mfg. Co.,* 175 N. C., 435; *Barnett v. Cotton Mills,* 167 N. C., 580, cited and applied.

CIVIL ACTION for injuries suffered by the alleged negligence of defendant, tried before his Honor, *Lane, J.,* and a jury, at September Term, 1923, of FORSYTH.

On issues submitted as to the alleged negligence of defendant—contributory negligence on part of plaintiff and damages, there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed.

John D. Slawter and Swink, Clement & Hutchins for plaintiff.
W. T. Wilson for defendant.

HOKE, C. J. There is evidence on the part of the plaintiff tending to show that defendants are husband and wife, and on or before 13 March, 1922, J. Libes, the husband, was engaged in making excavations in the grading of Peachtree Street in the city of Winston, bordering on certain town property belonging to his wife, the codefendant, and that he was doing the work, or having it done, as the authorized agent of his wife. That a lot of blasting was necessary for the proper carrying on of the work and that J. Libes, in the line of his supervision and control, procured and supplied to the workmen the dynamite and caps necessary to explode the same, and that in the course of the work he negligently left this material so unguarded and exposed that it was readily accessible to children living and playing in the vicinity of the improvements. That plaintiff, a child about six years of age, with a small companion, found and obtained one of these caps and in playing with the same in the yard of plaintiff's father it exploded, inflicting on plaintiff's hands and arms painful, serious and permanent injuries, for which he brings suit. For defendant, there were facts in evidence in denial of plaintiff's claim and tending to show that defendant J. Libes, the husband, was not acting in this matter as the agent of the wife, and that she knew nothing of the work. That said husband was not negligent in the matter as charged, and that the work was being done by independent contractors who were alone at fault. Under a correct, clear and comprehensive charge, these opposing averments were submitted to the jury who have accepted the plaintiff's version of the occurrence; and this being true, a cause of action is clearly established. Under our legislation applicable, and on the facts presented, the wife was competent to appoint her husband as her agent, C. S., 2507 (the Martin Act); *Croom v. Lumber Co.*, 182 N. C., 217; *Thrash v. Ould*, 172 N. C., 728-730; *Royal v. Southerland*, 168 N. C., 405; *Lipinsky v. Revell*, 167 N. C., 508, and in such case she becomes responsible with him for acts within the course and scope of the agency as in other instances. *Munick v. Durham*, 181 N. C., 188; *Cook v. R. R.*, 128 N. C., 333. On the facts established by the verdict, the principles applicable and sustaining recovery are well set forth in *Krachanake v. Mfg. Co.*, 175 N. C., 435, and *Barnett v. Mills*, 167 N. C., 580, and we find no valid reason for disturbing the results of the trial.

No error.

MARY WILLIS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 21 June, 1924.)

1. Telegraphs—Negligence—Prima Facie Case—Burden of Proof—Service Messages — Evidence — Nonsuit — Questions for Jury — Mental Anguish.

When the evidence tending to show that a telegraph company has received a telegram for transmission and has failed to deliver it within a reasonable time, a *prima facie* case of negligence is shown entitling the plaintiff to have the issue passed upon by the jury, with the burden of disproving its negligence on the defendant, and the failure of the defendant to send a service message notifying the sender of its nondelivery is also evidence of its actionable negligence.

2. Telegraphs—Negligence—Service Messages—Pleadings—Evidence.

It is not required that the complaint, in an action to recover damages for mental anguish against a telegraph company for negligently failing to deliver a death message within a reasonable time, allege negligence in respect to its failure to send a service message back to the sender informing him of the fact of nondelivery, in order to admit evidence thereof on the trial.

3. Verdicts—Excessive Damages—Court's Discretion—Appeal and Error.

The action of the trial court in refusing to set aside a verdict for excessive damages is a discretionary matter, and it will not be disturbed on appeal unless it is made to appear that the verdict must have been the result of passion or prejudice.

APPEAL by defendant from *Bryson, J.*, at October Term, 1923, of SWAIN.

Civil action to recover damages for alleged mental anguish.

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

"1. Did Charlie Mahaffey for, and at the request of Mrs. Alice Brown, deliver to the agent of the defendant telegraph company at Waynesville the telegram mentioned in the complaint, and request the defendant's agent to transmit the same over its wires to Bryson City and pay for the transmission and delivery of the same as alleged in the complaint? Ans. Yes.

"2. If so, did the defendant negligently fail to deliver the same as alleged in the complaint? Ans. Yes.

"3. If so, what amount, if any, is the plaintiff, Mary Willis, entitled to recover of the defendant? Ans. $1,250."

From a judgment on the verdict in favor of plaintiff, the defendant appeals, assigning errors.

S. W. Black and Frye & Randolph for plaintiff.

Francis R. Stark, Joseph L. Egan, Merrimon, Adams & Johnston, and Tillett & Guthrie for defendant.

STACY, J. Plaintiff brings this suit, alleging that by reason of the negligent failure of the defendant to deliver a telegram announcing the death of her father she was deprived of the opportunity of attending his funeral, and she seeks to recover damages for the mental anguish sustained by her as a resultant injury.

It is conceded that plaintiff's sister sent one Charles Mahaffey to the defendant's office in Waynesville, N. C., on the morning of 27 November, 1922, with a telegram to be sent to plaintiff at Bryson City, N. C., in care of Captain Frye. The message was promptly transmitted and received by defendant's agent at Bryson City, but it was not delivered until called for by plaintiff's son on 8 December, 11 days thereafter. This evidence was sufficient to carry the case to the jury. *Sherrill v. Tel. Co.*, 116 N. C., 655. "It is well settled that where a telegraph company receives a message for delivery and fails to deliver it with reasonable diligence, it becomes *prima facie* liable, and that the burden rests upon it of alleging and proving such facts as it relies upon to excuse its failure." *Douglas, J.*, in *Hendricks v. Tel. Co.*, 126 N. C., 309.

On the record, the defendant apparently made out a strong case in exculpation of liability, and a verdict in its favor would have been fully warranted by the evidence, but we need not consider this phase of the controversy, as it was purely a question for the jury, and they have determined it in favor of plaintiff's claim. The plaintiff, having made out a *prima facie* case, was entitled to have the matter submitted to the jury. The defendant's motion to dismiss or for judgment as of nonsuit was properly overruled.

There was also objection to the admission of evidence tending to show that the defendant made no effort to notify the sender of the nondelivery of said telegram by returning service message or otherwise, as the complaint omitted to specify such failure as one of the grounds of negligence. This evidence was competent upon the general allegation of negligence, and the exception must be overruled. "If for any reason it (telegraph company) cannot deliver the message, it becomes its duty to so inform the sender, stating the reasons therefor, so that the sender may have the opportunity of supplying the deficiency, whether it be in the address or additional cost of delivery. The failure to notify the sender of such nondelivery is of itself evidence of negligence." *Douglas, J.*, in *Cogdell v. Tel. Co.*, 135 N. C., 431.

Defendant's motion for a new trial upon the ground of excessive award of damages must also be overruled. Appellate courts do not

ordinarily interfere with the discretion of the jury in assessing the amount of damages in cases of this kind, unless it appear that the verdict must have been the result of passion or prejudice, or that the amount awarded is clearly or grossly excessive. 37 Cyc., 1793. It being a question for the jury, and not for the court, to fix the amount, in cases of unliquidated damages, a verdict will not be set aside merely because it is large, or because the reviewing court would have awarded less. 8 R. C. L., 673. See, also, opinion of *Horton, C. J.*, in *Union P. R. Co. v. Young,* 19 Kan., 488.

After a critical examination of the record, we have found no error which would justify us in disturbing the verdict and judgment, and this will be certified.

No error.

BATTLE ET AL. V. MERCER ET AL.

(Filed 21 June, 1924.)

Appeal and Error—Rehearing—Laches—Procedure—Rules of Court.

A petition to rehear a case in the Supreme Court will not be granted when the alleged error is attributable solely to the petitioner's own laches or want of attention in looking after his case or he has neglected to follow the rules of procedure necessary to a proper presentment thereof, and especially when there is nothing to warrant the assurance that substantial relief would otherwise be afforded him.

PETITION by Mary S. Mercer and Margaret M. Tilghman to rehear this case, reported in 187 N. C., 436, where the facts are fully stated.

O. P. Dickinson for petitioners.

STACY, J. The circumstances of this case have caused a most critical and searching examination of the petition to rehear. It is the policy of our law to give every litigant full and ample opportunity to be heard. This the petitioning defendants have had in the instant suit; and if they have lost any rights, it must be attributed to their own laches and want of attention in looking after their case. The adjective law is not to be enforced harshly or oppressively, but rather in a spirit of liberality, to the end that justice may be administered in all cases. But this does not mean that procedural statutes will be construed by the courts in a manner so as to favor the negligent and penalize the diligent party. *Vigilantibus et non dormientibus subvenit lex:* "The law comes to the assistance of the diligent, and not to those who sleep upon their rights." When litigants resort to the judiciary for the settlement of their dis-

putes they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties.

There are no sufficient facts and circumstances appearing in the original case or in the petition to rehear to warrant a reasonable assurance that the petitioning defendants would secure any substantial relief even if the petition were allowed. Nothing on the record was overlooked when the case was originally heard.

The petition to rehear must be denied.

OSMOND BARRINGER COMPANY v. STANDARD FIRE INSURANCE COMPANY.

(Filed 21 June, 1924.)

Insurance, Fire—Automobiles—Policies—Exceptions—Change of Interest—Larceny—Evidence—Questions for Jury.

An insurance policy on an automobile of a user thereof and not a dealer therein, indemnifying against all direct loss and damage by fire arising from any cause whatever, except, among other things, the change in ownership of interest, title or possession, or directly or indirectly by theft: *Held*, the change of possession by the theft of the car does not fall within the intent and meaning of the exception of the policy, unless such change of possession directly or indirectly caused the loss, which presents a question of fact, under the evidence, for the determination of the jury. *Williams v. Ins. Co.*, 184 N. C., 268, cited and applied.

APPEAL by plaintiff from *Harding, J.*, at October Term, 1923, of MECKLENBURG.

C. W. Tillett, Jr., for plaintiff.
John M. Robinson for defendant.

ADAMS, J. On 22 September, 1921, the plaintiff and the defendant entered into a contract of insurance by the terms of which the defendant insured for the term of one year, to the extent of the actual cash value, not exceeding $2,000, a Peerless automobile owned by the plaintiff, a corporation transacting business in the city of Charlotte. The policy provides for indemnity against all direct loss and damage by fire arising from any cause whatever, except as therein set out. In the sections of the policy entitled "Hazards not Covered" appear these clauses: (1) "This entire policy shall be void unless otherwise provided

by agreement in writing added hereto, . . . if any change, other than by the death of the insured, take place in the interest, title or possession of the subject of insurance (except change of occupants, without increase of hazard"); (2) "this company shall not be liable for loss or damage caused directly or indirectly . . . by theft." The first is known as the "nonalienation" clause and the second as the "theft" clause. The appellee contends that either is sufficient to bar the plaintiff's recovery of damages.

It is insisted that the larceny of the plaintiff's car constituted such a change of possession as exonerated the defendant from liability, and that the question has been determined in *Williams v. Ins. Co.*, 184 N. C., 268. There is a distinction, however, between the policy construed in that case and the policy which is the subject of the present suit. In *Williams' case* the action was brought upon an " 'open dealer's' policy of insurance on automobiles held for sale." The holder of the policy was engaged in the business of buying and selling automobiles and applied for and obtained insurance which was specifically adapted to his business. Considering its several provisions, the court construed the policy as exempting the insurance company from liability when the actual or physical possession of the automobile passed from the insured to another. But the policy in the instant case is the standard fire insurance policy, from which are omitted many of the provisions in the "open dealer's" policy. As every decision should be considered in the light of the facts upon which it is based, it is clear, we think, that in considering the policy in the case at bar the court is not concluded by its interpretation of the provisions incorporated in the policy sued on in the *Williams case.*

The decisions of this Court in which the "nonalienation" clause in the standard policy has been discussed seem to have proceeded on the principle that a mere physical change of possession without a transfer of title or interest is not such change of possession as will defeat the policy. In *Pants Co. v. Ins. Co.*, 159 N. C., 78, it was held that taking charge of property by a receiver is not a change of possession which will avoid the policy. There is a difference, of course, between possession by a receiver and possession by a thief; but in the case last cited this Court approved the following quotation from *Ins. Co. v. Bartlett,* 91 Va., 305: "The condition in the policy against alienation refers only to such sale or disposition of the property as caused all interest of the assured in, or control over, the property to cease." The same principle is maintained in the following cases: *Rumsey v. Ins. Co.*, 1 Fed., 396; 2 Fed., 429; *Ætna Ins. Co. v. Aston,* 123 Va., 237; 96 S. E., 722; *Marcello v. Ins. Co.*, 234 Pa., 31; 39 L. R. A. (N. S.), 366; *Bowling v. Ins. Co.,* 103 S. E., 285.

While the larceny of the car did not *ipso facto* avoid the policy, a new trial must be awarded for determination of the question involved in the provision relating to loss or damage caused by theft. Whether the loss was caused directly or indirectly by theft is a matter which can finally be disposed of only by the aid of a jury. The evidence now appearing is circumstantial, and the liability of the defendant cannot be decided as an abstract question of law. If it is shown that the automobile was stolen, the inquiry then will be whether the loss was caused directly or indirectly by the theft.

New trial.

STATE EX REL. R. H. LEE ET AL. v. E. E. MARTIN AND NEW AMSTERDAM CASUALTY COMPANY.

(Filed 21 June, 1924.)

1. Appeal and Error—Petition to Rehear—Error.

Upon a petition to rehear, the case will be corrected when it appears that the petitioner has thereby been erroneously deprived of its property.

2. Principal and Surety—Official Bonds—Clerks of Court—Cumulative Suretyship.

The surety on the official bond given for one term of office is not liable on the distinct bond of the same incumbent given upon his succeeding himself to the same office; but where, during either of these terms, a new bond is taken with the same surety for that period the security is considered cumulative, and upon defalcation before or after its taking, the surety is liable to the extent of the total amount of them both.

3. Same—Penalty—Liability—Surety.

Where a defaulting clerk of the Superior Court succeeds himself in office, and has given the required bond separately for each term, with the same surety, and continues his defalcation, recovery cannot be had against the surety except to the amount of the bond given for each term.

4. Same—Statutes—Judgments—Interest.

The surety bond of a clerk of the Superior Court is fixed as to amount in the sum of five thousand dollars, and to that extent a surety is responsible for the defalcation of his principal, including 6 per cent interest from the time of notice given it, except from judgment thereon, when a different principal applies and the surety is liable for 6 per cent interest on the judgment until it is paid. C. S., 2309.

5. Same.

While, as against the principal on the bond of a clerk of the Superior Court, interest under our statute at the rate of 12 per cent is collectible from the time of defalcation, the amount of the penalty on his bond determines the liability of the surety thereon. C. S., 357.

PETITION by defendant, New Amsterdam Casualty Company, to rehear this case, reported in 186 N. C., 127.

F. C. Brinson and Ward & Ward for petitioner.
Z. V. Rawls for respondents.

STACY, J. A careful and critical reëxamination of this case forces us to the conclusion that our original opinion was in some respects erroneous. It is correctly suggested by counsel that such result was probably induced, in large measure, by the condition of the record. But if, by reason of this inadvertence, the petitioning defendant is liable to be unjustly deprived of its property, as it contends it is, we must correct the error.

In 1914 E. E. Martin was elected clerk of the Superior Court of Pamlico County for a term of four years. He was duly inducted into office on the first Monday in December, 1914, and gave his official bond, as required by law, with the New England Casualty Company of Boston as surety. The New England Casualty Company failed or went out of business in 1916; and in November of that year the defendant Martin executed another official bond in the sum of $5,000, with the petitioning defendant, New Amsterdam Casualty Company, as surety thereon. This bond was duly acknowledged, accepted, and approved by the county commissioners.

In 1918 the defendant Martin was again elected clerk of the Superior Court to succeed himself for a second term of four years, commencing on the first Monday in December of that year. The official bond of $5,000 executed in November, 1916, with the New Amsterdam Casualty Company as surety, was continued in force and renewed from year to year, by the payment of premiums thereon, until the forced resignation of said Martin on 27 January, 1921. *Fidelity Co. v. Fleming*, 132 N. C., 332.

There were defalcations or misappropriations on the part of the defendant Martin during his first term of office and after the execution of the $5,000 bond now in question; and in addition, there were quite a number of defalcations or misappropriations during his second term of office, but there is no finding on the record as to the exact amount of these defalcations or misappropriations during each term when considered separately.

It is the established law of this jurisdiction that official bonds given by an officer during any one term of his office are cumulative; that is, the first bond given is liable for defaults occurring throughout the entire term, and any new bond given at a later period during the same term is an additional security for the faithful discharge of such of the

duties as have not been performed at the time of its execution. This principle is clearly set forth by *Pearson, J.*, in *Poole v. Cox*, 31 N. C., 71, as follows:

"We consider the principle well settled that where a term of office is for more than one year, the bonds given for a proper discharge of the duties of the office, at the time of appointment, and the new bonds, given from time to time afterwards, are cumulative, that is, the first bonds continue to be a security for the discharge of the duties as at first intended, and the new bonds become an additional security for the discharge of such of the duties as have not been performed at the time they are entered into. This principle is deduced from two considerations: The new bonds are not required for the relief of the sureties upon the first bonds, but are taken for the benefit of those who may be concerned in the proper discharge of the duties of the office; and when the office is to continue for more than one year, it was presumed that the bonds taken at first might become insufficient from the insolvency of the sureties or other causes; hence the Legislature took the precaution to require new bonds to be given from time to time, and the courts, in order to give effect to the intention of the law-makers, consider the new bonds not as taking the place of the old ones, but as additional thereto."

To like effect was the holding in *Oats v. Bryan*, 14 N. C., 451, where bonds of a clerk and master of the Court of Equity were under consideration. See, also, C. S., 354, and cases cited thereunder.

But we are aware of no decision or statute which would make the official bond or bonds, given by an officer during one term, liable for the nonperformance of his official duties during another and different term, even though the principal and sureties be the same for both terms. The two terms are separate and distinct, and the bonds given by an officer as security for the performance of his official duties during any one term may not be held liable for derelictions occurring in another and different term, in the absence of some contract or statute imposing such liability. *Ward v. Hassell*, 66 N. C., 389. Each term, like every tub of Macklinian allusion, "must stand upon its own bottom." (Charles Macklin, "The Man of the World," Act 1, Scene 2.)

In the instant case, we are of opinion that the keeping of the bond in question alive and in full force and effect from 1916 to 1921, by the payment of annual premiums thereon, was equivalent to the execution by the defendant of two bonds in the sum of $5,000 each—one covering the latter part of Martin's first term of office from November, 1916, to the first Monday in December, 1918, and the other covering the period of his incumbency during the second term of office. The premiums paid during the second term were intended by all of the parties to purchase security for that term. This much is admitted by the petitioning de-

fendant. See correspondence set out in original opinion. A bond of not less than $5,000 for each term is required by C. S., 929. Thus it will be necessary to remand the case in order that the defalcations or misappropriations may be separated, and those occurring during the latter part of Martin's first term charged against one liability of $5,000, and those occurring during the period of his incumbency in the second term charged against another liability of $5,000.

The liability of the petitioning defendant, however, would not exceed the penal sum of $5,000 in any one term, plus interest thereon at the rate of 6 per cent per annum after judgment against the surety. C. S., 2309; *Moseley v. Johnson,* 144 N. C., p. 275; *Machine Co. v. Seago,* 128 N. C., 158. As against the principal, E. E. Martin, the plaintiffs or relators are entitled to recover, in addition to the several sums found to be detained by him, damages at the rate of 12 per cent per annum from the time of detention until paid (C. S., 357); but as against the surety, New Amsterdam Casualty Company, the maximum liability in any one term will not exceed the penalty of the bond given for that term, plus interest thereon at the rate of 6 per cent per annum after judgment against said surety. *Bernhardt v. Dutton,* 146 N. C., 206. If the judgments against the principal for defalcations or misappropriations during any one term, plus damages at the rate of 12 per cent per annum, do not exceed the penalty of the bond given for that term, the relators would be entitled to collect out of the surety the full amount of their judgments against the principal. But if the bond given for any one term be not sufficient to pay such judgments in full, the pro rata interest of each relator would be determined on the basis of the principal amount recovered plus damages at the rate of 12 per cent per annum from the time of detention by the officer up to date of settlement. That is to say, the recoveries against the principal will form the basis of computation in determining the pro rata amount which the surety will be required to pay each of the relators, should their claims in any one term exceed the ultimate liability of the surety for that term.

According to the modern weight of authority in other jurisdictions, the general rule seems to be that although the penalty of the bond fixes the limit of liability of the surety at the time liability arises thereunder, yet, if the principal or surety fail to discharge that liability when it matures, interest may be allowed on the amount from the time the liability accrues, even if the amount of recovery exceed the penalty named in the bond. 22 R. C. L., 518. As against the sureties, however, interest is allowed only from the date of notice to them of the breach, or from the date of a demand on them to make good such breach. *Dickinson v. White,* 25 N. D., 523; 143 N. W., 754; 49 L. R. A. (N. S.), 362. See valuable note to *Griffith v. Rundle,* 23 Wash., 453, as reported in 55

L. R. A., 381, where the rule is stated, with citation of authorities; and see, also, dissenting opinion of *Clark, J.*, in *Machine Co. v. Seago,* 128 N. C., p. 162. But in North Carolina, both by statute and judicial decision, the surety's liability may not exceed the penalty of the bond until judgment has been rendered against the surety. Interest may then be collected on said judgment without regard to the limit of liability named in the bond, because the nature of the demand is altered by the judgment, and under the statute such judgment would bear interest at the rate of 6 per cent per annum until paid. C. S., 2309; *Warden v. Nielson,* 5 N. C., 275; *Moseley v. Johnson, supra; Bernhardt v. Dutton, supra; Machine Co. v. Seago, supra.*

Our original opinion will be modified to the extent above indicated; the cause will be remanded, to the end that it may be heard and determined according to the usual course and practice of the court, not inconsistent with the principles announced in this opinion.

The costs of this appeal will be taxed against the defendants.

Petition allowed.

R. G. VAUGHAN, TRADING AS CAROLINA BODY COMPANY, v. B. R. LACY, TREASURER, AND D. B. STAFFORD, SHERIFF.

(Filed 21 June, 1924.)

Taxation—Statutes—Liens—Vendor and Purchaser.

Where a manufacturer of automobiles or a receiver appointed for him has failed to pay the license or privilege tax imposed by the Revenue and Machinery acts, C. S., 7987, construed *in pari materia* expressly provides that a lien therefor shall attach to all real estate of the taxpayer situated within the county, etc., and continue until such taxes, with any penalty and cost which shall accrue thereon shall have been paid, and the lien may be enforced by the State, etc., for each tax year accordingly, and a subsequent purchaser of the manufacturing plant is subject to the lien for the nonpayment of the taxes, and it is enforceable against the realty.

APPEAL by plaintiff from *Shaw, J.*, at December Term, 1923, of GUILFORD.

The facts admitted and set out in the judgment are as follows: The Southern Truck and Car Corporation, during the fiscal years 1920-21, 1921-22, and prior thereto, was a manufacturer and dealer in automobile trucks; it owned a factory and plant in Guilford County near Greensboro, N. C., situated upon the tract of land described in the complaint. It was also the owner of this tract of land in fee. In the course of its business it sold during the fiscal year 1920-21 automobile trucks. It did not during said year pay to the State any license tax for selling

the same. On 5 February, 1921, Garland Daniel was appointed receiver of said corporation, and continued as such till 11 November, 1922, when he was discharged, and the property restored to its owner. He as such receiver, under the direction of the court, conducted its business, and during the time of his receivership he sold one truck on 17 February, 1921, and one 26 September, 1921, and he paid no license tax; said license taxes for said fiscal year have never been paid by any one.

On 7 April, 1923, the plaintiff purchased from the Southern Truck and Car Corporation the factory, the plant and tract of land aforesaid, and took a deed therefor, which was duly registered. Plaintiff had no actual notice of the fact that said license taxes had not been paid. His purchase of the land was bona fide and for value. On 1 October, 1923, defendant Stafford, acting under the direction of B. R. Lacy, State Treasurer, and by virtue of the provisions of the Revenue and Machinery acts of North Carolina, levied upon said land for the nonpayment of the license tax of $500 for the fiscal year 1920-21, and $250 penalty, and a like sum and penalty for the nonpayment of the license tax for the fiscal year 1921-22, and $2 costs, and said sheriff duly advertised said land to be sold therefor. The plaintiff thereupon brought this action, and obtained a restraining order.

His Honor adjudged that the land was subject to a lien for the tax and penalty for each year and subject to sale for nonpayment. The restraining order was dissolved, and the plaintiff appealed.

Hoyle & Harrison for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendants.

ADAMS, J. On 5 February, 1921, Garland Daniel was appointed receiver of the Southern Truck and Car Corporation, which for some time prior thereto had been engaged in manufacturing and selling automobile trucks. The receiver continued the business until 11 November, 1922, when, upon his discharge, the property was restored to the officers of the corporation. On 7 April, 1923, the plaintiff purchased all the property owned by the corporation, including several tracts or lots of land. Neither the corporation nor the receiver paid the license tax imposed under Schedule B of the Revenue Act for the fiscal years 1920-21 and 1921-22. Public Laws 1921, ch. 34, sec. 72.

Upon the plaintiff's failure to pay the tax, the sheriff of Guilford County, at the instance of the State Treasurer, levied upon the land described in the complaint with a view to selling it, and the plaintiff obtained a restraining order which was dissolved at the hearing. The plaintiff excepted and appealed.

The amount of the taxes and penalties is fixed by statute. Public Laws 1923, ch. 4, sec. 78, and ch. 12, secs. 109, 110; Public Laws 1921, ch. 34, sec. 72, and ch. 38, secs. 116, 117. So, likewise, is the lien on land. C. S., 7987 provides: "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 1 June, annually, and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid." This section is a permanent statute in the sense that it is not altered or modified biennially in like manner with certain sections of the Revenue Act. The several statutes relating to the subject should be construed together. By virtue of section 7987, the lien of the taxes for each year attached to the land on 1 June (*Harper v. Battle,* 180 N. C., 377), and in the absence of payment, has since continued. It is therefore immaterial that the plaintiff is a bona fide purchaser of the land for value and without actual notice. The plaintiff contends that the section applies only to such taxes as are collectible by the sheriff under the tax list delivered to him by the board of county commissioners; but the lien which attaches to land is that of State, county, and municipal taxes levied for any purpose. The tax is levied or imposed for the privilege of carrying on the business or doing the act named, and is included in the clause, "taxes levied for any and all purposes."

The constitutionality of the section under which the tax was imposed is discussed in *Bank v. Lacy, ante,* 25.

The judgment is

Affirmed.

GROVER MEDFORD v. REX SPINNING COMPANY.

(Filed 21 June, 1924.)

Employer and Employee—Master and Servant—Negligence—Assumption of Risks—Instructions—Appeal and Error—Reversible Error.

In an action by an employee against his employer to recover damages for a personal injury received in the course of his employment at a power-driven machine, involving the question of assumption of risk, etc., it is reversible error to the defendant's prejudice for the trial judge to instruct the jury as to the employer's liability upon this issue, but leave them uninstructed upon the evidence on the case tending to show that a man of ordinary prudence would not have continued to work in the face of the apparent danger under the circumstances.

APPEAL by defendant from *Bryson, J.*, at October Term, 1923, of SWAIN.

The action was brought to recover damages for personal injury alleged to have been caused by the defendant's negligence. Plaintiff went from Swain County to Gastonia to work for the defendant. He was 23 years old and was employed to keep the cards clean. The cards were set in rows about 18 inches apart and were operated by a small pulley about 10 inches from the floor. There was a larger pulley higher up. The two were connected by a rope belt. There was also a leather belt which was used to operate other machinery. The two belts were about 3 inches apart. The rope belt came off the pulley and the plaintiff attempted to put it back while the machinery was running. His left hand was caught in the belt and his arm was so injured that it had to be amputated. He testified in part as follows:

"How I came to get hurt was this: I was cleaning up about 8:15 and the belt flew off this rope, and I was trying to put it on and got down with my right hand near the floor to put it on the pulley with my left hand up here and put it on the top, and the second time it slipped off and the belt that run from the center to pull the cotton off the slats came down in there and gave a whirl and cut my arm. It is the usual custom used there to put the rope back with the hands when it comes off. The belt runs off very often; it run off because it was too big. Mr. Stewart had instructed me to put the belt on when the machinery was running; he was the card-room boss, or the card-room fixer, I do not know which—the one that fixes the cards. Mr. Biddy told me I would have to take orders from Mr. Stewart or get out. Mr. Biddy was the second man, and it was his duty to look after the card room. When the second man gives orders to the employees in that room, they obey it. . . . . It was not the pulley that caught the rope down there; it was the belt that runs the slats; it did not run as fast as the cylinder; there were two pulleys and two belts; one was a leather belt and the other was a rope belt; I tried to put the rope on the pulley; I could not say how close the leather belt was to me while I was doing that; I guess it was about 3 inches. The belt that run on the slats cut my hand. I was fooling with the belt that runs the cards. We had a leather belt that was running the machinery that took it off the slats and the rope belt that took it off the cards, and it was the leather belt that caught my hand and took it in there, and these two belts were running about 3 inches apart. I knew how to stop them; it was the easiest thing in the world to stop them both; the easiest thing was to take my hand and stop both belts like that (indicating).

"Q. If you had done that you would have had two arms today? A. I don't know.

"Q. Not been a thing in the world to catch you? A. No.
"Q. And you knew how to do that? A. Yes."

The issues of negligence, contributory negligence, assumption of risk, and damages were answered in favor of the plaintiff. Judgment. Appeal by defendant.

Thurman Leatherwood and Alley & Alley for plaintiff.
Merrimon, Adams & Johnston for defendants.

ADAMS, J. The defendant excepted to the following instruction in regard to the plaintiff's assumption of risk: "I again instruct you that upon the third issue the burden of proof is cast upon the defendant, and if you reach its consideration, if the defendant has satisfied you by the greater weight of the evidence that the injury to the plaintiff was the direct and proximate result of a risk assumed by him, then you would answer this issue 'Yes'; if you are not so satisfied you would answer it 'No.'" In the same connection his Honor had previously said: "As applied to an investigation of this nature, the law recognizes that when one enters into service he assumes certain risks, and that if injured while in such service as a result of a risk assumed, no liability attaches to his master for such injury. I instruct you that one who enters the employment of another does not assume risks which arise from any failure upon the part of the master to perform such duties as the law fixes upon him. These are termed additional risks which are not assumed when the relation of employer and employee is entered into."

The instructions embrace these three propositions: (1) the burden of proving assumption of risk is upon the defendant; (2) the plaintiff assumed only such risk as was incident to the work he was required to perform when properly conducted; (3) the plaintiff did not assume any risk arising from the defendant's failure to perform the duty it owed the plaintiff. It will be seen that no reference is made to the position on which the defendant chiefly relied; that is, even if the defendant had failed to exercise due care in providing a reasonably safe place for work or reasonably safe and suitable appliances, still the plaintiff assumed the risk of injury by continuing his work with knowledge of impending danger.

It is true that, when the master's negligence is the proximate cause of the servant's injury, the injured servant shall not be barred of recovery by the mere fact that he works on in the presence of a known defect, even though he may be aware to some extent of the increased danger; but if the danger is obvious and so imminent that no man of ordinary prudence, acting with such prudence, would incur the risk which the conditions disclose, the servant's knowledge of such hazard

would be treated as falling within the class of ordinary risks generally assumed by him in the prosecution of his work. This principle, clearly stated in *Hicks v. Mfg. Co.*, 138 N. C., 319, 327, has been approved in several subsequent decisions. *Jones v. Taylor*, 179 N. C., 293; *Howard v. Wright*, 173 N. C., 339; *Wright v. Thompson*, 171 N. C., 88; *Deligny v. Furniture Co.*, 170 N. C., 189, 203; *Pressly v. Yarn Mills*, 138 N. C., 410. Whether the danger of putting the belt in the pulley when the machinery was in motion was so obvious that a man of ordinary prudence would not have gone on with the work, was a question for the jury to determine upon all the evidence. *Pigford v. R. R.*, 160 N. C., 93, 101; *Tate v. Mirror Co.*, 165 N. C., 273. But this phase of the case was not presented by the charge. The jury were instructed to answer the issue "Yes" if they were satisfied by the greater weight of the evidence that the plaintiff's injury was the proximate result of risk assumed by him, that is, the ordinary risk incident to his work; but if they were not so satisfied to answer it "No," without an instruction as to whether the plaintiff's continuance of the work with knowledge of danger, notwithstanding the master's negligence, was an ordinary or extraordinary risk. The jury were left to infer that the only ordinary risks were those incident to the work when there was no negligence on the part of the defendant. For this reason a new trial is awarded.

New trial.

CAROLINA-TENNESSEE POWER COMPANY v. HIAWASSEE RIVER POWER COMPANY.

(Filed 21 June, 1924.)

1. Waters—Power Plants—Condemnation—Prior Rights—Judgment—Estoppel.

After a water-power company having the statutory authority has staked off upon the lands and mapped its location, in condemnation, and has commenced and is proceeding without unreasonable delay, in good faith, to develop the water-power thereon, another such company may not acquire by condemnation subsequently any portion of the land for such purposes thus designated; and where a portion thereof has been unlawfully sought to be thus condemned, and the court has so determined, the case is conclusive as to another portion thereof thus situated, under the principle that it either was or should have been litigated in the former action.

2. Same—Constitutional Law.

The superior right to a water-power prior acquired, under condemnation, to that attempted to have been later acquired under such proceedings, is not a special privilege prohibited by the Fourteenth Amendment to the Federal Constitution.

ADAMS, J., did not sit or take part in the determination of this case.

POWER CO. *v.* POWER CO.

APPEAL by defendant from *Bryson, J.*, at December Special Term, 1923, of CHEROKEE.

Special proceeding to condemn lands and water rights on the Hiawassee River in Cherokee County, for use of petitioner in connection with a water-power development or hydroelectric plant.

The matter was heard before the clerk, who appointed commissioners to assess the value of the lands condemned, as provided by C. S., 1720. Said commissioners in due course made their report, which was confirmed by the clerk on 14 February, 1923. Defendant appealed to the Superior Court in term.

Upon the hearing, a jury trial was waived and it was agreed that the judge should hear the evidence, find the facts and render judgment accordingly.

From the judgment entered in favor of petitioner, the defendant appeals, assigning errors.

Martin, Rollins & Wright for plaintiff.
J. Crawford Biggs for defendant.

STACY, J. This case is only another branch of the same litigation which has been going on between these parties for a number of years. *Power Co. v. Power Co.*, 186 N. C., 179; *S. c.*, 175 N. C., 668; *S. c.*, 171 N. C., 248.

In 1909, the petitioner, through its officers, engineers and other representatives, entered upon, explored and surveyed certain lands and water rights in and along the Hiawassee River in Cherokee County, N. C., not declared by law to be navigable, and marked upon the ground the location of its route for water-power development, and adopted the same by authoritative corporate action. The proposed location of said works, dams, flumes, power plants and other structures, extends for a considerable distance up and down the Hiawassee River and covers what is spoken of on the record as two basins or reservoirs—one known as the upper reservoir and the other as the lower reservoir.

Thereafter on 21 June, 1911, the Carolina-Tennessee Power Company filed and deposited in the office of the clerk of the Superior Court for Cherokee County surveys, maps and plats showing the proposed location of said works and the lands necessary for their successful operation.

The location of petitioner's proposed works, dams, etc., for the development of water-power and the generation of electricity, described in the petition and amended petition in this cause, is the same as the location of the proposed works, dams, etc., described in the record and

judgment in the case brought by the Carolina-Tennessee Power Company against the Hiawassee River Power Company, and reported in 186 N. C., 179, the only difference being that in the reported case the lands and water rights there sought to be condemned were located in what is known as the upper reservoir, while the lands and water rights here sought to be condemned are located in what is known as the lower reservoir—both said upper and lower reservoirs being covered by the one location as marked out and staked off by the petitioner in 1909. Hence many of the questions now presented were considered and determined by us in the case just mentioned. The two cases involve the same development, the same location, and the same improvement; the parties are the same, the only difference being in the tracts of land sought to be condemned in the two actions.

The defendant company was not organized until 1914, several years after the petitioner had staked out the lands in question and adopted its route in accordance with the provisions of its charter. But defendant contends that it has now acquired sufficient territory and water rights within the "lower reservoir" to constitute an independent water-power, which is not subject to condemnation by the petitioner.

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 hydroelectric or water-power development must be considered as settled by our former decisions. In the absence of unreasonable delay or evidence tending to show a want of good faith, or abandonment of its purpose on the part of the petitioner, or some specific legislative authority granting such right, the defendant may not acquire a water-power within the water-power already marked out by the petitioner, and thus destroy the petitioner's superior rights. This would be to allow a smaller water-power to swallow up a larger one; and there is nothing on the present record to warrant such a procedure.

The general questions we are now considering were so thoroughly examined and dealt with in the carefully prepared opinion of the present *Chief Justice* in *R. R. v. R. R.*, 142 N. C., 423, that little, if any more, need be said on the subject. It was there held that, in the absence of statutory regulations to the contrary, the prior right belongs to that company "which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action," citing apposite authorities, and among them Lewis on Eminent Domain, sec. 305, where it is said: "Where the conflict arises out of rival locations over the same property by companies acting under general powers, that one is entitled to priority which is first in making a completed location

over the property, and the relative dates of their organizations or charters are immaterial."

In *C. and O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va., 641, it was held:

"A survey staked out upon the ground as a center line, a preliminary line, or as an actual location, whether delineated on paper or not, if adopted by the corporation, as aforesaid, is a location within the meaning of the statute, and the company first making such location has a right to it superior to that of any other company.

"A railway company may begin the work of location on any part of its contemplated route, and a location of a part only of its road may be held against a rival company seeking the same location as long as such locating company manifests good faith by the diligent prosecution of the work contemplated by its organization."

See, also, *L. H. and T. Co. v. R. R.*, 132 Wis., 313, where the matter is discussed at considerable length.

The constitutionality of petitioner's charter is again assailed by the defendant upon the ground that the Legislature has granted it certain special privileges and special charter rights, which are in violation of the Fourteenth Amendment to the Constitution of the United States. The exceptions addressed to this question must be overruled on authority of *Power Co. v. Power Co.*, 171 N. C., 248; *S. c.*, 175 N. C., 668; *R. R. v. Ferguson*, 169 N. C., 70; *Land Co. v. Traction Co.*, 162 N. C., 314; *R. R. v. R. R.*, 142 N. C., 423. It would only be "threshing over old straw" to repeat here what has been so recently said in these cases. For a valuable discussion of the subject, see *Trust Co. v. Harless*, 15 L. R. A., 505.

The defendant also questions the good faith of the petitioner, and alleges that it does not intend to carry on the business authorized by its charter and thus use the lands sought to be condemned for water-power development, etc. This matter was squarely presented in the case, *supra*, between these same parties, involving the lands and water rights located in what is known as the upper reservoir, and definitely ruled against the defendant's position. The trial court, therefore, properly held that the defendant was precluded from relitigating this question in the present suit. These two suits were brought during the same month; the two controversies are between the same parties; the public improvements are described in identically the same language and are in fact the same identical public improvements. The only difference between the two cases is that different tracts of land, in the same location, are being condemned in the different suits. The rule is well settled that a judgment of a court having jurisdiction of the parties and of the subject matter binds all of the parties and their privies as to all

issuable matters embraced in the pleadings and all material matters within the scope of the pleadings which were in fact investigated and determined. *Coltrane v. Laughlin,* 157 N. C., 287; 72 S. E., 961; *Ferebee v. Sawyer,* 167 N. C., 199; *Cromwell v. Sack Co.,* 94 U. S., 351.

What is said in regard to the question of good faith applies also to the question of laches and the statute of limitations, both of which have been set up in bar of the petitioner's right to recover in this proceeding. These questions were squarely presented and decided against the defendant in the case reported in 186 N. C., 179. But even if this were not so, it appears from the record that the defendant did not decline to sell to the petitioner the lands and water rights here sought to be condemned until 24 November, 1922, and this proceeding was instituted by the issuance of summons on 2 December, 1922, only a few days thereafter. C. S., 1715 and 1716. See, also, *Yadkin River Co. v. Wissler,* 160 N. C., 269; *S. c.,* 33 Ann. Cas., 268, and Lewis on Eminent Domain, sec. 380.

There are a number of exceptions appearing on the record relating to the issue of damages, but all of these have been abandoned by the defendant.

After a careful and critical examination of the whole record, we have found no action or ruling on the part of the trial court which we apprehend should be held for reversible error. The judgment in favor of the petitioner as entered below will be upheld.

No error.

ADAMS, J., not sitting or taking part in the decision.

JOHN S. MICHAUX, ADMINISTRATOR OF JEFF MILLER, v. R. G. LASSITER & COMPANY, A CORPORATION.

(Filed 21 June, 1924.)

Employer and Employee—Master and Servant—Safe Place to Work—Negligence—Fellow Servant—Evidence—Nonsuit—Statutes.

Where the evidence tends only to show that a contractor for the building of a highway has furnished his employee with a proper machine for mixing the concrete, driven by its own power, and while properly working it was so negligently managed by a fellow servant of the plaintiff's intestate that a part thereof fell upon the latter and caused his death; and there is no evidence tending to show negligence on the part of the employer in the selection of the fellow servant or other fault attributable to him, a judgment as of nonsuit upon defendant's motion under the statute is properly rendered.

MICHAUX *v.* LASSITER.

CIVIL ACTION to recover damages for the death of plaintiff's intestate caused by the alleged negligence of defendant company, heard before *Shaw, J.*, and a jury, at November Term, 1923, of GUILFORD.

At the close of the testimony, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

R. G. Strudwick and Adams & Adams for plaintiff.
Parham & Lassiter and King, Sapp & King for defendant.

HOKE, C. J. The evidence tended to show that defendant is a corporation extensively engaged in the construction of roads and streets, and in May, 1922, in the line of its business, was at work in repairing the streets of Greensboro, using for that purpose, among other appliances, a mixer or road paver. This paver was a detached machine working by its own mechanical power and consisting chiefly of the engine, a revolving drum and a large pan or skip which, in the beginning of the operation, rests upon the ground so that the differing ingredients, sand and gravel, etc., can be unloaded into it from the carts. It is then raised by mechanical power to an upright position, dumping its load into the revolving drum wherein the ingredients are properly mixed, and when upright it is fastened and held in its place by a latch, and so held until the operator releases it to drop and take in another load. This machine is controlled and worked by an operative standing on a table or platform through five levers; one starts the machine, two lifts the skip, three dumps the "batch" after it is mixed, the fourth turns on the water, and fifth latches the skip when it is raised into place. In order to the better operation of the machine, it is necessary at times to clean off the ground where the skip rests so it may be level, and at the place and time in question plaintiff's intestate and another hand, employees of defendant, were at work with the machine, their duties being to unload the delivery carts into the pan and to keep the ground where the pan rested clear of any matter dropped from the pan or otherwise, and while so engaged the operator held the skip in place—releasing the same on signal from the workmen below. On this occasion, while intestate was cleaning off the ground and out of view by reason of a shield encircling the machine for its protection, the pan dropped from its place and crushed the intestate so that he died in a few moments. The proof showed that the machine was a standard one recently purchased and installed by defendant company and was in good order; and at the close of the testimony, and before the argument, counsel for defendant admitted in open court that they had offered no evidence tending to show that the mixer was not in good order, and that they would not ask the jury to find that it was not in proper condition.

On these, the facts in evidence chiefly pertinent, we must approve the decision of his Honor directing a nonsuit, being of opinion that from the evidence presented and the admissions of counsel, there is no permissible inference of an actionable breach of duty on the part of the defendant company. It is very generally accepted that in the exercise of reasonable care it is the duty of an employer of labor to provide for his employees a reasonably safe place in which to do their work, to furnish them with appliances and tools suitable for the work in which they are engaged. *Gaither v. Clement,* 183 N. C., 450; *Thompson v. Oil Co.,* 177 N. C., 279, and also to select employees who are competent and sufficient for such work. *Walters v. Lumber Co.,* 163 N. C., 536; *Northern Pacific R. R. v. Peterson,* 162 U. S., 346; and where there is a breach of duty in these respects or any of them, and the same is shown to be the proximate cause of an injury, the employee himself having been without default, an actionable wrong is established. It is also recognized with us, and very generally elsewhere, that unless otherwise provided by statute, as it is in this State in case of railroads, and to a large extent, also, under the Federal Employers' Liability Act, that an employer is not responsible for injuries attributable solely to the negligence of a fellow servant. *Walters' case, supra; Jones v. R. R.,* 176 N. C., 260. Considering the record in view of these authorities and the principles they approve and establish, there has, as stated, been no breach of duty shown on the part of defendant company, the proof and admissions showing that the machine was of standard make, newly purchased and installed, and as a mechanical proposition, operating properly at the time. Nor is there anywhere evidence of default in reference to selecting the operator; and on the facts offered by the plaintiff the injury is necessarily attributable and attributable only to an exceptional negligent act of the operator of the machine, who either failed to fasten the pan or released it in breach of his duty to his fellows. There is no testimony or suggestion that the operator had any authority over the intestate, or tending to show that he stood towards the latter in the place of his principal, being only a fellow servant. The injury was due solely to his default, and the court has correctly ruled that no cause of action has been shown. We are cited by counsel to the case of *Cook v. Mfg. Co.,* 182 N. C., p. 205; *S. c.,* 183 N. C., p. 48, as an authority in contravention of his Honor's ruling, but from those well-considered cases, where the matter is learnedly and fully discussed, particularly in the opinion of *Associate Justice Stacy* in denial of a petition to rehear, it will appear that, owing to the imminence of the danger presented, there was a general rule established by the employer that before restarting the machinery, when same had been stopped for repair, a certain signal should be given by blowing a whistle which could be heard by every one.

Being a general rule established and published by the employer as necessary for the protection of the workmen, and being so established, reasonably to be relied upon by them, it was properly construed as a nondelegable duty on the part of the employer; and under the circumstances the person charged with the duty of carrying out the rule was in no sense a fellow servant, but in that respect represented the principal, and for his negligence the principal was to be considered responsible. But not so here where the sole cause of the injury was the single and exceptional negligent default of a fellow servant presently engaged with the intestate in operating a single machine at which they were at work together.

We find no reversible error, and the ruling and judgment below is Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1924

NORFOLK SOUTHERN RAILROAD COMPANY v. ALBEMARLE FERTILIZER COMPANY.

(Filed 10 September, 1924.)

Carriers—Railroads—Custom — Evidence — Demurrage — Through Shipments.

In an action by a railroad company to recover demurrage on certain shipments made by the consignor to himself and reshipped over another line, evidence is competent to show that it was the custom established between the parties that the consignor mark the cars by a certain method to show destination over the connecting carrier, and thus transport it over the connecting carrier as a through shipment, and that therefore he was not required to handle the shipment at the transfer point.

APPEAL by plaintiff from *Devin, J.*, February Term, 1924, of PASQUOTANK.

This is a civil action brought by plaintiff, a common carrier, against the defendant for demurrage and war tax.

The plaintiff contends that the defendant, a fertilizer company, had a manufacturing plant on the outskirts of Elizabeth City. That it shipped from its plant to itself carload lots of fertilizer to the wharf of the North River Line, on track No. 1 of plaintiff, a local shipment on special contract, and it was defendant's duty to unload same in the free time period allowed by law, which was not done, and this suit is instituted for the demurrage. That bills of lading were issued by North River Line showing that plaintiff had performed its special contract.

The defendant admits the shipments, but denies its liability for any

demurrage. That by custom, well known to the parties, method of doing business and conduct of the parties, the defendant contended that these cars were sent from the defendant's plant consigned to persons along the North River Line, and that it was a continuous freight shipment. That on the side of each car were placed printed forms, and marked on these cards was "To the North River Line for the different consignees." The names of the consignees were written on the cards, etc. When the cards were put on the cars the plaintiff took them to the North River Line, and the defendant had nothing further to do with the cars, and this was the custom well known to plaintiff. The cards were written for the purpose of guiding the destination, and the plaintiff's yardmaster knew exactly what to do. The defendant paid the plaintiff for the charge from defendant's plant to North River Line, and paid the North River Line for the freight on the cars that went over their line. That the shipments were through and not local. The method, custom and manner of doing business between all the parties showed the fertilizers were shipped from defendant's plant to their ultimate destination.

The controversy was for demurrage on twelve cars, eight cars delivered on track No. 1 at the North River Line, and demurrage on four cars delivered to the defendant at its plant loaded with fish scrap. As to the four cars delivered with fish scrap, it was denied that they remained over free time, and the jury so found. This was a question solely of fact. The eight cars on which demurrage was claimed we will consider. The positive evidence is that they were unloaded beyond free time.

The verdict of the jury was against the plaintiff. It excepted, assigned numerous errors and appealed to the Supreme Court.

Thompson & Wilson for plaintiff.
Aydlett & Simpson for defendant.

CLARKSON, J. The controversy between the contending parties was as to whether the shipment of the eight cars was a continuous or through freight shipment or a local shipment. Was there legal evidence sufficient to go to the jury that it was a continuous or through freight shipment? The plaintiff contending and producing evidence on the trial and submitting prayers for instructions that it was not a continuous or through shipment, but local and it had performed its special contract and demurrage should be allowed for admitted delay over free time allowed by law, and on all the evidence it should recover, and the defendant contending and submitting evidence to the contrary.

The testimony of J. H. Leroy, bearing on the question was as follows: "I am manager of the Albemarle Fertilizer Company. I was shipping fertilizer by the North River Line in January and February, 1921, and shipped these cars that have been testified to here. We loaded them in cars at our plant. We have printed forms which we place on the side of the car and it is marked on that printed card 'To the North River Line for the different consignees,' and when that card is found there the Norfolk Southern man takes it to the North River Line. After we load the car at the plant we have nothing at all further to do with it. The North River Line issued the bills of lading. I mean that the card tacked on the cars had the direction to the North River Line and the name of the consignee at some point on the North River Line written on the card also. We had these cards written for that purpose and the yardmaster knows exactly what to do with that. . . . The custom is, as I said, that we load these cars, put the tag or placard on the cars and the yardmaster takes them and is governed by that card as to where to take them, North River Line, whether they go south on the Norfolk Southern or whether going north."

The court below gave the contentions and charged the jury as follows: "Where a railroad company receives cars for through freight shipment to consignees beyond its line and it is necessary to transport cargo between connecting lines it would not be the duty of the consignor to unload and release cars at the point of transfer, and if you find by reason of the method of doing business between plaintiff and defendant that the defendant merely placed a placard on its loaded cars showing the route and destination, and the plaintiff took the cars without further instructions and transported the cars as far as its line extended, and that it was the intention of the parties as shown by such conduct and custom that the plaintiff should receive and transport the cars as one of the carriers in continuous shipment, then nothing else appearing, though no bill of lading or other written contract was issued, it would be a continuous shipment and would not be obligatory on the consignor to unload the cars at the point of transfer. But, if you find the defendant, by paying switching charges to the Norfolk Southern Railroad Company and by taking a bill of lading from the North River Line, recognized this as a separate and distinct shipment or separate and distinct steps of the transportation of its freight, then the duty would rest upon the defendant to unload and release the cars and to apply the rules and regulations with respect to the demurrage."

We think the evidence excepted to by plaintiff on the trial below was properly allowed. There was no error in the refusal of plaintiff's prayers for instruction. There was sufficient legal evidence to be submitted to the jury and they have found for the defendant.

Defendant's evidence tended to show that a usage or custom prevailed between all the parties to the transaction, to treat the dealings with plaintiff as a through freight shipment, and defendant had nothing further to do with the shipment when it was delivered to plaintiff. The court below allowed this evidence, and we can see no error.

In *McDearman v. Morris,* 183 N. C., 78, it is said: "Where there is a well known usage or custom which obtains in a given trade or business, it is presumed that all who are engaged in said trade or business where it prevails contract with a view to such usage or custom, unless the presumption is excluded by agreement of the parties. *Hazard v. New England Marine Ins. Co.,* 8 Pet., 557; 27 R. C. L., 162, and cases cited in note." *Oil Co. v. Burney,* 174 N. C., 382; *May v. Menzies,* 186 N. C., 149.

We do not think the cases cited in plaintiff's brief applicable in the present case.

For the reasons given, there is

No error.

U. W. TARKINGTON v. R. H. CRIFFIELD, NATHAN ARTHUR AND CHARLES EVANS.

(Filed 10 September, 1924.)

1. Statute of Frauds — Promise to Answer for Debt of Another—Evidence—Trials.

A promise to become personally responsible for the debt of another, does not fall within the intent and meaning of the Statute of Frauds, and is not required to be in writing, etc.

2. Instructions—Appeal and Error—New Trials.

In an action to recover on the defendant's promise to pay the debt of another, when the full amount thereof is uncertain, it is reversible error for the trial judge to instruct the jury in effect to answer the issue in a certain amount for plaintiff, should they find from the greater weight of the evidence that the plaintiff had given the credit upon the assurance of the defendant.

THREE civil causes instituted before justice of the peace, consolidated by consent, and tried before *Brown, J.,* and a jury, at March Special Term, 1924, of BEAUFORT.

The first was a suit by plaintiff, a merchant, against Criffield, a farmer, and Nathan Arthur, one of his tenants, for $149.66 for supplies, money, etc., advanced by plaintiff to said tenant for the year 1920.

Second, suit by plaintiff against Criffield and Charles Evans, another tenant, for $45.49 for similar advancements for 1920.

Third, suit by plaintiff against Criffield on written orders of the latter for goods supplied to these two tenants during same year. This last not being disputed.

On the liability of defendant Criffield the following issue was submitted: "Is defendant indebted to plaintiff and if so in what amount?"

Plaintiff, testifying in his own behalf, among other things, said: That in the early part of 1920 defendant Criffield came to witness and told him to let Nathan Arthur and Charles Evans, two of his tenants, for that year, have goods, supplies, etc., and he would be responsible for same to amount not to exceed $150.00 for Arthur and $50.00 for Evans; that plaintiff advanced to said parties on this assurance the amounts claimed, as above stated, and that he would not have trusted either of the men for these sales, but sold them on the promise of Criffield, as stated; that plaintiff, during said year, also advanced to these same tenants goods, supplies and money to the amount of $90.00, this being on written orders of defendant Criffield.

The defendant Criffield, in his evidence, denied the assurance and promise claimed by plaintiff in reference to first two suits, and stated that he told plaintiff that the witness would be liable only for goods advanced to these men on his written order; that plaintiff let them have goods on such orders to the amount of $90.00, and this was all that defendant was liable for or had promised to pay for; that he had tried to pay this amount to plaintiff, who had refused to take it, and defendant could do nothing further, but did not deny owing the $90.00.

The court charged the jury, in effect, that if defendant, before the goods were sold, told Mr. Tarkington, the plaintiff, to let his tenants have these goods to a certain amount, and that he, Criffield, would be responsible for them, and on his promise and assurance the credit was extended to Criffield, the statute of frauds would have no application; and in such case, if the jury should find the facts as testified to by plaintiff, they would answer the issue "Yes, $285.63"; but if they should find the facts as testified to by Criffield, the defendant, they would answer the issue "$90.00."

There was verdict for plaintiff, "Yes, $250.26." Judgment on verdict for plaintiff. Defendant excepted and appealed.

Ward & Grimes for plaintiff.
A. W. Bailey for defendants.

PER CURIAM. The charge of the court as to the application of the statute of frauds is fully supported by our decisions on the subject, and appellant's exception to the validity of the trial on that ground must

be overruled. *Taylor v. Lee,* 187 N. C., 393; *Whitehurst v. Padgett,* 157 N. C., 424; *Peele v. Powell,* 156 N. C., 553; *Sheppard v. Newton,* 139 N. C., 533.

The Court is of opinion, however, that prejudicial error was committed in charging the jury that if they accepted plaintiff's version of the matter the amount would be $285.63. All of these goods were sold or advanced to the two tenants, Arthur and Evans, in the year 1920; and, putting aside a slight discrepancy of a few cents, this $285.63 includes and contains all of the claims, to wit, the $149.66 to Arthur, the $45.49 to Evans, and the $90.00 on the written orders. Plaintiff himself testified that in the original arrangement the amounts to be advanced to these tenants for the year was not to exceed $150.00 to Arthur and $50.00 to Evans—$200.00. And his further testimony leaves it uncertain whether this restriction extended to the entire amount sold or advanced to these parties during the year, or whether the $90.00 advanced on the written orders was in addition to and unaffected by the restriction. Being ambiguous, it is for the jury to determine, even on plaintiff's own evidence, whether the $90.00 advanced on the written order is subject to the restriction stated.

The cause, therefore, must be referred to another jury, and if they again find with the plaintiff as to the promise to pay, the question of the amount will be also submitted to them for decision.

New trial.

STATE v. A. E. JONES.

(Filed 10 September, 1924.)

1. Homicide—Murder—Evidence—Trials—Manslaughter.

Upon the trial of a homicide there was evidence tending to show that the deceased was an employee of the prisoner, and the latter on his premises reproached him for going late to his work, and then followed him therefrom and struck him with a stick, which caused his death; and *per contra* that the deceased had a temper which was easily aroused, and given to violence, and on this occasion attacked the prisoner with his knife, who then struck the fatal blow in self-defense: *Held,* sufficient to sustain a verdict of manslaughter.

2. Same—Instructions—Self-Defense.

Under the evidence in this case: *Held,* an instruction was not erroneous, that if the jury found beyond a reasonable doubt that the defendant voluntarily and intentionally struck the fatal blow, nothing else appearing, he would be guilty of murder in the second degree; and that it would be incumbent upon him to satisfy the jury from all the evidence of facts that would mitigate it to manslaughter or justify the plea of self-defense.

3. Appeal and Error — Instructions — Objections and Exceptions — Verdict—Contentions.

An exception to the statement of the contention of the parties after verdict comes too late to be considered on appeal.

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

Exceptions to parts of the instructions of the judge to the jury will be considered with reference to the relevant parts as a whole, and when no prejudice thus is found, it is not a ground for reversible error.

INDICTMENT for murder of one Alfred Ferrebee, tried before *Devin, J.*, and a jury, at March Term, 1924, of PASQUOTANK.

The cause was submitted on the question of murder in the second degree, of manslaughter, or excusable homicide under a claim of self-defense. Defendant was convicted of manslaughter and sentenced to the State Prison for a term not less than two nor more than five years. From which said judgment defendant appeals, assigning errors.

Attorney-General Manning, Assistant Attorney-General Nash, and Ehringhaus & Hall for the State.

W. I. Halstead, W. L. Cohoon, and Aydlett & Simpson for defendant.

HOKE, C. J. There was evidence on the part of the State tending to show that deceased had been and was in the employ of the prisoner, and on the evening of 20 December, 1923, about six o'clock, the deceased went to the home of the prisoner and being in the house asked for the money due him and another employee, which was given him. That the prisoner then reproached deceased about getting too late to his work and an altercation then ensued, whereupon prisoner ordered deceased from his premises. The latter replied that he would go, and turned to leave, going out of the fence and gate which enclosed the yard and home proper, and out of a second gate into an opening which led to the State highway. That the prisoner pursued him into this outer space, struck him a blow on the head with a large stick which felled him to the ground, and from the effects of which, after lingering, he died three days later.

There was evidence from the prisoner tending to show that the deceased was a man who easily became enraged and when aroused was much given to violence. That on this occasion, having become angered, he was very abusive and prisoner ordered him off. That he turned to go, and prisoner following to see that he left the premises, when they had passed the outer gate, the deceased turned on the prisoner with a knife and the latter struck the fatal blow in his necessary self-defense.

In a comprehensive, correct and intelligent charge, the opposing views were submitted to the jury, and rejecting the prisoner's plea of self-defense and the evidence offered in its support, they have convicted defendant of the crime of manslaughter, and we find nothing to justify us in disturbing the results of the trial.

The first exception is to a portion of his Honor's charge containing a statement of certain facts in evidence bearing on the prisoner's claim of self-defense, the objection being that it expresses an erroneous estimate of these facts to the prisoner's prejudice. An examination of the record, however, will disclose that the court was merely stating a contention of the State in reference to the matter, and the general rule is that such exception should be made at some appropriate time during the trial and is never available when presented for the first time after verdict. *S. v. Barnhill,* 186 N. C., 446; *S. v. Baldwin,* 184 N. C., 789; *Green v. Lumber Co.,* 182 N. C., 681; *S. v. Hall,* 181 N. C., 527.

The defendant excepts further to portions of his Honor's charge as follows: "If you find from the evidence beyond a reasonable doubt that the defendant struck the deceased with a club or stick, and inflicted the wound and fractured the skull, from which the deceased thereafter died, and that this was done intentionally, that it was a voluntary act on the defendant's part, then nothing else appearing, he would be guilty of murder in the second degree, and it would then be incumbent upon the defendant to satisfy the jury from all the evidence of facts that would mitigate it to manslaughter or would excuse it altogether upon the plea of self-defense." (And in the third exception, the court tells the jury:) "That if you should find beyond a reasonable doubt that he struck the blow with a stick or club and inflicted the wound which produced death, and this was done intentionally, nothing else appearing, it would be your duty to return a verdict of guilty of murder in the second degree."

These statements are in exact accord with our decisions on the subject, *S. v. Miller,* 185 N. C., 679; *S. v. Benson,* 183 N. C., 795; and when considered in connection with his Honor's full and correct references to the prisoner's plea of self-defense, the law bearing thereon, and the evidence offered to support it, could have worked no possible prejudice to the prisoner.

In our opinion the cause has been correctly and fairly tried, and no valid exception appearing in the record, the judgment below is affirmed.

No error.

WASHINGTON FURNITURE COMPANY v. BENJAMIN POTTER ET AL.

(Filed 10 September, 1924.)

1. Mortgages—Title—Merger—Presumptions—Intention of Parties.

While ordinarily when the mortgagee of lands afterwards acquires the mortgagor's equity of redemption, the lesser interest merges into the greater, and he becomes the owner of the full title, this result will not follow when the merger would be inimical to the interest of the owner, or would prevent his setting up the mortgage to defeat an intermediate title, such as a subsequent lien or a second mortgage, unless the parties otherwise intended, which will not be presumed contrary to the apparent interest of the parties.

2. Same—Instructions—Evidence—Appeal and Error.

Where the mortgagee of lands has later acquired the mortgagor's equity of redemption, and there is evidence that it was not the intention of the parties to effect a merger to defeat his rights against a junior mortgage it is reversible error for the trial judge to instruct the jury to the contrary.

APPEAL by defendants from *Devin, J.*, at February Term, 1924, of BEAUFORT.

Civil action, by assignee of junior mortgage on lands, to enjoin the foreclosure of a senior mortgage on the same lands, upon the ground that said senior mortgage has been extinguished by merger, the assignee thereof having purchased the equity of redemption in the mortgaged premises.

From a verdict and judgment in favor of plaintiff the defendants appeal, assigning errors.

Ward & Grimes for defendants.

STACY, J. The essential facts are as follows:

1. On 4 March, 1920, J. R. Rowe and wife, being the owners of certain real estate, mortgaged the same to Benjamin Potter to secure the payment of $150.00, evidenced by three promissory notes. This mortgage was duly registered on 22 March, 1920, and in September of that year it was assigned to J. E. Overton by endorsement, as follows: "I hereby transfer the within mortgage, and notes thereto, to J. E. Overton, without recourse to Benjamin Potter." (*Williams v. Teachey*, 85 N. C., 402; *Morton v. Lumber Co.*, 154 N. C., 336.)

2. On 28 June, 1920, a second mortgage, covering the same premises, was executed by J. R. Rowe and wife to Gorham & Bonner to secure

the payment of $475.00. This mortgage was duly registered 2 July, 1920, and thereafter assigned and transferred to the plaintiff for a valuable consideration.

3. On 4 October, 1920, J. R. Rowe and wife, by deed, containing full covenants of warranty, conveyed said mortgaged premises to J. E. Overton.

4. J. E. Overton, through his assignor, having advertised the property for sale under the first mortgage, the plaintiff, assignee of the second mortgage, brings this action to enjoin the sale, alleging that the first mortgage has been extinguished by merger, the assignee thereof having purchased the equity of redemption in the mortgaged premises. It is admitted that the value of the land is less than the balance due on the debts secured by the two mortgages.

5. There was allegation to the effect that the defendant J. E. Overton agreed to relinquish his rights under the first mortgage, and that this was taken into consideration in adjusting the purchase price of the land, or the amount he was to pay for the mortgagors' equity of redemption. But this was denied by Overton. He testified that no extinguishment of the first mortgage was intended, because such would work a forfeiture of his interests thereunder.

6. The trial court instructed the jury peremptorily that, upon the record evidence, the second mortgage—the one held by plaintiff—had become a first lien upon the property, because the senior mortgage had been extinguished by merger. To this instruction the defendants excepted, and the same is assigned as error.

It is undoubtedly the general rule of law that where one who holds a mortgage on real estate becomes the owner of the fee, and the two estates are thus united in the same person, ordinarily the former estate merges in the latter. *Hutchins v. Carleton*, 19 N. H., 487. The equitable or lesser estate is said to be swallowed up, or "drowned out," by the legal or greater interest. But this rule does not apply where such merger would be inimical to the interests of the owner, as, for example, where it would prevent his setting up the mortgage to defeat an intermediate title—such as a subsequent lien or a second mortgage, as in the instant case—unless the parties intended otherwise; and this intention will not be presumed contrary to the apparent interests of the owner. *Hines v. Ward*, 121 Cal., 115; Jones on Mortgages, sec. 870; 19 R. C. L., 484; Note: 39 L. R. A. (N. S.), 834, *et seq.* As to whether such was intended by the parties is a question of fact; and the courts will "permit or prevent the application of the doctrine as the same may accord with the intent of the parties and the right and justice of the matter." *Odom v. Morgan*, 177 N. C., p. 369.

The following statement of the law, taken from 27 Cyc., 1379, we apprehend, is applicable, in substance at least, to the facts of the present case:

"The technical doctrine of merger will not be applied contrary to the agreement or the express or implied intention of the parties; and, therefore, in equity, there will be no merger of estates when a mortgagee receives a conveyance of the equity of redemption, when such a result would be contrary to his real intention in the transaction, or to the bargain made by the parties at the time. This is the case where the mortgagee means to keep the security alive for his own protection as against other liens or encumbrances, and also where the conveyance is not intended by the parties to be in satisfaction of the mortgage debt, but only as additional security for it. The question whether or not the parties intended that a merger of estates should take place is a question of fact. It is not settled by the mere recording of the deed. But the intention that there should be no merger may be shown by a stipulation in the deed or other express declaration of the parties, or the fact that the mortgage does not cancel or surrender the evidences of the debt or release the mortgage, but on the contrary, retains them, or that he assigns the mortgage to a bona fide purchaser, representing it as a good and valid security. On the other hand, if he assumes to deal with the estate as absolute owner, and conveys it to another, it proves a merger. In the absence of any such proof, the question must be determined by a preponderance of the evidence presented."

In the face of defendant's testimony that no merger or extinguishment of the senior mortgage was intended, the court's peremptory instruction to the contrary was erroneous. The cause will be remanded, to the end that it may be submitted to another jury under instructions not inconsistent with the principles announced herein.

New trial.

W. JOHN ASKEW v. BERNARD DILDY ET AL.

(Filed 10 September, 1924.)

Wills—Devises—Lapsed Legacies—Statutes—Death of Beneficiary in Lifetime of Testator.

A devise to the son of a portion of the testator's lands, who died during the life of the testator, leaving children who survive the testator, does not lapse, but goes to his children, the grandchildren of the testator, at the latter's death, under the provisions of C. S., 4168, no contrary intent of the testator appearing by a construction of his will.

APPEAL by plaintiff from *Devin, J.*, at Spring Term, 1924, of GATES.

Special proceeding, for partition of lands, brought by plaintiff, purchaser of the interests of the surviving children and widow of J. T. Dildy, against the defendants, surviving children of C. P. Dildy. The lands sought to be partitioned were owned by J. T. Dildy at the time of his death, and devised by him under his last will and testament.

From a judgment sustaining a demurrer the plaintiff appeals.

A. P. Godwin and Ehringhaus & Hall for plaintiff.

T. W. Costen and McMullan & Leroy for defendants.

STACY, J. The case involves a construction of the will of J. T. Dildy.

In the first item of his will the testator left approximately one-half of his estate to his son, C. P. Dildy, adding the following words immediately after the devise: "But it is understood that said C. P. Dildy, after my death, is to take care of my wife, M. Susan Dildy, and to furnish her all the necessaries of life, and after her death to give her a decent burial at his expense."

The second item reads as follows: "I give and bequeath unto the rest of my legal heirs the balance real estate, to be equally divided between them in any way they see fit, by sale or division."

C. P. Dildy was living with his father at the time the will was made, but died during his father's lifetime, leaving a widow and four children him surviving. The other children of the testator take under item two of his will.

The plaintiff contends that as C. P. Dildy predeceased his father the devise to him lapsed; and that as it embraced a large portion of the testator's estate, the whole will should be declared void. *Burleyson v. Whitley,* 97 N. C., 295. Plaintiff has acquired by purchase the interests of all the heirs of J. T. Dildy in the lands owned by him at the time of his death, except such as may be held by the children of C. P. Dildy.

The defendants, on the other hand, who are the surviving children of C. P. Dildy and grandchildren of the testator living at his death, contend that, by reason of the provisions of C. S., 4168, the devise in fee to their father never lapsed, but that they take the same, by purchase, under the will, in such proportions and estates as they would have acquired it by descent, had their father died solvent and intestate, immediately after the death of the testator, without leaving a widow or representatives of a deceased child or children. The terms of this statute are as follows:

"When any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for

any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportions and estates as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

The only land claimed by the defendants is that devised to C. P. Dildy in the first item of the will. It is conceded that if the position of the defendants be correct, they are the sole owners of the land claimed by them, and the judgment sustaining the demurrer should be affirmed. But it is the contention of the plaintiff that a "contrary intention appears from the will," and hence the devise should be held to have lapsed.

We are unable to discover from the will such a contrary intention on the part of the testator as to render the statute inoperative in the instant case. *Cox v. Ward*, 107 N. C., 507. The devise in fee to C. P. Dildy was not upon a condition precedent, as was the case in *Lefler v. Rowland*, 62 N. C., 143, cited and strongly relied upon by plaintiff. *Wellons v. Jordan*, 83 N. C., 371. Nor is it necessary for us presently to say whether the provision for maintenance and decent burial amounts to a personal obligation on the devisee (*Lumber Co. v. Lumber Co.*, 153 N. C., 49), a charge on the rents and profits from the land (*Wall v. Wall*, 126 N. C., 405), or a charge on the land itself (*Helms v. Helms*, 135 N. C., 171). *Fleming v. Motz*, 187 N. C., 593; *Bailey v. Bailey*, 172 N. C., 671. M. Susan Dildy, widow of the testator, is not a party to this proceeding, and the plaintiff has no partitionable interest in the land devised by J. T. Dildy to his son, C. P. Dildy, and now held by the children of the said C. P. Dildy, defendants herein.

The question is not presented on the instant record as to whether the children of C. P. Dildy, who are grandchildren of the testator, take any interest in the remaining lands under item two of the will. But this would seem to be involved in no serious doubt as to its proper solution. If the devise to C. P. Dildy is to take effect and vest a title in his surviving issue "in the same manner, proportions and estates as if the death of such person had happened immediatly after the death of the testator," then the children of C. P. Dildy apparently take their father's place as devisee under the will, and stand in his shoes as such. In this case they would not be among the "rest" of the testator's legal heirs.

No error having been made to appear, the judgment of the Superior Court must be upheld.

Affirmed.

BYRD & PARKER v. JAMES C. DAVIS, AGENT, AND THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 September, 1924.)

1. Courts — Jurisdiction — Federal Government — Director General of Railroads—War.

The United States Government is bound by the appearance of the Director General of Railroads, submitting to the jurisdiction of the State court in an action against a railroad company under government control, only to the extent of his authority as authorized by the general Federal statute on the subject.

2. Courts—Federal Government—Decisions—State Courts.

The decision of the Supreme Court of the United States is controlling in the State court, upon Federal questions involving the liability of the United States Government in matters relating to the liability of carriers under the control of the Federal Government as a war measure.

PETITION by defendant, Director General of Railroads, to rehear this case, reported in 187 N. C., 575.

Rountree & Carr; Stevens, Beasley & Stevens for defendant, petitioner.

George R. Ward and H. D. Williams for plaintiffs, respondents.

STACY, J. This case was originally decided by us on 16 April, 1924. Since that time the Supreme Court of the United States has rendered a contrary decision in a case essentially similar to the one at bar, and which we consider a controlling authority on the question here presented. *Davis v. Donovan,* 44 Sup. Ct., 513 (decided 26 May, 1924), approving *Manbar Coal Co. v. Davis, Agent* (Circuit Court of Appeals, Fourth Circuit, 10 March, 1924), 297 Fed., 24, where the question is discussed in a learned opinion by *Rose, Circuit Judge.*

On the trial the following issue was submitted to the jury and answered by them in the negative: "Were the three mules, or any of them described in the complaint, delivered to the Director General of Railroads, operating the Atlantic Coast Line Railroad?"

The mooted question presented by the pleadings and the verdict is whether the defendant, as Director General of all the railroads over which the shipment was routed, submitted himself to the jurisdiction of the court in his capacity as Director General of the initial and connecting carriers, as well as of the delivering carrier. The plaintiffs were entitled, as a matter of right, to proceed against the defendant only in his capacity as Director General of the Atlantic Coast Line

Railroad. As this was the only capacity in which the United States consented to be sued in an action like the present, the defendant's answer should be construed in conformity with the statute and orders under which such consent was given, and not otherwise. *St. Louis, B. & M. Ry. Co. v. McLean,* 253 S. W., 248.

No liability having been established against the defendant in the capacity in which he was served, or in which he answered, it follows that our former decision granting a new trial must be reversed, and the judgment of the Superior Court dismissing the action as originally rendered will be affirmed.

Petition allowed.

NORFOLK SOUTHERN RAILROAD COMPANY ET AL. V. W. M. FORBES, SHERIFF, ET AL.

(Filed 10 September, 1924.)

1. Taxation—Counties—Municipalities—Correction of Records.

Where the record of the board of county commissioners, through a clerical error, states that a tax levy for general county purposes is 20 cents on the $100 valuation of property, this error may subsequently be corrected by the board, at its own instance, to correctly show that in fact the levy was actually made for 15 cents for general county purposes, 5 cents thereof being for the improvement of the courthouse and county home, and thus within the constitutional requirement.

2. Constitutional Law—Amendments—Statutes—Repeal.

An amendment to the Constitution will not invalidate an existing statute not expressly or impliedly repealed thereby, or unless its repugnancy is so manifest as to leave no room for a reasonable doubt of its unconstitutionality.

APPEAL from *Devin, J.,* dissolving an order restraining the collection of a tax. From CAMDEN.

The board of commissioners of Camden County levied taxes for 1923, which were entered of record as follows: School tax, 75 cents; county tax, 20 cents; road tax, 25 cents; road bond tax, 15 cents; pension tax, 1 cent. Total, $1.36.

The plaintiffs brought suit to enjoin the collection of the tax for pensions and of any tax for the general county fund in excess of 15 cents on the $100 valuation of property. The defendant Forbes, sheriff and tax collector, filed an answer, alleging that the minutes of the board of commissioners as originally entered did not "speak the truth as to the

levy for the county fund"; that the tax levied for this fund was in truth only 15 cents, and for the improvement of the courthouse and county home 5 cents on the $100 valuation of property, and particularly that the last-named tax was not a part of the general county fund; that the board of commissioners, by resolution properly passed, had amended and corrected their minutes so as to make them speak the truth, and that the levy actually made when the board first met for assessing and apportioning the tax was as follows: School tax, 75 cents on $100 property; county general fund, 15 cents on $100 property; improvement to courthouse and county home, 5 cents on $100 property; road, 25 cents on $100 property; road bonds, 15 cents on $100 property; pensions, 1 cent on $100 property.

The board of commissioners, by leave of court, appeared as a party defendant, and adopted the answer filed by its codefendant.

When the motion to continue the restraining order was heard, the defendants offered a certified copy of the minutes of the board, made 26 April, 1924, in part as follows:

"The chairman informed the board that the minutes of the meeting of board, 2 July, 1923, were incorrect, and by mistake did not record the true act and intent of the board; and at said meeting relative to levy of tax for county fund, after investigation and discussion by the board as to the mistake in the record of said minutes, the following resolution and motion was made and carried:

"It appearing to the board that the minutes of this board of 2 July, 1923, with reference to levy of tax, was and is incorrectly stated, and that the same should be amended to speak the truth, it is, therefore, upon motion made and carried, that the said minutes as pertaining to tax levy shall be amended, as *nunc pro tunc,* to record the true act and intention of this board at said meeting, which was incorrectly stated in said minutes, and which shall be amended to read as follows"—reciting what the defendants say was the correct levy.

The defendants offered also the affidavit of the chairman and the clerk of the board, to this effect: "At the meeting of this board on 2 July, 1923, the tax levy for the different objects of the county was made, but the minutes of said meeting with reference to said levy were incorrectly made by mistake and did not speak the real act and intention of the said board of commissioners with respect to the levy for county fund, which should have been stated as 15 cents on the $100 property, and for improvement to the courthouse and county home 5 cents on the $100; that the said minutes of this board have been amended at a meeting thereof this day so as to speak the truth, and

that the levy as recorded in said minutes of the meeting of this board of 2 July, 1923, as to tax levy shall read as follows"—setting out the correction.

The plaintiffs offered no evidence in contradiction of that which was offered by the defendants. His Honor found the following facts:

1. The matters set forth in the answer of the defendants and the affidavit of the board of county commissioners are true. The Board of Camden County Commissioners, at the proper time for levying taxes in said county, made a levy of 15 cents on the $100 worth of property for the general county fund, and at the same time levied an additional amount of 5 cents on the $100 worth of property for a special purpose, to wit, for the improvement of the county home and the courthouse, and that by inadvertence the two said amounts were added together, and the minutes of the board of county commissioners incorrectly made it appear as if the levy had been made of 20 cents on the $100 worth of property, whereas in truth and in fact two separate and distinct levies were at the time made, as above set out.

2. The board of county commissioners of Camden County, by proper resolution, has corrected said mistake and made the minutes of said board correctly show the action which was taken by the board at the time of the original levy.

Thereupon it was adjudged that the tax was valid and that the restraining order should be dissolved. The plaintiffs appealed.

Thompson & Wilson for plaintiffs.

ADAMS, J. The questions arising on this appeal are substantially the same as those which were decided in *R. R. v. Reid*, 187 N. C., 320. There the Norfolk Southern Railroad Company, one of the plaintiffs in the case now before us, alleged that the board of commissioners of Pasquotank County had levied a tax of 18 cents on all property of the value of $100, contrary to the provisions of Article V, section 6, of the Constitution, and insisted that the tax in excess of 15 cents was levied, not for a special purpose, but for supplementing the general county fund. It insisted further that the provisions for supplementing the county fund (Public Laws 1923, ch. 7) could not be sustained, and that the entire act must therefore fail. In his answer the defendant Reid alleged that the board of commissioners had levied a tax of only 15 cents for general purposes and a tax of 3 cents for the construction and maintenance of bridges and the maintenance of the county home. Upon the questions raised by the pleadings and presented for decision the court held (1) that the tax of 3 cents was levied for a special pur-

pose if for the construction, repair, or maintenance of bridges and the county home; (2) that a tax cannot be levied under the act of 1923, *supra*, to supplement the general county fund; (3) that the entire act is not for this reason invalid; (4) that while the minutes of the board of commissioners could not be collaterally attacked, they could under certain circumstances be amended in like manner with other records so as to conform to the facts. It was suggested that any alteration of the minutes could be made only by the board, and then not for the purpose of modifying or changing the tax actually levied, but merely to correct an erroneous record and cause it, in the language of the law, "to speak the truth" concerning the tax. The court did not hold or intimate that the board of commissioners had power at a subsequent meeting to set aside or modify a tax which had been regularly levied as provided by law.

We concur with the appellants in saying that the board could not with retroactive effect change the resolution it had purposely adopted and the tax it had purposely imposed; but several decisions of this Court recognize and approve the power of a court to correct an erroneous record, particularly when the correction of the error affects only the original parties, and the rights of others are not involved.

We do not understand from the evidence offered by the defendants that the commissioners made a levy of 20 cents in one item to include the tax both for the general fund and for the courthouse and the county home, and afterwards undertook to correct this sort of an error by separating the one tax from the other. In the corrected minutes it is said that the first record was incorrect and by mistake showed neither the true act nor the intent of the board, and this statement is repeated in the affidavit of the chairman and the clerk. If the minutes were erroneous as to what the commissioners intended to do and what they actually did, why should they not be corrected? The minutes of 26 April and the affidavit obviously signify that the draftsman did not record the tax as it had really been levied by the commissioners. Certainly they neither levied nor intended to levy any tax on 26 April, 1924.

The plaintiffs contest the pension tax on the ground that it is provided for in section 5164 of the Consolidated Statutes (enacted in 1909), and that the later amendment to Article V, section 6, of the Constitution is prospective—that is, that the legislative approval of the tax must be subsequent to the constitutional amendment. Section 6 of Article V provides that "the total of the State and county tax on property shall not exceed 15 cents on the $100 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."

The Constitution, Article II, section 7, directs that beneficent provision be made for the poor, the unfortunate, and the orphan, and the Court has said that the law providing pensions for persons disabled in war, and their widows, was enacted in the discharge of a legal as well as a moral obligation. *Board of Education v. Comrs.*, 113 N. C., 379, 383. The tax for pensions is designated in the statute as a special tax (section 5164), which is to be levied for each year, at the same time and in the same manner as other county taxes are levied. Whether this section be regarded as general or special, it meets the requirements of Article V, section 6, *supra,* and its efficacy is not impaired by this section of the Constitution. It is a familiar principle that existing statutes not expressly or impliedly repealed by an amendment to the Constitution remain in full force and effect, and that a statute will not be declared void unless the breach of the Constitution is so manifest as to leave no room for reasonable doubt. *Coble v. Comrs.*, 184 N. C., 342, 348; *R. R. v. Cherokee County,* 177 N. C., 86, 97; 12 C. J., 725, sec. 97, and cases cited.

We do not construe the judgment as a final disposition of the action, but as an adjudication that, upon the evidence offered upon the hearing, the tax should be sustained and the restraining order dissolved.

The judgment of his Honor is

Affirmed.

CATHERINE W. BROWN, ADMX., v. W. H. JENNINGS, TRUSTEE.

(Filed 10 September 1924.)

1. Mortgages—Wills—Estates—Remainders — Equity — Deeds and Conveyances—Registration—Injunction.

A wife joined in a mortgage of her husband on two tracts of his land, and thereafter conveyed to a purchaser in fee simple with the usual warranty of title, tract No. 2, both duly registered, and subsequently died devising tract No. 2, to his wife for life and a portion thereof to his nephew, and the other portion to his son, the will having been probated after the deed to the purchaser of tract No. 2 had been duly registered, and thereafter the mortgagee proceeded to foreclose under the power of sale in his mortgage. In proceedings by the administratrix to enjoin the sale: *Held*, the equity of the mortgagee in tract No. 2 was superior to that of the life estate of the widow and of the remaindermen, with the right of the latter three to redeem the land by paying the mortgage debt.

2. Same—Exoneration.

Held, under the facts in this case, the equities of the widow and remaindermen under the will were equal, neither being entitled to exoneration against the others.

3. Same—Deeds and Conveyances—Purchasers.

Where lands devised by the husband to his widow for life with remainder over have been mortgaged with the joinder of the wife during his lifetime, and also conveyed thereafter to a purchaser in fee simple by deed duly recorded before the probate of his will has been made: *Held*, the purchaser had a superior equity to that of the life tenant and remaindermen under the will.

4. Same—Parties—Judgments.

In a suit to enjoin the foreclosure of a mortgage made by the deceased during his life brought by his administratrix after his death involving certain equities of his widow as a life tenant and the remaindermen claiming under his will: *Held*, it was necessary to make those claiming under the will parties to the action in order to bind them by the decree of the court.

5. Mortgages—Deeds in Trust—Power of Sale.

The power of sale contained in a mortgage is the contract of the parties, and must be strictly followed by the mortgagee to be a valid execution of the power.

6. Dower—Mortgages.

Where the widow in the lifetime of her husband has joined in his mortgage of his land she is barred of her right to dower therein.

7. Mortgages—Sales—Equities—Estates—Contingent Interests — Investment—Payment Into Court.

Where the owner of lands has mortgaged the same during his life as tracts numbered 1 and 2, and has later conveyed tract No. 2 to a purchaser in fee simple, and has devised tract No. 1 for life with remainder over: *Held*, the mortgagee should hold the proceeds of the sale after the satisfaction of his mortgage for the life tenant and remaindermen, who may determine whether the surplus be invested in accordance with their equities, or the interest of the life tenant be paid in cash under the provisions of the statute, C. S., 1791, or the mortgagee may relieve himself of liability by paying the fund into court. C. S., 2592.

APPEAL from judgment and decree rendered by *Devin, J.*, at January Term, 1924, of PASQUOTANK.

On 3 January, 1918, James E. Brown, owner in fee of two certain tracts of land in Pasquotank County, with his wife, Mary E. Brown, conveyed the same, describing them as tract No. 1 and tract No. 2, by a deed of trust to the defendant, W. H. Jennings, for the purpose of securing the payment of a note recited therein, executed by James E. Brown and due one year after date. This deed of trust was duly recorded in Pasquotank County.

Thereafter, the said Brown and wife, for a valuable consideration recited therein, by a deed duly recorded and containing the usual warranties conveyed the land described as tract No. 2 in the deed of trust to Ransom Price in fee simple.

Thereafter, the said James E. Brown died, having first made and published his last will and testament which was duly probated and recorded on 11 December, 1919, in the office of the clerk of the Superior Court of Pasquotank County. By this will, the said James E. Brown devised tract No. 1, described in the deed of trust to his wife, Mary E. Brown, for her life and at her death he devised a portion of the said tract to his nephew, Cleon W. Brown, and the remaining portion to his son, Jesse Brown, to each in fee simple.

Mary E. Brown, the wife, Cleon W. Brown, the nephew, and Jesse Brown, the son, all survived James E. Brown. Cleon W. Brown thereafter died intestate and the plaintiff has been duly appointed and has duly qualified as his administratrix.

Default having been made in the payment of the note secured in the deed of trust, defendant, W. H. Jennings, trustee, claiming to act under the power of sale contained in the deed of trust, advertised for sale on 25 February, 1922, "only the remainder interest of Cleon W. Brown and Jesse Brown" in and to tract No. 1 as described in the deed of trust and was proceeding to sell "only the said remainder interests" for the payment of the said note. The power of sale in said deed of trust, under which the defendant advertised, provides that if default shall be made in the payment of the said note, "it shall be lawful for and the duty of the said W. H. Jennings, trustee, to sell the lands aforesaid at the courthouse door in the county aforesaid after due advertisement according to law, to the highest bidder for cash and make title to the purchaser in fee and out of the proceeds after paying off and discharging the said note and retaining 5 per cent commissions for his services, pay the balance, if any, to the said James E. Brown."

Cleon W. Brown, at the date of his death, owed a large number of debts and his personal assets being insufficient to pay the same, it will be necessary to sell his real estate, including his interest in tract No. 1 devised to him by James E. Brown, to make assets for the payment of said debts.

The plaintiff alleges that the action of the defendant trustee in so offering for sale the interest of her intestate, Cleon W. Brown, is "wrongful and unlawful and not in accordance with the terms of the trust and the rights of the parties and that if defendant is permitted to sell the same as he threatens to do the plaintiff and the creditors

of the estate of Cleon W. Brown will be irreparably damaged." She further alleges that tract No. 2 and the life estate of Mary E. Brown in tract No. 1 should be first sold by the trustee in exoneration of the remainder interest devised to her intestate, Cleon W. Brown.

Defendant in his answer admits the material allegations of the complaint but alleges that the debt evidenced by the note of James E. Brown and secured in the deed of trust was the debt of Cleon W. Brown and not of James E. Brown and that therefore the interest of Cleon W. Brown in the land devised to him by James E. Brown and covered by the deed of trust should be first sold to pay off and discharge said note.

Upon motion of plaintiff an order was made, while the action was pending, restraining the defendant from proceeding further with the sale as advertised until the final hearing.

At the trial, by consent, the only issue submitted to the jury was, "Were the note and deed of trust described in the complaint executed by James E. Brown and wife for the benefit of Cleon W. Brown as alleged in the answer?" To this issue the jury responded, "No."

Thereupon the court "ordered, decreed and adjudged that the defendant be and he is hereby restrained and enjoined permanently from selling under said deed of trust as advertised and that the defendant as trustee be restrained and enjoined permanently from selling the interest of plaintiff's intestate until after the sale of the interest of Mary E. Brown in the property described in the pleadings in this cause and until after the sale of the property described in said trust other than that in which an interest was devised to plaintiff's intestate and that the interest of plaintiff's intestate be sold and offered for sale only after the sale of the other property and interest conveyed by said deed of trust and only in the event that through such sale a sufficient amount is not realized to pay the debt secured in said deed of trust and that only in the event the sale of the interest of Mary E. Brown and the sale of the other lands described in said trust deed shall fail to bring sufficient amount to pay the said debt and expenses of foreclosure shall defendant trustee be permitted to offer for sale the interest of plaintiff's intestate."

The defendant moved for a judgment dissolving the injunction and dismissing the action and upon motion being denied excepted and assigned as error the refusal of the court to dissolve the injunction or restraining order and to dismiss the action.

The court then having overruled defendant's objection to the judgment tendered by plaintiff and having signed the same as set out in the record, defendant excepted and assigned this action of the court as error.

These are the only exceptions and assignments of error appearing in the case on appeal.

Ehringhaus & Hall and W. L. Small for plaintiff, appellant.
Aydlett & Simpson for defendant, appellee.

CONNOR, J. The jury has found, as appears by the answer to the only issue tendered and submitted at the trial, that the debt evidenced by the note of James E. Brown secured by the deed of trust executed by Brown and wife was not the debt of Cleon W. Brown, plaintiff's intestate; thus the only allegation upon which the defendant relies to support his contention that Mary E. Brown, the widow, to whom a life estate is devised, has an equity superior to that of the remaindermen, with respect to the foreclosure of the deed of trust by the exercise of the power of sale contained therein, is not sustained.

At the date of the deed of trust James E. Brown, the debtor, was the owner in fee simple of the land conveyed therein. At his death, by virtue of his will, Mary E. Brown, his widow, became the owner of a life estate and Cleon W. Brown, his nephew, and Jesse Brown, his son, became the owners of the remainder in tract No. 1 described in the deed. This land came to them subject to the deed of trust and neither the widow nor the remaindermen have any superior equity in the said land. Either had the right to redeem the land from the deed of trust by paying the note secured therein and their equities being equal, each was entitled to exoneration from the other in proportion to the value of the respective interests devised to them in the will. This being true, the sale of the interests of the remaindermen in the land, subject to the deed of trust, by the trustee in exoneration of the interest of the life tenant was properly enjoined by the court and there was no error in overruling defendant's motion to dissolve the restraining order and to dismiss the action.

However, inasmuch as upon the facts appearing in the record the equities of the life tenant and the remaindermen are equal, neither is entitled to exoneration of his or her interest in the land by the sale of the interest of the other, in the land which is subject to the deed of trust. There was error in ordering and decreeing that the trustee be restrained from selling the interest of the remaindermen until after the sale of the life estate and therefore the decree should be modified by striking out so much thereof as thus restrains the trustee.

Tract No. 2 described in the deed of trust was conveyed by the grantors, James E. Brown and wife, to Ransom Price in fee simple, with the usual warranties, and the deed of trust, having been duly recorded prior to their deed to Price, Price took the same subject to the pro-

visions of the said deed of trust. However, having paid value for the land thus conveyed to him, Price has an equity to have the land devised in the will to Mary E. Brown for life and then to Cleon W. Brown and Jesse Brown sold before the sale of tract No. 2 by the trustee. His equity arises from the fact that he paid value for the same, and from the further fact that his deed was made and recorded before the probate of the will under which Mary E. Brown, Cleon W. Brown and Jesse Brown take title. Therefore, it was error to restrain the sale of the interest of the remaindermen "until after the sale of the property described in said trust other than that in which an interest was devised to plaintiff's intestate." The decree should be modified by striking out so much of the same as thus restrains the trustee.

This cause is remanded to the Superior Court of Pasquotank County in order that the decree may be modified in accordance with this opinion. Only the plaintiff, administratrix of Cleon W. Brown, one of the remaindermen, and the defendant, the trustee in the deed of trust, are parties to this action. If either party desires to do so he should have leave to make Mary E. Brown, the widow, Jesse Brown, the son, and other remainderman, and Ransom Price, the grantee of tract No. 2, parties to this action. No order, judgment or decree in this action can be binding upon them or either of them until they are thus made parties. If they are made parties, then, the Superior Court of Pasquotank County, upon motion of either party, can determine whether the deed of trust should be foreclosed by a decree and sale under the orders of the Court or whether the foreclosure should be made by the trustee under the power of sale.

The power of sale contained in the deed of trust provides that if default shall be made in the payment of the said note when due it shall be lawful for the said W. H. Jennings, trustee, to sell said lands and make title to the purchaser in fee and after paying the note and interest and deducting commissions for his services out of the proceeds to pay the balance to the said James E. Brown.

The law as stated in Cyc., Vol. 27, 1465, has been often approved by this Court. "A power of sale contained in a mortgage or deed of trust must be strictly pursued and all its terms and conditions complied with in order to render the sale valid." *Ferrebee v. Sawyer*, 167 N. C., 199; *Eubanks v. Becton*, 158 N. C., 230.

In the last-cited case *Justice Allen* says: "Powers of sale in a mortgage are contractual and as there are many opportunities for oppression in their enforcement, courts of equity are disposed to scrutinize them and to hold the mortgagee to the letter of the contract. If a different view should prevail and we could dispense with some stipula-

tions in the power because we could not see that injury had ensued from failure to observe it we could practically destroy the contract of the parties."

The same rule is stated very clearly and forcibly in 19 R. C. L., 592, at the beginning of sec. 707, as follows:

"While a power of sale contained in a mortgage or trust deed is valid and a sale thereunder may confer a good title on the purchaser the powers of the person foreclosing thereunder are limited and defined by the instrument under which he acts and he has only such authority as is thus expressly conferred upon him, together with the incidental and implied powers that are necessarily included thereunder."

Therefore, unless facts are clearly established from which some equity arises in favor of one who owns land or some interest therein subject to a mortgage or deed of trust, the trustee must advertise and sell in strict conformity with the terms of the power conferred upon him by the mortgagor or trustor and relied upon by the creditor for the security of his debt. The duty of the mortgagee or trustee is primarily to the creditor and secondarily to the mortgagor or those who claim under him. Where the interests of the creditor will not suffer and equities arise upon the facts admitted or established in favor of those who claim under the mortgagor or trustor, which are not equal, the mortgagee or trustee has the right in the exercise of good faith and a sound discretion to sell the land conveyed to him so as to preserve a superior equity if consistent with the rights of the creditor. In this case the widow joined with her husband, the owner of the land, in the execution of the deed of trust, and is thereby barred of her right to claim dower in the land conveyed by the deed of trust. The husband, by item 2 of the will, "gave and devised to his wife for and during the term of her natural life all of his real estate of every kind, class and description wheresoever situated." No right to dower is involved in this case, and therefore the procedure directed to be pursued in the case of *Overton v. Hinton*, 123 N. C., 1, does not apply.

The owner of the life estate and the remaindermen, by virtue of the will, stand in the place of James E. Brown, the grantor and debtor, who is now dead, neither having any equity superior to the other.

Upon the facts in this record the trustee, if called upon to foreclose by the exercise of the power of sale should advertise and sell the lands as described in the deed of trust, first selling tract No. 1, and if a sum sufficient to pay off and discharge the note, interest and commissions is realized from the sale of the same, then tract No. 2, having been conveyed by the grantor for value and prior to the vesting of any title or estate in tract No. 1 in Mary E. Brown, Jesse Brown or Cleon W. Brown should be exonerated; it should be sold only in the event

that the sum realized from the sale of tract No. 1 is not sufficient to pay the note, interest and costs.

The surplus, if any, from the sale of tract No. 1, payable under the terms of the power of sale to James E. Brown, who is now dead, should be held by the trustee for the life tenant and remaindermen who now represent James E. Brown, deceased, in accordance with their respective interests in the land devised to them and subject to the deed of trust. They may determine whether or not they desire that said surplus be invested so that the life tenant may have and enjoy the income therefrom during her life and the remaindermen have the same at her death, or whether or not they prefer to have the interest of the life tenant ascertained and paid to her in cash as provided by C. S., 1791, and the balance paid over at once to the remaindermen. If the life tenant and the remaindermen fail to agree as to the disposition of such surplus, the trustee may pay the same into the office of the clerk of the Superior Court of Pasquotank County in accordance with the provisions of C. S., 2592, and thus be relieved of any further liability therefor.

The costs incurred upon appeal to this Court will be paid one-half by appellant and the remaining one-half by the appellee.

Modified and affirmed.

IN RE SCOTT DILLINGHAM'S APPLICATION FOR LICENSE TO PRACTICE LAW.

(Filed 10 September, 1924.)

1. Attorneys at Law—License to Practice — Applicants — Protest — Procedure.

Where an applicant to practice law has complied with the preliminary requirements of the statute and the rules of Court as to his ability and moral character, etc., to stand for his examination by the Court, and pending his examination a protest has been filed as to his moral fitness to practice this profession, the matter of granting him a license becomes one of general interest, and he may not then voluntarily withdraw his application and stop the inquiry of the Court entered upon under the protest filed.

2. Same—Burden of Proof.

The burden is upon the protestants to show the moral unfitness of an applicant for examination to practice law when the applicant has complied with the preliminaries of the statute and the rules of Court relating thereto.

3. Same—Statutes—Rules of Court—Character.

Where protest has been made in the Supreme Court to granting applicant a license to practice law, and the protestant has shown that the applicant has been convicted in the near past of violating the criminal

law of the State, which is not denied, evidence offered by him tending to show that he has since for a period of twelve months lived a proper life is insufficient to show that his character has been restored or that he is now entitled to his license. Attention to the new rules regulating the admission of applicants to practice law is called to the attention of the profession by HOKE, C. J., and the observance of such rules emphasized by him.

HOKE, C. J. The portions of our statute law more directly applicable to the questions presented, and appearing chiefly in C. S., chap. 4, provide in effect that no person shall practice law in this State without first obtaining license to do so from this Court. That all examinations shall be in writing and based upon such course of study and under such rules as the Court may prescribe. That all applicants who satisfy the Court of their competent knowledge of the law and of their upright character shall receive license to practice in all the courts of the State.

Second, that examinations for license to practice law shall be held in the city of Raleigh on Monday, one week prior to the Spring and Fall Terms of the Court respectively, and before being allowed to stand examinations each applicant must be 21 years of age or will arrive at such age before time for the next examination, and must file with the clerk a certificate of good moral character signed by two attorneys who practice in this Court, and deposit the fees specified in the law.

In addition to these provisions, the rules of this Court, formulated under and in furtherance of the statute and appearing in 185 N. C., 787-788, require among other things that each applicant shall file "a certificate of the dean of a law school or a member of the bar of this Court that the applicant has read law under his instruction or to his knowledge or satisfaction for two years, and upon examination by such instructor has been found competent and proficient in said course, etc."

At the time for entering on the examination of the August class, 1924, the present applicant, resident in Asheville, North Carolina, being among them, there appeared on our files a formal protest by prominent members of the Asheville bar against issuing a license to this applicant on the specified ground that "he is not a citizen of upright character," as contemplated and required by the law.

The class, an unusually large one, being here ready, it was considered advisable to proceed with the examination, and the applicant, having met the preliminary requirements, was allowed to take the same with the others, and having passed a very creditable examination showing that he had a competent knowledge of the law, the question of the

protest, in which a large proportion of the Asheville bar had in the meantime joined, was directly presented. Thereupon, notice having been duly issued and served on the applicant and protestants, an investigation was entered on before the Court at chambers in the city of Raleigh on 4 September, 1924, wherein the protestants were represented by the Hon. James G. Merrimon, designated by the Asheville bar for the purpose, and the applicant, hereafter called respondent, appeared in his own proper person.

In *limine,* respondent moved that he be allowed to withdraw his application, but on objection the Court ruled that he having persisted in the face of the formal protest and made and tendered for consideration his examination paper, the matter was no longer under his exclusive control, and being of opinion that the question presented was now one in which the profession and public generally were vitally interested, directed that the hearing proceed.

Thereupon, the burden being on the protestants, they offered numbers of affidavits and certifications of court records which disclosed a series of acts by respondent in the years 1919, 1920 and 1921, amounting in many instances to violations of the criminal law, including obtaining goods by false pretense, larceny, or conspiracy to commit it, forgery, extortion and others, all of them involving moral turpitude and showing him now utterly unworthy of the honorable and important position to which he aspires.

The respondent makes no substantial denial of these charges, but claims they were incident to or connected with respondent's failure in business at the times referred to and all occurred prior to the year 1922. That in this latter year, having become convinced of the error of his ways, he turned from his evil practices and has since demeaned himself as a good citizen. In support of this claim he offered a certificate of date, May, 1924, signed by several prominent citizens of Asheville and vicinity, some of them holding official position there, to the effect that for the past twelve months the respondent had been actively engaged in business in the city of Asheville, and that having occasion daily to observe him, they cheerfully certify to his good conduct during that time and give it as their decided opinion that he is rapidly regaining the position of respect and confidence which he formerly held in the community, and that the signers confidently feel that he is now making a good citizen of his county and State, etc. Respondent then closed his statement with the assertion that whether a license be granted him or not, he intends to persist in his present course of well doing.

In regard to this certificate, it was pertinently suggested by protestants that same, restricted in its terms, was given in reference to respondent's

recent conviction in the courts of Tennessee of conspiracy to violate the Federal Automobile Theft Act, and with the view of affecting a mitigation of his punishment, a time and occasion when men rarely refuse to do what is permissible to aid a human being in distress, but neither the certificate presented, nor the closing statement of respondent's purpose, commendable as it is, suffice as an assurance to us that he has the upright character required for lawful issuance of this license.

"Character," said Mr. Erskine in the trial of Thomas Hardy for high treason, "is the slow-spreading influence of opinion arising from the deportment of a man in society, as a man's deportment, good or bad, necessarily produces one circle without another and so extends itself till it unites in one general opinion."

Even more is this true when the effort is a restoration of a character which has been deservedly forfeited. It then is a question of time and growth.

An attorney at law is a sworn officer of the court to aid in the administration of justice. He is sought as counselor, and his advice followed in the most important and intimate relations of life. There is doubt if any profession affords an equal opportunity for fixing the standards and directing the civic conduct of his fellows. It is of supreme importance, therefore, that one who aspires to this high position should be of upright character and should hold, and deserve to hold, the confidence of the community where he lives and works. For this honorable association the respondent has not qualified himself, in fact or law, and we are all of opinion that his application for license be denied.

In the course of the hearing it was disclosed that only by the merest chance was the fact of the present application made known. In view of this, and in commending our brethren of the Asheville bar for their prompt and efficient action in the matter, we deem it desirable to say that an amendment to the rules has been made and hereto appended, to the effect that all persons who "intend to apply for license shall inform the clerk of the Court of their purpose at least thirty days before the time for the examinations as fixed by the statute, and that a list of these persons shall be forthwith made and kept in the office and open to public inspection for this thirty days.

Again, a form of certificate by attorneys, required to be made to obtain right of examination, has been prepared, which will be sent to each applicant, and which shall be properly signed and filed with the clerk in apt time. The statute pertinent (C. S., 196), provides, as stated, that the applicant shall file with the clerk a certificate of good moral character, signed by two attorneys who practice in this Court. It will be noted that this is not by persons who are merely

qualified, but attorneys who in fact practice before us, and we consider it not amiss to admonish our brethren of the bar that the signing of this certificate is not a formal or perfunctory act, but should be given only from personal knowledge or after painstaking inquiry into the matter. By observing this requirement they can do much to aid the Court in protecting our profession from unworthy members.

Application denied.

The following amendment shall be added to the rules:

3½. As a condition precedent to his right to apply for license, every applicant for license to practice law in this State, either under the Comity Act or by taking the prescribed examination, shall notify the clerk of his intention to become an applicant at least thirty days prior to the day of examination. Immediately upon receipt of such notice, the clerk shall furnish said applicant with blank forms for his certificates, as required by Rules 2 and 3. The names of those who have thus signified their intention of becoming applicants for license to practice law shall be open to inspection in the clerk's office during the thirty-day period prior to the examination.

This notice to the clerk is not in lieu of, but in addition to, the requirements relating to certificates of proficiency and good moral character; and as to these, the time for filing same shall be changed from "not later than noon of Friday preceding the day of examination" to "not later than noon of Tuesday preceding the day of examination."

W. VANCE BROWN ET AL. V. GEORGE H. SMATHERS ET AL.

(Filed 10 September, 1924.)

1. Public Lands—Indian Reservations—Cherokee Indians—State Grants—Void Grants.

Under the provisions of statute in 1783, certain described land was reserved to the Cherokee Indian tribe, with express provision that no person should enter and survey the same within the bounds thus reserved, and that all entries of State lands and grants thereof from the State should be void; and *held*, those claiming title to these lands under a grantee from the State during the life of the statute, and before its repeal, acquired no title as against those claiming under a valid grant from the State after its repeal. The history of the rights of entry upon the Indian land from pre-Revolutionary times, together with the various statutes affecting them, applied by ADAMS, J.

2. Same—Statutes—Interpretation.

In construing the statute of 1783 as to lands reserved to the Cherokee Indians, as to whether certain lands granted by the State came within the boundaries of lands prohibited to be entered: *Held*, the State had the right for itself, and those claiming under it, to say and settle where the true boundary line was; and that portion which is west of the Meigs and Freeman line and north and west of the Blue Ridge range of mountains, and within the Indian boundary, was not subject to entry since the statute of 1783 and prior to its repeal.

3. Same—Boundaries.

In construing whether certain grants from the State fall within the description of the lands reserved to the Cherokee Indians, and therefore void under the statute: *Held*, the last call in the statutory description must be taken to the State's line in the shortest available direction which conforms to the description; and *held* further, that the grantee from the State during the life of the statute, or before its repeal, could acquire no title to lands falling within the boundaries of the lands reserved to the Cherokee Indians, thus construed, notwithstanding the mistake at the time that a certain parallel of latitude marked the boundary.

CONTROVERSY without action, to try title to land, heard by *Bryson, J.*, on facts agreed. From TRANSYLVANIA. Plaintiffs appealed.

Plaintiffs allege that they are the owners in fee and entitled to the possession of a part of the land embraced in a grant (No. 230) of 50,560 acres, issued by the State to George Lattimer, 20 July, 1796, and that the defendants wrongfully withhold possession. The grant is represented on the plat by 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and the lines of the excepted part (not claimed by plaintiffs) extend from 1 to a stake on the top of the Tennessee Ridge, thence southwest with the ridge to the top of the Blue Ridge, thence southeast with the top of the Blue Ridge to a stake in the old Lattimer line, thence the various courses of the grant back to 1, the beginning. The *locus in quo* is so much of the land claimed by the Wolf Mountain Lumber Company as is embraced in the red lines in the northwest corner of the Lattimer grant.

Defendants deny plaintiffs' allegations, set up several defenses, and ask for affirmative relief. They allege that the land claimed by the plaintiffs was not subject to grant at the time the entry was laid or the grant issued, because it was then occupied by the Cherokee tribe of Indians, whose right of occupancy had not been extinguished by treaty or otherwise; that by an act of the General Assembly, passed in 1783, all entries and grants of the land occupied by the Cherokees were declared "utterly void," and that other acts were passed declaratory of the general policy of the State to prohibit the entry of any lands so occupied until the title or claim of the Indians had been extinguished. They allege that so much of the Lattimer grant as lies west of the

Meigs and Freeman line was not subject to entry until 1817 or 1819, when the General Assembly authorized a survey of land lying west of this line, and that by an act passed in 1835 the unsurveyed land situated between the Meigs and Freeman line and the Tennessee River was made subject to entry and grant; also, that practically all the land lying west of this line has been sold to sundry parties who obtained grants therefor in pursuance of the Cherokee land laws, and that the defendants claim title under grants thus acquired; that the Lattimer grant, according to course and distance, laps on about 1,100 acres owned by the defendant, Wolf Mountain Lumber Company, and derived from its codefendant, George H. Smathers. They ask that they be declared the owners in fee of the land in controversy; that plaintiffs' claim be declared a cloud on their title to the extent of the lappage, and that the plaintiffs be barred of any claim to the land in suit. The land conveyed by George H. Smathers to the Wolf Mountain Lumber Company is subject to the lien of a deed in trust executed by the lumber company to William M. Smathers, trustee, to secure certain purchase-money notes.

A jury trial was waived and the controversy was submitted for determination upon the following agreed statement of facts:

1. The plaintiffs claim title to a large area of land lying and being in the counties of Transylvania and Jackson, in the State of North Carolina, included in grant No. 230, issued by the State of North Carolina to George Lattimer on 20 July, 1796, and calling to contain 50,560 acres, and it is agreed that whatever title to the area in controversy passed from the State to George Lattimer by virtue of the grant aforesaid is now vested in the plaintiffs.

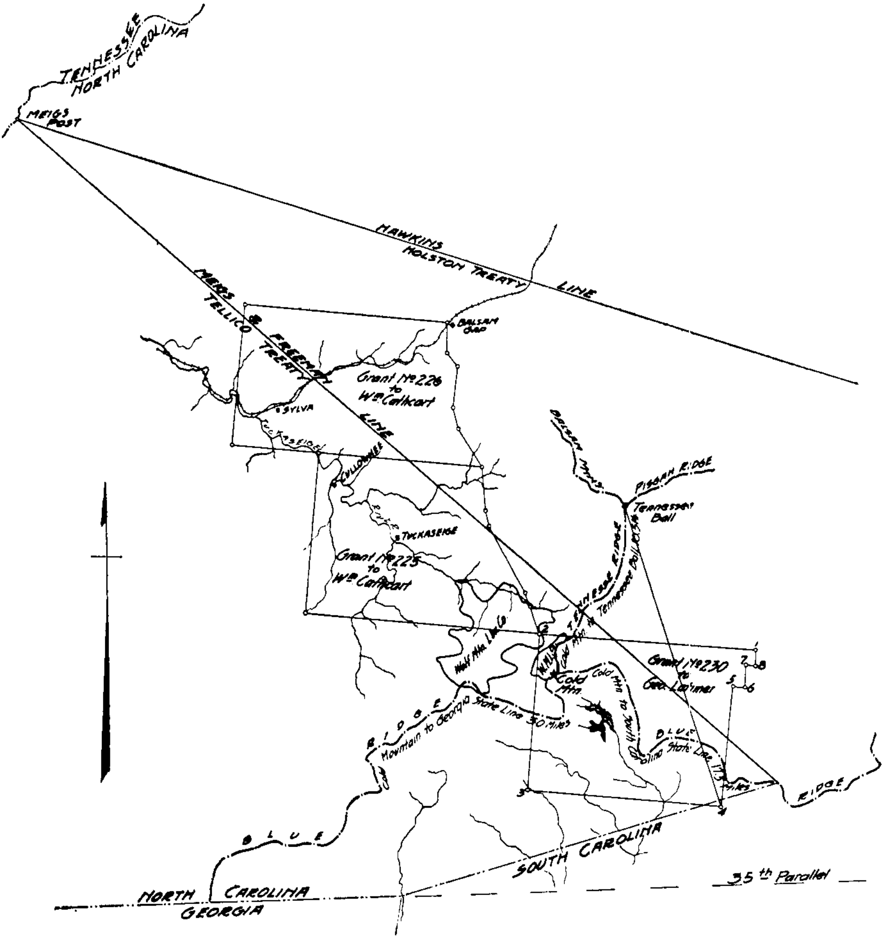
2. The defendants claim a portion of the area included in grant No. 230 under and by virtue of certain junior grants issued by the State of North Carolina, to wit, Jackson County grant, No. 190, issued by the State to J. T. Foster, 1 October, 1855; Jackson County grant, No. 191, issued by the State to J. T. Foster, 1 October, 1855; Jackson County grant, No. 193, issued by the State to J. T. Foster, 1 October, 1855, calling to contain 640 acres each; and Jackson County grant, No. 14126, issued by the State to C. B. Zachary *et al.*, 14 February, 1900, calling to contain 400 acres; the lappage of said grants on grant No. 230 including about 1,100 acres, about 75 acres of which lies on the south side of the Blue Ridge, on the headwaters of Toxaway River, and about 1,025 acres of which lies on the north side of the Blue Ridge, on the headwaters of Tuckaseegee River; and it is agreed that whatever title passed from the State of North Carolina by virtue of said junior grants is now vested in the defendants; and it is further agreed between the parties hereby that if no title passed by said grant No. 230 to

George Lattimer to the 1,100 acres of land in controversy in this action, the title passed by said grants Nos. 190, 191, and 193 to J. T. Foster, and grant No. 14126 to C. B. Zachary *et al.*, under whom the defendants claim title to the 1,100 acres of land in controversy, and that title to the same is now vested in the defendants as their interest may appear.

3. The map hereto attached and made a part of this agreed statement of facts correctly shows, for the purpose of this suit, the topography of the country, the ridges, mountain ranges, and streams; also, correctly shows the location of grant No. 230 and the area claimed by the defendants under said junior grants, together with the correct location of the line known as the Meigs and Freeman line, run for the purpose of locating the line of the Tellico treaty of 2 October, 1798, and referred to in the acts of the General Assembly for the State of North Carolina for 1809 (now Potter's Revisal, vol. II, ch. 774), and also of the line known as the Hawkins line, run for the purpose of locating the line of the treaty of Holston, dated 2 July, 1791; and also correctly shows the location of the 35th parallel, north latitude; and also the line between the States of North Carolina and South Carolina as now recognized, running from the Ellicott Rock eastwardly, as surveyed and located pursuant to the commission appointed by the State of North Carolina in 1803 and duly ratified by the General Assembly for the State of North Carolina, by the act of 1813; and, further, that the line shown on said map running from the Tennessee Bald south 27 degrees east to the southern boundary of this State, represents the most direct course from the Tennessee Bald to the southern boundary of this State, as surveyed and located by the aforesaid commission; and, further, that all distances, relative locations and all other data and information appearing on said map are correct.

4. The defendants, and those under whom they claim, have never had any actual adverse possession of that portion of the area claimed by them, lying on the south side of the Blue Ridge, on the waters of Toxaway River, but they, and those claiming under them, have listed and paid taxes on the land in controversy between the parties hereto for a long period of years, and the plaintiffs have not listed and paid the taxes on the said land for a long period of years.

5. It is further agreed that grant No. 226, issued and patented by the State of North Carolina to William Cathcart, 20 July, 1796, calling to contain 49,920 acres, shown on the map hereto attached, in red, and designated on said map in words and figures as follows: "Grant 226, to William Cathcart, 20 July, 1796," was made the subject of the decision of the Supreme Court of the United States in the case entitled *Lessee of Margaret Lattimer et al., Plaintiffs in Error, v. William Potect, Defendant in Error,* reported in 14 Peters, U. S., p. 4, *et seq.*


TENNESSEE
NORTH CAROLINA
MEIGS POST
HAWKINS
HOLSTON TREATY
LINE
MEIGS & FREEMAN
TELLICO TREATY
LINE
BALSAM GAP
Grant No 226 to Wm Cathcart
SYLVA
CULLOWHEE
TUCKASEIGE
Grant No 225 to Wm Cathcart
BALSAM MTNS.
PISGAH RIDGE
Tennessee Bald
TENNESSEE RIDGE
Wolf Mtn. Line Co.
Cold Mtn.
Grant No 230 to Geo. Latimer
RIDGE
Mountain to Georgia State Line 30 miles
BLUE
SOUTH CAROLINA
35th Parallel
NORTH CAROLINA
GEORGIA

6. It is further agreed that the plaintiffs now have pending in the Superior Court for Transylvania County various other actions involving the same controversy as that involved in this action; said action involving some 25,000 acres, and that the final determination of this action will to a large extent settle the controversy between the plaintiffs and the other claimants to areas lying within grant No. 230.

In the judgment his Honor construed the call, "thence along the dividing ridge between the waters of Pigeon River and Tuckaseegee River to the southern boundary of this State," as running with the summit of the Balsam range a southerly course to the terminus of the water divide designated on the map as "Tennessee Bald," thence along the Tennessee Ridge a southerly course to where the same intersects the summit of the Blue Ridge at the point designated on the map as "Cold Mountain," thence along the summit of the Blue Ridge a southeast course to the southern boundary of the State. It was held that the last line extends from this point to the beginning along the boundary of South Carolina and Georgia. His Honor adjudged that the *locus in quo* was within the territory reserved to the Cherokee Indians by the fifth section of the act of 1783; that the plaintiffs are not entitled to recover the land in controversy; that their claim is a cloud upon the title of the defendants and should be canceled; that the plaintiffs, and those claiming under them, be enjoined from asserting any claim, interest or estate in or to the lands in dispute, and from trespassing thereon, and that the defendants recover their costs. Plaintiffs excepted and appealed.

Dayton Hunter and Ruffner Campbell for plaintiffs.

Merrimon, Adams & Johnston, George H. Smathers, and E. C. Ward for defendants.

ADAMS, J. The appeal presents the two questions, whether the land in controversy, or any part of it, was subject to entry on 20 July, 1796, when the grant to George Lattimer was issued, and whether the disputed boundary of the land set apart to the Cherokee Indians under the act of 1783 (1 Potter, 435) extended southeast from Cold Mountain along the crest of the Blue Ridge to the southern boundary of the State, as adjudged, or southwest to the State line, as contended by the plaintiffs. The defendants say that the *locus in quo* is a part of the land allotted to the Indians, that it was not subject to entry at the date of the Lattimer grant, and that Lattimer therefore acquired no title. The plaintiffs contend that in 1794 the General Assembly, by a statute "amending and explaining" the act of 1783, authorized the entry and grant of the disputed land, and that in any event 75 acres of it, situated south of the Blue Ridge, were outside the reservation, and hence not

within the inhibition on which the defendants rely. The parties have agreed that whatever title Lattimer acquired by his grant is vested in the plaintiffs, and that if the State conveyed no title to Lattimer the title to the land in suit is vested in the defendants, who claim under grants issued pursuant to legislation following the treaty of 1819. By this agreement proof of a complete chain of title, or of possession under color, is made immaterial. As the defendants assail the Lattimer grant, it is essential to inquire into the relation that existed between the State and the Cherokee Indians at the time the entry was made and the grant was issued.

When the maritime powers of Europe discovered this continent they found it necessary to establish some principle by which, as between themselves, their respective rights should be determined, and they agreed that "discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." Accordingly, Great Britain granted charters to certain subjects who were associated for the purpose of carrying into effect the policy of the crown; and while these charters, or some of them, purported to convey the soil, they were generally understood to transfer only such title as the sovereign might rightfully convey. This, said *Chief Justice Marshall,* was the exclusive right of purchasing such lands as the natives were willing to sell. *Fletcher v. Peck,* 6 Cranch, 87, 143; 3 Law Ed., 162, 180; *Worcester v. Georgia,* 6 Peters, 515; 8 Law Ed., 483. So, before the Revolution, the colonists dealt with the Indians as a tribe or nation capable of holding property, and entered into treaties with them, defining their respective rights; but after the renunciation of colonial dependence, the soil was declared to be the property of the people who composed the State. And, although the policy of observing treaties "secured by any former or future legislature" was enjoined by the Constitution of 1776 (Declaration of Rights, sec. 25), North Carolina, after this time and before the adoption of the Federal Constitution, had the inherent right, except as affected by the Articles of Confederation, to conclude treaties with Indians living within her borders. *Weston v. Lumber Co.,* 163 N. C., 78. The Indian title, unless otherwise defined, was thus treated as a mere possessory right, or right of occupancy, unquestionable until it was extinguished by treaty, conquest, or voluntary cession. If extinguished, the title reverted to the State, for all "lands lying within the boundary of the State, acknowledged by the Federal Government when received into the Union, must remain the lands of the State until she cedes them away." *Strother v. Cathey,* 5 N. C., 162; *Eu-che-lah v. Welsh,* 10 N. C., 155; *Danforth v. Wear,* 9 Wheaton, 673; 6 Law Ed., 188; *Fletcher v. Peck, supra,* p. 143; *Brown v. Brown,* 103 N. C., 222, 223; *S. c.,* 106 N. C., 454.

In 1777 the General Assembly opened a land office and prescribed the method by which land in the several counties should be entered by citizens of the State. 1 Potter, 274. This act, repealed, reinstated, and several times amended, was followed by others setting forth more definitely the right of entry and grant pertaining to lands east and west of the mountains. 1 Potter, 274, 354, 372, 405, 408, 413, 415, 461, 463. At this time all that part of the region west of the Alleghanies which is now embraced within the boundaries of Tennessee was at least nominally under the jurisdiction of North Carolina. It was ceded by the Legislature to the United States in 1784 (1 Potter, 457), but the act was repealed and the matter was postponed until 1789, when a second act of cession was passed. 1 Potter, 599, ch. 299. In 1796 Tennessee was admitted into the Union, and a part of the Indian lands described in the act of 1783 was situated within the present boundaries of that State. This act (1 Potter, 435) provided (section 5) that the Cherokee Indians should have and enjoy a tract of land bounded as follows: "Beginning on the Tennessee where the southern boundary of this State intersects the same nearest the Chickamawga towns, thence up the middle of the Tennessee and Holstein to the middle of French Broad, thence up the middle of French Broad River (which lines are not to include any island or islands in the said river) to the mouth of Big Pigeon River, thence up the same to the head thereof, thence along the dividing ridge between the waters of Pigeon River and Tuckasejah River to the southern boundary of this State." The section further provided that this land should be "reserved unto the said Cherokee Indians and their nation forever, anything to the contrary notwithstanding." In section 6 it was enacted that no person should enter and survey any lands within the bounds thus reserved, and that all such entries and grants should be utterly void. 24 State Records, 478; The Code, secs. 2346, 2347.

The defendants contend, not that the Lattimer grant is void upon its face, but that the closing lines of the land described in section 5 extend from the head of Pigeon River along the Balsam range to the Tennessee Bald, thence along the Tennessee ridge to Cold Mountain, and thence southeast with the Blue Ridge to the southern boundary of the State; that the entire *locus in quo* lies within the reserved territory, and that the Lattimer grant was issued without authority of law. The plaintiffs admit that all the land in controversy is west of the Meigs and Freeman line, and that so much thereof as lies north and west of the Blue Ridge (about 1,025 acres) is within the Indian boundary. If the part on the south of the ridge (75 acres) is within the Indian reservation, it must be disposed of in like manner with the remainder of the disputed land.

Insisting upon the validity of the Lattimer grant, the plaintiffs contend that the act of 1783 (construed in *Avery v. Strother,* 1 N. C., 558, and *Strother v. Cathey, supra*) was amended or superseded by the "four-line statute" of 1794, which is as follows: "An act to explain and amend an act entitled 'An act to empower county surveyors to make surveys and returns in the manner therein mentioned.' Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, that all the lands in this State lying to the eastward of the line of the ceded territory shall be deemed and considered as coming within the meaning and purview of the said act." 1 Potter, 763, ch. 422.

The plaintiffs specifically contend that this statute was both amendatory and declarative; that it did not include all the land described in the act of 1783 or the land ceded to the United States, but that it did embrace all the land in the State situated east of the ceded territory, and not merely the portion reacquired in 1791 by the treaty of Holston.

The act of 1784 provided that surveyors might survey two or more entries as one (24 State Records, 565; 1 Potter, 458), and we now refer to it only to observe that even if the boundaries therein described covered the land reserved for the Indians by the act of 1783, there is no repeal of the fifth and sixth sections; and as the former act can operate upon lands not reserved, these sections cannot be held to have been repealed by implication. *Lattimer v. Poteet,* 14 Peters, 4, 14; 10 Law Ed., 328, 333.

The purpose and effect of the act of 1794, *supra,* have been pointed out in previous decisions. It was not referred to in *Brown v. Brown,* 103 N. C., 213. There it was held that land situated between Wolf and Tennessee creeks, within the original Indian boundary, was not subject to entry, and that even if the Indian title had been extinguished by treaty and reacquired by the State, it was yet the province of the Legislature to determine by statute how the State's title should be disposed of. As research had failed to discover a statute containing such a provision, the plaintiff's grant was held to be void. Upon considering a petition to rehear (103 N. C., 221) the Court held that the "four-line statute" of 1794, previously overlooked, embraced all the region in this State "lying to the eastward of the line of the ceded territory" (the Tennessee line, *Mendenhall v. Cassells,* 20 N. C., 43; *Brown v. Brown,* 103 N. C., 224) which had not been specially devoted to some particular purpose, and that its object was to subject to entry the land acquired from the Indians by the treaty of Holston. Powell's Report of the Bureau of Ethnology, 158. The former judgment was therefore reversed and a new trial directed. After the second trial, the case was again brought to this Court (106 N. C., 451), and it was then held that the

treaty of Holston, which was concluded 2 July, 1791, extinguished the Indian title to all lands east of the treaty line, the true location of which had been in dispute. The boundary began at the top of the Currahee Mountain and ran thence "a direct line to Tugalo River, thence northeast to the Occunna Mountain, and over it, along the South Carolina Indian boundary to the North Carolina boundary, thence north to a point from which a line was to be extended to the Clinch River," etc. It is contended that the last of these calls is designated on the map as the Hawkins line. But in the case last cited the Court held that the Legislature had power to construe the treaty and to declare where the disputed boundary was situated, and that the line theretofore in doubt was fixed and made certain by the Meigs and Freeman line. Powell's Report, *supra*, 174. In the opinion it was said: "The Meigs and Freeman line ascertained and fixed the hitherto uncertain line of boundary between the State and the Indians, and the line thus settled, so far as the State or any one claiming under it is concerned, ought not to be reopened. It does not change the Holstein or any other Indian treaty line, but the State had a right for itself, and all claiming under it, to say and settle where the true boundary line was, and this having been done by the act of 1809, the question should be at rest." 2 Potter, 1161, ch. 774.

The land in controversy is situated west of the Hawkins line and of the Meigs and Freeman line; and if we adhere to the former decisions of the Court we must hold that all that portion which is west of the Meigs and Freeman line and north and west of the Blue Ridge and within the Indian boundary (about 1,025 acres) was not subject to entry at the time the Lattimer grant was issued, and that the grantee acquired no title thereto.

But the plaintiffs say that the last appeal in *Brown's case* (106 N. C., 451) did not present the question whether the Allison grant was valid or void. Why not? Because, it is said, the Court remarked that the objections to the validity of the Allison grant "on its face" had been withdrawn. This indicates a misconception of the opinion, for it was further said that as the plaintiff had to rely upon seven years possession it was necessary to consider only those exceptions which related to the sufficiency of the grant to take the title out of the State, and to the sufficiency of possession under color of title. Possession of the land for seven years under color would have availed nothing in the absence of a valid grant. Whether the grant was valid was therefore one of the decisive questions, concerning which the Court said: "We think it settled in this case (103 N. C., 221) that the Allison grant was valid to convey the State's title to the lands embraced therein lying east, and not west, of the Meigs and Freeman line." In other words, the land

which was within the Indian boundary described in the act of 1783 and east of the Meigs and Freeman line was made subject to entry and grant by the act of 1794. Contrary to the plaintiffs' suggestion, it is perfectly obvious that this conclusion cannot be treated as a mere *dictum,* either in the opinion of *Mr. Justice Davis* (106 N. C., 451) or in that of *Mr. Justice Merrimon* upon the petition to rehear (103 N. C., 221).

In the next place, the plaintiffs contend that a part of the *locus in quo* (75 acres) lies south and east of the Blue Ridge, was not within the Indian boundary of 1783, and was therefore subject to entry and grant, without regard to the "four-line statute." Here the question is whether his Honor was correct in adjudging that the last lines of the boundary hereinbefore set out extended from the Tennessee Bald to Cold Mountain and thence with the ridge in a southeastern direction to the southern boundary of the State, for it was held in the first of the *Brown cases* (103 N. C., 218) that the treaty of Holston did not repeal or modify the statute forbidding the entry of land within this boundary. In their briefs the parties admit that the line extends from Tennessee Bald to Cold Mountain, but the plaintiffs contend that it runs from Cold Mountain to Great Hog Back, thence in a westerly direction along the ridge to the southern boundary of the State. This, the plaintiffs contend, is the main ridge, exceeding in altitude that along which the defendants say the line runs. They insist, moreover, that this ridge reaches the thirty-fifth parallel of latitude, which in 1783 was the southern boundary of the State, and that the ridge set out in the judgment falls short of the thirty-fifth parallel by eleven or twelve miles. Constitution of 1776, Declaration of Rights, sec. 25. This is true, but at that time the parallel referred to was generally assumed to be twelve miles north of its true position, and the assumed position was afterwards declared to be the southern boundary of the State. Powell's Report, *supra,* 182; 2 Potter, 997, 1013, 1062, 1131, 1280, 1318. Besides, if it be granted that the thirty-fifth parallel was the southern boundary, this fact, while a circumstance to be considered, would not necessarily be fatal to the judgment. *Sandifer v. Foster,* 2 N. C., 237; *Shultz v. Young,* 25 N. C., 385; *Long v. Long,* 73 N. C., 370; *Power Co. v. Savage,* 170 N. C., 625; *Millard v. Smathers,* 175 N. C., 56.

The appellants' contention that the ridge extending to the west from Cold Mountain divides the waters of the Tuckaseegee and of Pigeon River may be applied with equal if not greater force to the eastern ridge, as may be seen by reference to the map.

In the absence of controlling facts to the contrary, we apprehend that a proper interpretation of the act of 1783, defining the Indian reservation, requires that the last call be run from Cold Mountain to the State

line in the shortest available direction which conforms to the description of the land. In *Campbell v. Branch*, 49 N. C., 313, it is said: "Where the object designated has a considerable extension—as in the case of a river, swamp, or the line of another tract of land—then the disputed line must be run to the nearest point on said river, swamp, or line of another tract." With no less force should the principle apply when the designated object is a State boundary. So, if it be conceded that both ridges answer to the description—"thence along the dividing ridge between the waters of Pigeon River and Tuckaseegee River to the southern boundary of the State"—nothing else appearing, the line should run to the nearest point in the State line. The line, if run from Cold Mountain to the southwest, in accordance with the plaintiffs' contention, will be almost twice the length of the line which the trial judge approved as the proper boundary. Upon this point, also, we think the judgment of the lower court is correct.

The plaintiffs refer to several treaties entered into prior to the Declaration of Independence to show that the Indians had not been permitted to occupy territory south and east of the Blue Ridge after 1730. Minute discussion of the several treaties is not essential, but we may say that, after inspecting them, we are unable to concur in this conclusion.

The defendants have not appealed, and their reference to the act of 1794, as construed in *Brown v. Brown, supra,* upon the petition to rehear, need not be considered.

We find no error in the judgment.

Affirmed.

FARMERS BANKING AND TRUST COMPANY AND MRS. MARY EVANS v. TARBORO LEAF TOBACCO COMPANY.

(Filed 17 September, 1924.)

1. Assignments—Debtor and Creditor—Mortgages—Statutes—Liens.

A chattel mortgage, attempted to be executed by an insolvent corporation owing other creditors, to secure a preëxisting debt on practically all of its property, will be treated as an assignment, and void, unless the requirements of the statute have been complied with, and no lien otherwise on the property described therein can be thereby created. C. S., 1609.

2. Same—Leases—Covenants.

A clause in a lease of a tobacco sales warehouse, providing that machinery, material, etc., placed therein by the lessor shall belong to it at the termination of the lease, upon "satisfaction of any and all indebtedness or liens that may be due 'the lessee,'" etc., is a personal covenant

of the lessee and cannot alone have the effect of creating a lien on the leased property to secure the lessor's obligation to pay the rents as stipulated in the lease.

3. Appeal and Error—Evidence—Trials—Prejudice.

Where the instrument relied upon by the appellant as sufficient to create a lien on the leased property is not sufficient for this purpose, the admission of evidence excepted to on the grounds that it tended to vary, etc., the written instrument of lease, is not reversible error.

APPEAL from *Bond, J.*, at June Term, 1924, of EDGECOMBE.

The plaintiffs alleged that the defendant was indebted to the Banking and Trust Company in the sum of $7,500, with interest on $6,000 from 10 December, 1921, and on $1,500 from 10 January, 1922; to Mrs. Evans in the sum of $1,000, with interest from 3 November, 1920, as evidenced by a judgment dated 20 May, 1922, by virtue of which an execution had been issued and a levy made on the defendant's property; and to the Farmers Tobacco Company for rent of the building occupied by the defendant. They alleged also that the defendant had made default in the payment of certain taxes, in consequence of which its property was advertised for sale.

C. A. Johnson and J. F. Ruffin were appointed receivers, and on 21 October, 1922, made their report, including a list of the claims filed with them, all of which were allowed, except that of the Farmers Tobacco Company. As to this claim, the facts are, that on 28 August, 1920, the Farmers Company purported to lease to the defendant for a term of seven years from 1 July, 1920, the building in which the defendant's business was conducted, at an agreed price, which was to be paid on the first day of each month. The purported lease was in writing, signed by both parties. The defendant failed to pay the rent as it became due, and, to secure the rent due and to become due, purported to execute and deliver to the Farmers Company on 1 February, 1922, a promissory note for $6,130.50, payable 1 January, 1923, and a chattel mortgage on all its property to secure said note. The Farmers Company filed exceptions to the report of the receivers, and at the trial the first eight issues were answered by consent, and the ninth, tenth, and eleventh under the direction of the presiding judge. The jury found that the defendant was indebted to the Farmers Company in the sum of $4,463.83; that the president and secretary of the defendant company had not been authorized at any meeting of the board of directors to execute the chattel mortgage or the lease; that the mortgage embraced all the defendant's property; that the Farmers Company did not file an inventory with the clerk within ten days after the registration of the mortgage; that the defendant was insolvent when the mortgage was

executed; and that the execution, neither of the lease nor of the mortgage, was the act of the defendant.

His Honor rendered judgment against the defendant in favor of the Farmers Company for $4,463.83 as an unsecured claim for rent, and adjudged the chattel mortgage and lease invalid, either as a security or as giving any lien on the property to secure said debt. The Farmers Tobacco Company appealed.

John L. Bridgers for appellant.
Gilliam & Bond and W. O. Howard for plaintiff and receivers.

ADAMS, J. The Farmers Tobacco Company excepted to the judgment, and contended that by virtue both of the lease and of the chattel mortgage it held a lien on certain property which went into the hands of the receivers. It is therefore necessary to ascertain the legal effect of each of these instruments.

The purported lease was dated 28 August, 1920, and the chattel mortgage which was intended to secure payment of the rental due the Farmers Company was dated 1 February, 1922. It was admitted that the chattel mortgage included all the property of the defendant; that the defendant was insolvent when the mortgage was executed; that it owed other creditors, and that the law in regard to assignments for the benefit of creditors had not been complied with. C. S., 1609, *et seq.*

This Court has held that where a person who is insolvent makes an assignment of practically all his property to secure a preëxisting debt, there being also other creditors, such instrument will be treated as an assignment for the benefit of creditors and subject to the statutes relating thereto, and that neither the omission of a small part of the debtor's property nor a defeasance clause in the instrument will change this result. Everything appears which is necessary to bring the mortgage in question within this principle. It is apparent, then, that it is ineffective, either as a mortgage or an assignment, and that it created no lien on the property which it purported to convey. *Bank v. Gilmer,* 116 N. C., 685; *S. c.,* 117 N. C., 416; *Glanton v. Jacobs,* 117 N. C., 427; *Cooper v. McKinnon,* 122 N. C., 447; *Brown v. Nimocks,* 124 N. C., 417; *Odom v. Clark,* 146 N. C., 544, 552; *Powell v. Lumber Co.,* 153 N. C., 52.

The appellant contends that it acquired a lien on certain property in the possession of the receivers by virtue of the following clause in the alleged lease: "It is further mutually agreed that such property, machinery and material as may be placed in said building by the Leaf Company belong to and are their property; and upon satisfaction of any and all indebtedness or liens that may be due to the Farmers or

their assigns, the Leaf may, at the expiration of their lease, move such fixtures or equipment that they may have placed in said building."

The written "lease" purports to have been executed on behalf of the defendant company by its president and secretary. In response to the second issue the jury found that these officers had not been authorized in a meeting of the board of directors to execute such instrument; and the appellees say that the clause hereinbefore set out was not a part of the contract and was never ratified by the corporation. These questions we need not consider, for if it be granted that the alleged lease was duly executed, the clause relied on by the appellant is not sufficient to constitute a lien on the property therein described, it being nothing more than a personal covenant on the part of the lessee. A stipulation in a lease that the lessee shall not remove or dispose of certain property upon the demised premises until the rent or any indebtedness due the landlord is paid is a personal covenant and not a lien. In the instant case no lien exists by reservation, estoppel, or ratification. *Marshall v. Luiz,* 115 Cal., 622; *Bleakley v. Sullivan,* 140 N. Y., 175; *Beers v. Field,* 69 Vt., 533; *Kaufman v. Underwood,* 119 A. S. R., 121, note; 16 R. C. L., 978, sec. 490; 24 Cyc., 1245.

Exception was noted to the admission of certain evidence on the ground that it tended to vary the written agreement; but as the instrument, if accepted as a whole, is not sufficient to create a lien, we are unable to see that the appellant has been prejudiced in this respect. If, as we have said, the chattel mortgage was void and the lease created no lien on the property described in it, the appellant's prayers for instruction to the jury were properly refused.

We find

No error.

S. G. GARNER v. J. G. QUAKENBUSH, W. W. GARRETT ET AL.

(Filed 17 September, 1924.)

1. Claim and Delivery — Principal and Surety — Replevin Bond — Statutes—Defenses.

The surety on a replevin bond in claim and delivery, under the requirements of the statute (C. S., 836) that the property shall be delivered to the plaintiff, or, if it cannot be, the value at the time it was delivered to the defendant, etc., may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or prevented by the act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise.

2. New Trials—Appeal and Error—Judgments—Presumptions—Burden to Show Error.

The judgment of the Superior Court having jurisdiction of the parties and subject-matter of the action is presumed to be correct on appeal, and will not be reversed and a new trial ordered unless it is made reasonably to appear that the granting thereof would probably result in the appellant's favor, the burden of showing error being upon him.

THIS is a petition to rehear this case, reported in 187 N. C., 603.

This cause was heard at Spring Term, 1924, of this Court, upon appeal from a judgment rendered by *Stack, J.*, at October Term, 1923, of MOORE, affirming the order of the clerk of the Superior Court of said county, in which he denied a motion by the defendants to set aside a judgment hereinbefore rendered by default final for want of an answer, said motion being based upon allegations that the said judgment was irregular and that the failure of the defendant Quakenbush to file answer to the complaint was due to his excusable neglect. This Court affirmed the judgment as to Quakenbush and modified and affirmed the same as to the defendant Garrett, surety on defendant's undertaking for replevin. See opinion in this case, 187 N. C., 603.

This action was instituted by the plaintiff to recover of the defendant Quakenbush judgment upon a note dated 10 November, 1921, for $400 and for the possession of four mules and two horses, described in a mortgage executed by Quakenbush to plaintiff to secure the payment of the said note. The writ of claim and delivery was issued by the clerk of the Superior Court of Moore County, and by virtue of the same the sheriff of Alamance County seized the said mules and horses. Thereupon, the defendant executed and filed in this action a replevin bond with penal sum of $1,000, as provided by C. S., 836, with the defendant W. W. Garrett as his surety, and said property was thereupon returned by the sheriff to the defendant Quakenbush.

Thereafter, plaintiff having filed his complaint, and defendant having filed no answer, judgment was rendered by the clerk of the Superior Court of Moore County by default final on 25 February, 1922, in which it was adjudged that "plaintiff recover of the defendant J. G. Quakenbush the sum of $400, with interest thereon from 10 November, 1921, until paid, together with the costs of this action, to be taxed by the clerk. It was further adjudged that "plaintiff is the owner of the four mules and two horses described in the complaint, and that he recover the same of the defendant, to the end that the same may be sold by the plaintiff in order to discharge said indebtedness, as provided in the mortgage mentioned in the complaint." It was further ordered and adjudged that "plaintiff recover of the surety on defendant's replevin

bond the sum of $1,000, to be discharged, however, upon the payment of $400, interest and costs hereinbefore adjudged in favor of plaintiff and against the defendant, or to be discharged if the personal property replevied by the defendant shall be returned to the plaintiff, together with all damages resulting from the deterioration and detention thereof under said replevin bond."

Execution was issued on said judgment, and thereafter W. W. Garrett, surety on the replevin bond, moved that said judgment be set aside. Said motion was denied by the clerk, and upon appeal by Garrett to the judge presiding in the Superior Court of Moore County the order of the clerk was affirmed. Upon appeal to the Supreme Court by the surety, Garrett, the order and judgment of the clerk and the judge were affirmed.

In the opinion filed by this Court it is ordered that, as to Quakenbush, the principal, the judgment below is affirmed; as to the defendant, Garrett (surety on replevin bond), it will be *modified* into a judgment by default and inquiry only in order that the value of the team, for which he is responsible, *subject to the prior mortgages*, shall be ascertained before a jury."

Plaintiff, after full compliance with the rules of this Court in respect thereto, filed a petition to rehear on 16 May, 1924, respectfully insisting that it was error, due to inadvertence, for this Court to order the "judgment as to defendant Garrett modified into a judgment by default and inquiry, in order that the value of the team for which he is responsible, *subject to the prior mortgages,* shall be ascertained before a jury."

H. F. Seawell for petitioner.
Parker & Long for W. W. Garrett.

CONNOR, J. In the opinion filed in this case for the Court it is held, citing *Jeffries v. Aaron,* 120 N. C., 167: "There being no ground to sustain the defendant's motion upon the allegation of mistake, surprise or excusable neglect, it should not be modified on the ground of irregularity; for, the court having jurisdiction of the subject and the parties, there is a presumption in favor of its judgment, and the burden of overcoming this presumption is with the party seeking to set aside the judgment. . . . Although there was irregularity in entering the judgment, yet unless the Court can now see reasonably that the defendants had a good defense, or that they could now make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside now, and then be called upon soon thereafter to render just such another between the same parties?"

The Court further held that "the final judgment was regularly entered as against Quakenbush on the note and mortgage, and for the possession of the property described in his complaint, and for the return of which the replevin bond was given by the defendant, with Garrett as his surety." It is further held: "The contract of Garrett on the replevin bond was for the return of the team, or their value, and the final judgment against him should not be reopened and modified by a judgment of default and inquiry, but for the fact that he alleges that the value of the team, *subject to prior mortgages,* under which they were seized and have been sold did not equal the amount of the judgment. It was error in the court to refuse to permit him to offer evidence to that effect, and for this reason he is entitled to have the judgment modified into one by default and inquiry, and evidence introduced to that effect." It was therefore ordered that the judgment be modified as to the surety on the replevin bond in accordance with this holding.

This plaintiff insists that this was an inadvertent error on the part of the court, in that it holds that the surety on the replevin bond may offer as a defense that there were prior mortgages on the property, for the return of which, or for the value of which, if same could not be returned, he has bound himself by his bond.

The liability of the surety to the plaintiff in this action is fixed by the terms and conditions of his bond. The terms of a replevin bond are fixed by statute (C. S., 836), and the bond signed by Garrett in this action is in strict conformity with the statute. He bound himself unto the plaintiff in the sum of $1,000, that if the property then in the hands of the sheriff, who had taken same from defendant Quakenbush, be returned to the defendant, "it shall be delivered to the plaintiff, with damages for its deterioration and detention, together with the costs of the action, if such delivery be adjudged and can be had, and if such delivery cannot *for any cause* be had, that the plaintiff shall be paid such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages, for such taking and detention, together with the costs of the action."

The surety now insists that, as a defense to plaintiff's demand for judgment on this bond, he can show that some person other than the plaintiff, not a party to the action, had a right or title to the property superior to the plaintiff, or that he can show that the property cannot now be returned, because the same has been taken from the defendant by some other person under a title superior to that of the plaintiff. This defense is not available to the surety by reason of the terms of his contract as set forth in the bond. It has been adjudged that the plaintiff is the owner of the property, and he is therefore entitled to delivery of

the same, or if such delivery cannot *for any cause* be had, that the plaintiff shall be paid the value of the property at the time it was delivered to the defendant by virtue of his replevin bond.

This Court has held, in *Randolph v. McGowan,* 174 N. C., 203, that the failure upon the part of a defendant to establish his title makes him a wrongdoer and, being such, he is not permitted to set up the destruction of the property while wrongfully withheld from the plaintiff as a discharge of his obligation to return the goods or pay their value and damages. Nor can the defense be available to the surety that the property, for the return of which to the plaintiff upon its being adjudged that the plaintiff was entitled to delivery, belonged to third persons who were not parties to the action. 34 Cyc., 1594, and cases cited; 23 R. C. L., 906, sec. 67.

In *Motor Co. v. Sands,* 186 N. C., 732, this Court says: "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 the act of God, or other circumstance beyond his control, is of no avail to relieve him of his obligation, nor is he discharged by a showing of a want of negligence on his part."

So much of the order made by this Court upon the hearing at Spring Term, 1924, as directs that the judgment as to the defendant Garrett be modified into a judgment by default and inquiry, in order that the value of the team for which he is responsible, *subject to the prior mortgages,* shall be ascertained, is reversed. It is manifest that the said order was due to an inadvertence on the part of the court, and the judgment as to Garrett, the surety, as well as to Quakenbush, the principal, as originally entered in the court below, is affirmed.

It appears to be conceded that the horses and mules cannot now be delivered to the plaintiff. This action is remanded to the Superior Court of Moore County in order that an issue may be submitted to a jury substantially as follows: What was the value of the mules and horses replevied in this action at the time of the defendant's replevin bond in this case, and the return of the mules and horses to the defendant on 27 December, 1921?

Petition allowed.

S. R. ADAMS v. W. L. CAUDLE AND W. S. RICHARDSON.

(Filed 17 September, 1924.)

Landlord and Tenant—Liens—Statutes—Burden of Proof.

The burden of proof is on the landlord to show that he has acquired a statutory landlord's lien on the crop of his tenant, in an action against the tenant to recover for goods sold and delivered.

APPEAL by defendant W. S. Richardson from *Lyon, J.*, at May Special Term, 1924, of VANCE.

Civil action, arising out of contract for goods and merchandise sold by plaintiff to W. L. Caudle, tenant of the appealing defendant.

From a verdict and judgment in favor of the plaintiff the defendant W. S. Richardson appeals.

R. S. McCoin for plaintiff.
J. P. Zollicoffer for defendant.

STACY, J. The plaintiff is a merchant, residing in Vance County, and the defendants are residents of the State of Virginia. In 1920 W. L. Caudle, tenant of his codefendant, became indebted to the plaintiff on a merchandise account, and now owes him thereon the sum of $976.24. This is not denied. In the fall of 1921 the plaintiff attached a load of tobacco in the possession of W. L. Caudle, which he had brought into this State for sale on the Henderson market. It is conceded that one-fourth of the tobacco belonged to W. S. Richardson, the landlord—and this has been awarded to him under the judgment—while the remaining three-fourths, plaintiff contends, belonged to the defendant, W. L. Caudle. The tenant's share is the only tobacco in controversy.

The appealing defendant alleges that the tobacco in question was not subject to attachment in the hands of W. L. Caudle, because of a first lien which he held by virtue of a statute of Virginia for advances made by him as landlord to enable the tenant to make his crop. This was the single issue joined on the trial. The burden of proof was placed upon the appealing defendant to show his superior right to the property attached. He lost before the jury, and appeals, assigning error in the instruction relating to the burden of proof.

The case was correctly tried. An allegation on the part of a landlord that he has made advances to his tenant and therefore holds a lien upon his crop as security is a matter peculiarly within his own knowledge. *S. v. Falkner,* 182 N. C., p. 796. In an action like the present, between creditor and debtor, the landlord stands very much in the position of

one who intervenes in an attachment proceeding and claims title to the property in dispute, in which event it is uniformly held that the intervener has the burden of showing title to the property he claims. *Electric Co. v. Light Plant,* 185 N. C., 537; *Feed Co. v. Feed Co.,* 182 N. C., 690; *Mfg. Co. v. Tierney,* 133 N. C., 631. While the Virginia statute seems to have been treated as in evidence, there is nothing on the record to show its introduction as such. But waiving the point as to whether it was properly before the court, it appears from section 6454 of the Code of Virginia, the very statute under which the defendant claims his lien, that in an action presenting the question the landlord is required to establish the amount of his claim, and that it is for advances made under a contract with the tenant cultivating his land.

We find no reversible error.

No error.

PETER G. GALLOP, ADMR. OF DURWOOD GALLOP, v. B. PRESTON CLARK ET ALS., ASSOCIATED UNDER THE NAME AND STYLE OF PINE ISLAND CLUB, AND ST. CLAIR LEWARK.

(Filed 17 September, 1924.)

1. Principal and Agent—Torts—Scope of Agency—Respondeat Superior.

The principal is liable in damages for a tort committed within the scope of his agent's employment, whether the tortious act resulting in the injury was expressly authorized by him or not.

2. Same—Game—Evidence—Questions for Jury—Trials.

Where the one employed to guard the game preserves of those associated together into a hunting club shoots and fatally injures one who has gone there for the purpose of shooting the game that he was employed to guard, he is acting within the apparent scope of his employment, and the principals are responsible in damages for his wrongful act. The evidence in this case *held* sufficient to take the case to the jury.

THIS is an appeal by the defendants from a judgment rendered by *Devin, J.,* at May Term, 1924, of CURRITUCK.

The first issue submitted to the jury, with the answer thereto, was as follows: (1) Was the death of plaintiff's intestate caused by the wilful, wanton, or reckless conduct of the defendant Lewark, as alleged in the complaint? Answer: Yes.

It was alleged in the complaint "That on the ..... day of November, 1920, plaintiff's intestate, Durwood Gallop, in company with a companion, was in a boat, on the waters of Currituck County, adjacent to property held and claimed by the defendants, other than Lewark, and guarded by the said Lewark, and that as said Durwood Gallop and his

companion approached said property in said boat, the defendant Lewark, the employee and servant of his codefendants, wrongfully and unlawfully undertook to drive away the said Durwood Gallop and his said companion, and in so doing, wrongfully and unlawfully shot and mortally wounded the said Gallop, as a result of which he shortly thereafter died."

The defendants all denied said allegation. There was evidence, however, sufficient to support the affirmative of said issue. There was no exception by defendants to the evidence or to the charge of the court relative to this issue.

The second issue submitted to the jury, with the answer thereto, was as follows: (2) If so, was defendant Lewark, at the time, acting within the scope of his employment by his codefendants? Answer: Yes.

The plaintiff offered evidence relative to this issue, tending to show the facts, as follows:

The defendants, other than Lewark, on Thanksgiving Day, 1920, and for some years prior thereto, were the owners and in possession of "all that tract or parcel of land, and improvements thereon, bounded and described as follows: On the north by Indian Gap, Beasley's Bay, and the lands of the Currituck Shooting Club; on the east by the Atlantic Ocean; on the south by North Banks, or Bank Woods, and Currituck Sound; and being all of the land, of every nature and description, formerly owned by Josephus Baum, within said boundaries and in said sound, including all marsh land, beach land, islands of marsh, and lands covered by water contiguous and adjacent thereto, and islands in said sound." A club house and other facilities for hunting and shooting wild fowl was maintained by the defendants on the said tract of land. The property was used as a game or hunting preserve, for the benefit of the defendants and their guests. The defendants, other than Lewark, are associated together and known as the Pine Island Club.

The defendant Lewark was employed by his codefendants as a guard, or watchman, upon said property. He was required to watch over and guard said property, keeping a lookout for trespassers who might come on the same to hunt or shoot game. He went on duty each year in October, and remained on duty until the last of March of the succeeding year, thus being constantly on duty during the hunting season. The purpose of his employment was to protect the property, and especially the wild fowl and other game thereon, from trespassers. He often carried a rifle with him, and this fact was known to the superintendent of defendants, the owners of the property.

It is the habit of wild geese and duck, the game which made this property valuable as a hunting preserve, to feed during the winter months on the marsh lands and in the shallow water contiguous and

adjacent to the islands in the sound. At nightfall they come in large numbers from the open sound to these marshes and shallow waters, when and where hunters in boats or blinds shoot them as they fly about. Decoys are placed about in the shallow water, and the hunters place themselves at convenient places to shoot the wild geese and duck as they fly toward these decoys. The value of the property as a private game preserve depends largely upon keeping others from shooting the wild geese and duck as they come in at nightfall to these marshes and shallow waters to rest during the night. It was the duty of the defendant Lewark to keep a lookout for trespassers upon these marshes and shallow waters at the close of day in order that the geese and duck should not be disturbed as they went to their resting place.

During the afternoon of Thanksgiving Day, 1920, having been engaged in picking cotton during the morning, Durwood Gallop and James B. Shannon, both of them farmers, one with a double-barreled and the other with a single-barreled gun, went from their homes across the sound in a boat, towards the Pine Island Club property, to kill a goose. They rowed their boat north up Great Gap to Arc Cove. They stopped off in the sound, about 25 yards from the mainland, behind an island. It was about sundown, but light enough to see. Neither had fired a gun, but they were waiting for the geese to fly over toward the marshes and shallow waters, expecting then to get a shot. While thus waiting for the geese, sitting in their boat, with their guns, ready to shoot, they saw the defendant Lewark and another guard coming around the marsh in a skiff, or small boat. When they first saw Lewark he was 45 or 50 yards away, with a small island between them. As Lewark came around the island, he called to them that he would beat them if they did not leave. Both Gallop and Shannon knew Lewark, and knew that he was employed as a guard on the defendant's property. They turned their boat around, and as they did so, Lewark, again calling to them, began to shoot with a rifle. He shot between fifteen or twenty times, the fourth shot striking Gallop as he sat in the boat, inflicting the mortal wound. While Lewark was shooting, the boat was on the marsh and near the island. During the shooting, the boat, as it was being turned around, was at one time pointed toward the club property. After the shooting had ceased and Durwood Gallop had been mortally wounded, Shannon, his companion, rowed away rapidly.

Durwood Gallop died on Sunday morning following Thanksgiving Day, his death being the result of the gunshot wound received when Lewark was shooting at him in the boat. At the time of the shooting, Lewark and Wicker, the guard with him, had gone around the point in the marsh and had stopped in the marsh. They were about 125 yards from Gallop and Shannon.

At the close of plaintiff's evidence, the defendants, other than Lewark, moved for a judgment of nonsuit. Motion overruled, and defendants excepted.

Thereupon the defendants offered evidence tending to show the facts relative to the second issue, as follows: Lewark was forty-seven years old at the time of the shooting, and had been employed by Dr. Baum, the superintendent of the club, for about ten years. His duty was to watch the marsh, and if anybody trespassed, to ask him to leave. If such person did not leave, it was his duty, after making the request, to report the matter to Dr. Baum. He had no authority from Dr. Baum or the defendants to do anything else. He was on duty Thanksgiving Day, 1920, guarding and watching the marsh. Lewark testified that he had no ill will toward Gallop and Shannon, and did not know Gallop, nor did he see them or shoot at any one on that day. Neither Dr. Baum, the superintendent, nor any member of the club authorized Lewark to use or carry a rifle or gun with him while performing his duty as a guard or watchman, although Dr. Baum knew that he sometimes carried a rifle in his boat while on duty, and most of the time carried a gun of some description. A camp on the premises of the defendants was provided for the guards, and Lewark spent the nights at one of these camps. He spent the night of Thanksgiving Day at his camp.

No objection was ever made by members of the club to shooting, unless those who did the shooting came upon the marsh or the island. No one was permitted to hunt on the property of the club except the members and their guests.

At the close of all the evidence, the defendants, other than Lewark, renewed their motion of nonsuit. Motion overruled, and defendants excepted.

The third issue submitted to the jury, with the answer thereto, was as follows: (3) What damage, if any, is the plaintiff entitled to recover? Answer: $10,000.

There was no exception by the defendants to the evidence or charge of the court relative to this issue.

None of the exceptions to evidence noted during the progress of the trial, or to the charge of the court, and assigned as errors, were discussed in plaintiff's brief. The only exceptions and assignments of error relied upon by the defendants in their brief or in the argument upon appeal in this Court were to the refusal of the court to sustain the motions of nonsuit made at the close of the plaintiff's evidence and renewed at the close of all the evidence.

Judgment was rendered upon the verdict in favor of the plaintiff and against the defendants. The defendants duly excepted to this judgment and appealed therefrom to the Supreme Court.

Ehringhaus & Hall for plaintiff, appellee.

Aydlett & Simpson and McMullan & Leroy for defendants, appellants.

CONNOR, J. The defendants having abandoned, in their brief and in the argument upon their appeal to this Court, all exceptions except those based upon the refusal of the court to sustain the motions for nonsuit, made at the close of the plaintiff's evidence and renewed at the close of all the evidence (Rule 28, 185 N. C., 798), the only question presented to this Court is whether or not there was sufficient evidence to sustain an affirmative answer to the second issue, which was as follows: "If so, was defendant Lewark at the time acting within the scope of his employment by his codefendants?" The defendant Lewark did not move for judgment of nonsuit, and did not appeal from the judgment appearing in the record.

It was admitted by his codefendants that Lewark was employed by them as a guard and watchman upon their property, maintained by them as a hunting or game preserve. It was his duty to watch the marsh, and if any one trespassed, to ask them to leave. At the time the defendant Lewark, by his "wilful, wanton, or reckless conduct, caused the death of plaintiff's intestate," as found by the jury in their answer to the first issue, Lewark was in the performance of his duty as a guard, and the plaintiff's intestate and his companion, in a boat, with guns, at nightfall, when the wild geese and duck were flying to the marsh or shallow waters adjacent or contiguous to the property of the defendants, were waiting to get a shot at the wild geese and duck. Lewark was expressly authorized by his codefendants and employers to guard their property from such persons as were doing the very things that the plaintiff's intestate and his companion were doing. It is true that neither of them had fired a gun, but there is evidence sufficient for the jury to infer that Lewark knew what their purpose was at the time he ordered them off and fired the fatal shot. The fact that Lewark, before shooting, ordered the plaintiff's intestate and his companion to leave the place at which they had stationed themselves, is evidence that Lewark regarded them as trespassers, whom it was his duty to warn, and against whom it was his duty to protect the property of the defendants.

The liability of the defendants for the conduct of Lewark does not depend upon a finding by the jury that he was expressly authorized to perform his duty in guarding the property by a wilful, wanton, or reckless act. As Lewark was acting within the scope of his authority and was furthering the business of his employers, his employers are liable for the injury which he then inflicted upon Durwood Gallop by his

wilful, wanton, or reckless act, done in furtherance of the business for which he was employed by appellants.

Judge Devin, in a full, fair and correct charge to the jury, instructed them as follows upon the second issue: "A person is responsible, not only for his own acts, but for the acts of his employees and of his agents when they are done within the scope of their employment and in furtherance of the business which is entrusted to them. The test of the liability, in all cases, depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. The simple test is whether they were acts within the scope of his employment—not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred; but whether the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders. An act is within the scope of the servant's employment where necessary to accomplish the purpose of his employment and intended for that purpose, although in excess of the powers actually conferred upon the servant by the master. The purpose of the act, rather than its method of performance, is the test of the scope of employment." There was no exception to this instruction.

Justice Walker, in *Jackson v. Telegraph Co.,* 139 N. C., 348, says: "Whoever commits a wrong is liable for it, and it is immaterial whether it be done by him in person or by another acting by his authority, express or implied. *Qui facit per alium facit per se.* Upon this maxim of the law is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the rule; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of *respondeat superior* applies, and the master must answer for the tort if it was committed in the course and scope of the servant's employment and in furtherance of the master's business."

This rule has been so often stated as the law of this State that it would seem unnecessary to cite authorities sustaining it. In *Pierce v. R. R.,* 124 N. C., 93, *Clark, C. J.,* says: "'In the furtherance of the business of employer' means simply in the discharge of the duties of the employment, and the court properly told the jury that the defendant is responsible for the injury if caused by the wrongful act of the employee while acting in the scope of his employment."

In the same opinion the following is stated as the law: "Where the act is within the scope of the servant's authority, express or implied, it is immaterial whether the injury resulted from the result of his negligence or from his wilfulness and wantonness; nor is it necessary that the master should have known that the act was to be done. It is enough if it is within the scope of the servant's authority." To make the master liable it is not necessary to show that he expressly authorized the particular act; it is sufficient to show that the servant was acting at the time in the general scope of his authority, and this although he departed from his instructions, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury.

In *Cook v. R. R.*, 128 N. C., 333, it is said: "If any servant, 'acting in the general scope of his employment, wrongfully assaulted the plaintiff, and such wrongful assault caused the injury, the defendant is liable'—that is to say, if the conductor, *while acting as conductor,* or the flagman or brakeman, while *on duty as flagman or brakeman,* wrongfully assaults one on the train, even though such person be a trespasser, and such wrongful assault is the proximate cause of the injury, the carrier is liable. 'Acting within the general scope of his employment' means while on duty, and not that the servant was authorized to do such acts."

In *Butler v. Mfg. Co.*, 182 N. C., 547, *Justice Adams* cites and approves the statement made by *Walker, J.*, in *Daniel v. R. R.*, 136 N. C., 517, as follows: "It may then be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do, does something else which he is not employed to do at all, the master cannot be said to do it by his servant, and, therefore, is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit or to serve the master. It must be something done in attempting to do what the master has employed the servant to do. Nor does the question of liability depend on the quality of the act, but rather upon the question whether it has been performed in the line of duty and within the scope of the authority conferred by the master." See *Munick v. Durham,* 181 N. C., 188; *Clark v. Bland,* 181 N. C., 112.

Applying these rules to the evidence in this case, the jury was well justified in finding:

(1) That Lewark was the servant or employee of his codefendants, and that his duty by virtue of this employment was to guard or watch the marshes and shallow waters adjacent or contiguous to the property which the said defendants maintained as a private shooting or game preserve.

(2) That at the time of the shooting, plaintiff's intestate and his companion were engaged, or about to engage, in the very acts which it was the duty of Lewark, by virtue of his employment, to prevent, to wit, shooting at the wild geese and duck as they were flying from the open sound to the marsh and shallow water adjacent and contiguous to the property of defendants.

(3) That at the time Lewark fired at the plaintiff's intestate and his companion he was acting within the scope of his employment, to wit, guarding the defendant's premises against persons who threatened to shoot wild geese and duck on the defendant's premises.

(4) That the conduct of the said Lewark in shooting at plaintiff's intestate and his companion was in furtherance of his codefendants' business for which he was employed, to wit, in protecting their property from trespass.

(5) That while his act in shooting at plaintiff's intestate and his companion was not expressly authorized by defendants, it was done in the scope of their employment and in order to accomplish the purpose for which he was employed, to wit, protecting wild fowl which were on, or about to come upon, the defendants' premises to rest during the night, from plaintiff's intestate and his companion.

We are of the opinion that the exceptions to the refusal of the court to sustain the motion of nonsuit are not sustained, and that his Honor's ruling was in accord with the law of North Carolina as frequently stated in opinions of this Court. It is therefore ordered that the judgment be and the same is affirmed.

No error.

JOSEPH DUPREE v. JOHN C. DAUGHTRIDGE.

(Filed 17 September, 1924.)

Wills—Devise—Estates — Contingent Remainders—Title—Vested Interests—Statutes.

Where the testatrix devises absolutely her undivided land to her two sons, and by codicil devises to each a certain part thereof, that portion designated as lot No. 1 to one of them, and lot No. 2 to the other, with further provision, should either of them die leaving a child or children, said child or children shall be entitled to his or her parent's part: *Held*, the title to the lands vested in the son living at the time of the death of the testatrix, and was not postponed to await the uncertain event of the death of the son without leaving child or issue.

CONTROVERSY without action. Plaintiff appealed from a judgment of *Bond, J.*, rendered at June Term, 1924, of EDGECOMBE.

Harriet L. Dupree, mother of the plaintiff, died, leaving her last will and testament, as follows:

"I, Harriet Louisa Dupree, of the county of Edgecombe and State of North Carolina, being of sound mind and memory, but considering the uncertainty of my earthly existence, do make this my last will and testament, in manner and form following:

"First. That my executor (hereinafter named) shall provide for my body a decent burial, suitable to the wishes of relatives and friends, and pay all funeral expenses, together with my just debts, however and to whomsoever owing, out of the moneys that may first come into his hands as a part or parcel of my estate.

"I give, devise and bequeath unto my beloved sons, Joseph Lewis Dupree and Benjamin Franklin Dupree, their heirs and assigns forever, all my property, real, personal and mixed, of whatever nature or kind so ever and wheresoever the same shall be at the time of my death.

"And I do nominate, constitute and appoint my beloved son, Joseph Lewis Dupree, sole executor of this my last will and testament, hereby revoking and making void all and every other will or wills at any time heretofore made by me, and do declare this my last will and testament.

"In witness whereof, I, the said Harriet Louisa Dupree, have hereunto set my hand, this 20 January, 1906. H. L. DUPREE."

She also made the following codicil:

"I, Harriet L. Dupree, of Edgecombe County, North Carolina, make this codicil to my last will and testament written by me and dated the 20th day of January, 1906, which I now ratify and confirm except as the same shall be changed hereby.

"Whereas in my will I nominated and appointed my son, Joseph L. Dupree, my sole executor of entire estate, it is my will and desire that he shall execute all provisions and trusts of my will and codicil which it may be necessary for him to execute after my death.

"And whereas by my said will above mentioned I directed that after my death all my estate real, personal and mixed be divided among my children, share and share alike, and whereas on the 1st day of December, 1911, I had all the lands that it is my will and desire to devise surveyed, a copy of which survey is hereto attached and made a part of this codicil, I give and devise said land as follows:

"Lot No. 1 I give and devise to Benjamin F. Dupree.

"Lot No. 2 I give and devise to Joseph L. Dupree.

"The title to this property shall not pass to my children until after my death.

"I strike out the $100 for to be paid to my son Joseph L. Dupree. Should any of my children die leaving a child or children, said child or children shall be entitled to his or her parent's lot.

"It is my will and desire that after my executor (Joseph L. Dupree) shall divide equally between him and his brother Benjamin F. Dupree, all of my household property.

"After my death it is my will and desire that all my property, real, personal and mixed, of whatever nature or kind whatsoever, or wherever found, save and except what I have herein devised and bequeathed, be sold at public auction to the highest bidder, and the proceeds divided equally among my children or the descendants or such children as may then be living.

"In witness whereof I have hereunto set my hand and seal, this the 6th day of December, 1911. HARRIET L. DUPREE. (Seal)"

After the death of the testatrix the will was duly probated and recorded.

On or about 1 January, 1924, the plaintiff and the defendant entered into a contract whereby the plaintiff agreed to convey and the defendant agreed to buy lot No. 2 at the price of $15,000; and thereafter according to the contract the plaintiff tendered to the defendant a deed for the land, which the defendant declined to accept on the ground that the plaintiff could not convey an unencumbered title in fee simple.

Joseph L. Dupree has no children.

His Honor adjudged that the plaintiff is not the owner of an indefeasible title to the land devised to him by the testatrix, and that he pay the cost of the action. The plaintiff appealed.

Battle & Winslow for appellant.

ADAMS, J. At common law a limitation contingent upon the death of a grantee or devisee without issue was held to embrace an indefinite failure of issue and for this reason to be void. *Brown v. Brown,* 25 N. C., 134; *Buchanan v. Buchanan,* 99 N. C., 308, 311. In *Patterson v. McCormick,* 177 N. C., 448, it is said: "In the application of this principle and in order to avoid as far as possible defeating the intent of the grantor or testator, if there was in any deed or will an intermediate period, such as the termination of the life estate, a period fixed for division, arrival at full age or the like, the courts held that 'dying without issue' was referable to this intermediate period. This was the rule laid down in *Hilliard v. Kearney,* 45 N. C., 221. . . . The statute

of 1827 changed the principle making the limitation dying without issue void for remoteness and abrogated the rule of construction which applied it to an intermediate period. This statute applied to all limitations contingent upon dying without issue, and is not restricted to those where there is no intermediate estate." Its provisions are as follows: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: *Provided,* that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight." C. S., 1737.

The testatrix did not create a limitation contingent upon the death of Joseph L. Dupree without issue, but gave him lot No. 2, providing in the codicil that if he died leaving a child or children, said child or children should be entitled to his lot. The devise is therefore governed by the decision in *Goode v. Hearne,* 180 N. C., 475. There the will contained this item: "I give and devise in fee simple to my two daughters, Mamie G. Morris and Agnes Hearne, and to my daughter-in-law, Mamie W. Goode, the wife of George W. Goode, share and share alike, all my real estate wherever situated, and it is my will that the children of my daughter-in-law, Mamie W. Goode, by her husband, George W. Goode, shall, in the event of their mother's death, inherit her share of the estate."

The Court held that the devise did not come within the purport and meaning of section 1737, *supra,* and that the mother's estate became absolute at the testator's death. No time was fixed when the contingency should occur and the death of the testator was adopted in accordance with the principle stated in *Bank v. Murry,* 175 N. C., 65: "Subject to the position that the intent and purpose of the testator, as expressed in his will, shall always prevail, except when the same is in violation of law, it is a recognized rule of interpretation with us that when an estate by will is limited over on a contingency and no time is fixed for the contingency to occur, the time of the testator's death will be adopted, unless it appears from the terms of the will that some intervening time is indicated between such death and that of the first taker. *Bank v. Johnson,* 168 N. C., 304; *Dunn v. Hines,* 164 N. C., 113;

Galloway v. Carter, 100 N. C., 111; *Price v. Johnston,* 90 N. C., 593; *Vass v. Freeman,* 56 N. C., 221; *Cox v. Hall,* 17 N. C., 121."

Joseph L. Dupree survived the testatrix and has no child. His estate became absolute under the terms of the will at the time of her death. This conclusion, we think, is supported by the decisions of the Court and fortified by the obvious intention of the testatrix as manifested both in the will and the codicil to vest in the first taker a fee-simple title to lot No. 2 at her death, and to provide that if he died in her lifetime his surviving child or children should "be entitled to his or her parent's lot."

In our opinion the plaintiff has an indefeasible title in fee to the lot in question and the defendant has no right to refuse acceptance of the deed on the ground of the alleged defect.

The judgment is

Reversed.

P. W. WILLIAMS v. PEOPLES BANK AND CLAYTON MOORE, TRUSTEE.

(Filed 17 September, 1924.)

1. Principal and Agent—Banks and Banking—Cashier—Misappropriation of Funds.

Where a customer of a bank has his note for borrowed money accepted by a bank, and delivers it to its cashier for discount, the cashier is the agent for the bank to pay the proceeds over to the customer, or to place it to his credit at the bank; and where the cashier instead misappropriates it to his own use, he is acting within the scope of his agency as cashier of the bank, and applying the general principle relating to principal and agent, the bank is liable to its customer for the money thus misapplied. *Grady v. Bank,* 184 N. C., 158, cited and distinguished.

2. Same—Mortgages—Deeds in Trust—Equity—Injunction.

Where the cashier of a bank acting within the scope of his authority has misappropriated the funds paid to him, to take up the borrower's note given to the bank secured by a mortgage, the foreclosure of the mortgage will be enjoined in the suit for that purpose brought against the bank by the maker of the note.

APPEAL by defendants from *Lyon, J.,* May Special Term, 1924, of MARTIN.

The material facts are:

That Pleny Peele executed deed to P. W. Williams on 30 October, 1919, conveying 33 acres of land for a consideration of $6,000.

That P. W. Williams gave to Pleny Peele note for $1,250.15 to cover cash payment, with C. H. Godwin as endorser thereon, said note being dated 30 October, 1919.

That under date of 8 November, 1919, P. W. Williams executed his note to the Peoples Bank for $1,400, with deed of trust on certain land to Clayton Moore, trustee, as security. That this note has not been paid. J. G. Staton, since the action was brought, was appointed receiver for the defendant bank, and, by order of court, made a party defendant.

This action is brought by plaintiff against defendants to restrain them from selling the lands as set out in the deed of trust to Clayton Moore, trustee, to secure the note to the Peoples Bank for $1,400, dated 8 November, 1919.

The plaintiff contends that the evidence shows that he bought a piece of land from Mr. Peele, and that to raise the first payment he gave Peele his note, with one, C. H. Godwin, cashier of defendant bank, as surety, for $1,250.15, and that to enable Peele to get the money he gave to Moore, as trustee for the bank, a deed of trust to secure the note he made to the bank for $1,400, which covers interest, discounts, registration fees, etc. He contends that this note which he made to the bank after he had a conversation with Mr. Staton, the president, and Godwin, the cashier, was to put it in the bank for the purpose of raising twelve hundred and fifty and 15/100 dollars to pay Peele, and that is the last he had to do with it. He contends that the evidence shows that instead of the bank putting it to his credit, or paying it over to Peele and taking up the note that he had given Peele, Godwin, the cashier, took the money himself and placed it to his own credit and converted it to his own use. The plaintiff contends that he does not owe the bank anything because the bank has never paid anything to him or to Peele on this note.

The contention of the bank is that the bank knew nothing of Godwin being on the Williams note until after Godwin had left, and contends that the bank knew nothing of Godwin taking this money and putting it to his individual account until after he had left, and that Godwin was acting for himself and the plaintiff, and not for the bank.

The issue submitted to the jury was: "Is the plaintiff indebted to the defendant, J. G. Staton, receiver, on account of the note dated 8 November, 1919, if so, in what amount?"

The court below charged the jury as follows: "The court charges you that if you find from the evidence and by the greater weight thereof, the burden being on the plaintiff, that after plaintiff executed and delivered note and mortgage in controversy to the bank that Godwin, the cashier of said bank, converted said funds to his own personal use instead of giving the plaintiff credit or paying plaintiff the money, then it would be your duty to answer the issue 'no,' otherwise, you would answer it, 'yes'."

The jury answered the issue "no." The court below rendered the following judgment: "It is ordered and adjudged that defendant recover nothing on note and mortgage set out and described in complaint for $1,400. And it is further ordered and adjudged that the said note and mortgage for $1,400 executed by P. W. Williams and wife, dated 8 November, 1919, be declared null and void and that the same be surrendered to plaintiff and that plaintiff recover cost."

The defendants prayed the court to give the following instruction: "If the jury believe the evidence and find the facts to be as it tends to show, the jury should answer the issue, 'Yes, $1,250.15, with interest from 1 January, 1921'."

The defendants excepted and assigned as error the refusal of the court below to give the instruction prayed, the charge as given, the refusal to set aside the verdict as a matter of law, and the judgment as signed by the court, and appealed to the Supreme Court.

Critcher & Critcher and Martin & Peel for plaintiff.

Dunning, Moore & Horton, and Stephen C. Bragaw for defendants.

CLARKSON, J. The only question involved in this controversy is: "Was C. H. Godwin, the cashier of the defendant bank, the agent of plaintiff, P. W. Williams?" If he was, the plaintiff cannot recover. If he was the agent of the bank, the plaintiff can recover.

"The cashier of a bank is the chief executive officer. Still he is but an agent of the bank, and his acts are governed by the general rules applicable to agents, and if he exceeds his authority his acts will not bind the bank." 3 R. C. L., sec. 71, p. 444.

When the plaintiff delivered to defendant bank's cashier, Godwin, the $1,400 note and deed in trust, and the cashier accepted it, Godwin was the agent of the bank. There is no question about the bank making the loan. J. G. Staton testified: "This particular note went through on 10 November, 1919, and was approved by the finance committee 2 February, 1920. That is the signature of some of them approving the notes. Above my signature is written 'approved.' I do not know what date it was approved."

In *Goshorn v. Peoples Nat. Bank*, 32 Ind. App., 428 (102 Amer. State Reports, 251), it was said: The bank "selected its own cashier, and held him out to the world as deserving of confidence. Those who deal with persons occupying such responsible positions have a right to rely upon their integrity, and do so constantly. Depositors do not deal at arm's length with the cashier. In language used by *Justice Paxon* of the Supreme Court of Pennsylvania: 'It would be monstrous to allow them to take advantage of the ignorant and unwary, by reason

of their position, and the confidence it inspires.' *Zeigler v. First Nat. Bank,* 93 Pa. St., 393, 397; *Steckel v. First Nat. Bank,* 93 Pa. St., 376; 39 Am. Rep., 758; *City Nat. Bank v. Martin,* 70 Tex., 643; 8 Am. St. Rep., 632; 8 S. W., 507."

In the instant case the plaintiff was borrowing the money from the bank to pay a note made by himself to Pleny Peele, on which C. H. Godwin was endorser. The note of Williams was made to defendant bank, secured by deed in trust. The record shows that the cashier had authority to make the loan, as the president of the bank and the finance committee approved it. The cashier, Godwin, representing the bank had discounted the note for the bank and, after taking out the interest, etc., had misappropriated and converted the balance to his own use. He was the agent of the bank to give the plaintiff credit for it or to pay plaintiff the money or to pay the Peele note and mortgage. He did neither, and the bank is liable for the conversion and misappropriation of its agent, the cashier. It is immaterial that Godwin was endorser on the Peele note.

We do not think the case of *Grady v. Bank,* 184 N. C., 158, is an authority in this case. In that case (at p. 162) the Court says: "It is a well settled principle of law that the cashier cannot bind the bank by his acts in respect to matters in which he is personally interested, and third persons are bound to know that the cashier has no authority to use the funds of the bank for his own benefit."

In the case at bar the cashier was not using the funds of the bank for his own benefit. He misappropriated and misapplied the plaintiff's money contrary to the contract as cashier of the bank—in the scope of his employment—ratified by the president and finance committee—that he made with plaintiff, for which wrong the bank is liable. *LeDuc v. Moore,* 111 N. C., 516; *Phillips v. Hensley,* 175 N. C., 23.

For the reasons given, there is

No error.

LOUMIZA DAVIS v. W. T. BASS, TRUSTEE, ET AL.

(Filed 17 September, 1924.)

1. Estates—Entireties—Husband and Wife—Marriage.

The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State.

2. Same—Wills—Devises—Deeds and Conveyances.

In law, the husband and wife are regarded as one legal entity, and when they acquire title to land, after marriage, by devise, deed, or purchase it themselves, the question of whether they derive the title to the

land by entireties depends upon the construction of the instrument; and whether or not they are named therein as husband and wife, they take by entireties, the survivor acquiring the sole title, unless the contrary intent appears.

3. Same—Rents and Profits—Mortgages.

Where the husband and wife acquire lands by entirety, the husband is entitled to the rents and profits thereof during the joint lives of himself and wife, and may for that period of time mortgage or dispose of the same, but neither may deal therewith in any manner that will injure or lessen the estate therein of the other without the assent of the other, lawfully given, and no judgment against them, singly, can operate as a lien on the lands subjecting them to levy, but only a judgment against them both can have this effect. The reason for, and the extent of, this principle given by STACY, J.

4. Same—Statutes—Probate.

During the continuance of the joint lives of the husband and wife, who have acquired an estate by entireties, the wife's interest in the lands is such as is contemplated by C. S., 2515; and where the estate has been conveyed to one in trust for them both, and the officer in taking the acknowledgment of the wife has failed to make the certificate required by this section, requiring him, as a prerequisite to its validity, to certify that the instrument was not unreasonable or injurious to her, the instrument itself is void, and he may not, by will or otherwise, dispose of her interest thereunder.

5. Same—Partition—Dower—Tenant by the Curtesy.

The estate by entireties existing between husband and wife, from its very nature, without the consent of the other, lawfully given, is not subject to adversary partition, cannot be destroyed by either, and is only severed by divorce absolute; and as the estate ultimately goes to the survivor, the tenancy by the curtesy of the husband and the dower interest of the wife does not attach to it.

6. Same—Rule in Shelley's Case.

The rule in *Shelley's case* applies to an estate held by entireties by the husband and wife, when the instrument under which it is acquired is so drawn as to fall within its terms.

APPEAL by defendants from *Bond, J.*, at June Term, 1924, of WILSON.

Civil action, to cancel deed and to recover property ostensibly conveyed thereby.

On 12 May, 1916, the plaintiff and her husband, P. A. Davis, being the owners of certain lands as tenants by the entirety, executed a paper-writing purporting to convey said lands to W. T. Bass, trustee, under the terms of which the trustee was to hold the property for the sole use of both the grantors during the natural life of P. A. Davis, provided he predecease his wife; but if the plaintiff predeceased her husband, then at her death the uses and trusts created were to cease and all the property was to revert to P. A. Davis and be and remain his sole and separate property to all intents and purposes as fully and completely

as if the plaintiff had predeceased her husband without the execution of said deed. But if the said P. A. Davis predeceased the plaintiff (which he did), the trustee was authorized and directed to dispose of all the property according to the wishes of P. A. Davis, as expressed in his last will and testament.

The execution of this deed was duly acknowledged by the grantors, and the plaintiff's privy examination taken, but there was no compliance, or attempted compliance, with the provision of C. S., 2515, requiring the probate officer, as a prerequisite to its validity, to certify in his certificate of probate that such contract was not unreasonable or injurious to the plaintiff.

The defendants are residuary legatees under the will of P. A. Davis and, as such, claim title to the property by virtue of the deed above mentioned.

Plaintiff, on the other hand, widow of P. A. Davis, deceased, contends that said deed is void because not executed in accordance with the requirements of the statute, and that she is entitled to the property described therein by right of her survivorship. The case turns upon the validity or invalidity of this deed.

The trial court held the deed in question to be invalid, and rendered judgment for the plaintiff. Defendants appeal.

Bryce Little and W. A. Lucas for plaintiff.
Connor & Hill and Pou & Pou for defendants.

STACY, J., after stating the case: The question presented for decision is whether a conveyance made by husband and wife, during coverture, to a trustee, for the use and benefit of the husband, of lands held by the entirety, is such a contract between a husband and wife, affecting the real estate or the capital of the personal estate of the wife, as comes under C. S., 2515, requiring the probate officer, as a condition precedent to the validity of the conveyance, to certify in his certificate of probate that, at the time of its execution and the wife's privy examination, such contract was not unreasonable or injurious to her. The trial court held it to be such a contract, and that a failure to observe the requirements of the statute rendered it absolutely void. *Wallin v. Rice,* 170 N. C., 417. The appeal challenges the correctness of this ruling.

A satisfactory disposition of the case would seem to call for an examination into the basic character of an estate held by a husband and wife as such, or as tenants by the entirety as it is usually called. It is conceded that the deed in question was executed for the purpose of enabling the husband to deal with the property as his own, freed from his wife's interest therein.

When land is conveyed or devised to a husband and wife as such, they take the estate so conveyed, or devised, as tenants by the entirety, and not as joint tenants or tenants in common. *Harrison v. Ray,* 108 N. C., 215. This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. The estate rests upon the doctrine of the unity of person, and, upon the death of one, the whole belongs to the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee. *Long v. Barnes,* 87 N. C., 329; *Bertles v. Nunan,* 92 N. Y., 152. These two individuals, by virtue of their marital relationship, acquire the entire estate, and each is deemed to be seized of the whole, and not of a moiety or any undivided portion thereof. They are seized of the whole, because at common law they were considered but one person; and the estate thus created has never been destroyed or changed by statute in North Carolina. *Freeman v. Belfer,* 173 N. C., 587. It still possesses here the same properties and incidents as at common law. *Bynum v. Wicker,* 141 N. C., 95. The act abolishing survivorship in joint tenancies in fee (C. S., 1735) does not apply to tenancies by the entirety. *Motley v. Whitemore,* 19 N. C., 537. A joint tenancy is distinguished by the four unities of time, title, interest, and possession (*Moore v. Trust Co.,* 178 N. C., p. 124); and it has been held that in tenancies by the entirety, a fifth unity is added to the four common-law unities recognized in joint tenancies, to wit, unity of person. *Topping v. Sadler,* 50 N. C., 357.

"A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unit made up of *divisible parts;* that of husband and wife is also a unit; but it is made up of *indivisible parts.* In the first case there are several holders of different moieties or portions, and upon the death of either, the survivor takes a new estate. He acquires by survivorship the moiety of his deceased cotenant. In the last case, although there are two *natural* persons, they are but one person in *law,* and upon the death of either, the survivor takes no new estate. It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the *legal* personage holding the estate to an individuality identical with the *natural person.* The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. 1 Dana, 244; 7 Yearger, 319. This has been the settled law for centuries. The distinction may seem a nice one, but it is founded upon the nature of marriage and the rights and incapacities which it establishes. Co. Lit., 6; 1 Thom. Coke, 853; 2 Bl. Com., 182." *Lewis, C. J.,* in *Stuckey v. Keefe,* 26 Pa., p. 399.

It will be observed that the estate may be held by husband and wife as such, and not otherwise, though it is not necessary that they be so described. 13 R. C. L., 1108. A husband is a man who has a wife; and a wife is a woman who has a husband. There can be no husband without a wife, and there can be no wife without a husband. As members of the marriage state, the only capacity in which they may take an estate by the entirety, the one cannot exist without the other. The two, in law and in fact, constitute but one "husband and wife." 30 C. J., 562 *et seq.;* 13 R. C. L., 1114.

Chancellor Kent, in his Commentaries, describes this anomalous estate as follows: "If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties. They are both seized of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole"; and he cites Preston on Estates, which, with the authorities there collected, abundantly sustain his exposition of the law.

"This species of tenancy is *sui generis,* and arises from the unity of husband and wife. As between them there is but one owner, and that is neither the one nor the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole, and of every part and parcel thereof. There can be no partition during the coverture, for this would imply a separated interest in each; and for the same reason neither can alien, without the consent of the other, any portion or interest therein; and hence the legal necessity results, that the survivor must take the whole, for the estate being incapable of partition during the life of either, nothing could descend by the death of either. This consequence necessarily results from the nature of the estate, and the legal relation of the parties." *Smith, J.,* in *Ketchum v. Walsworth,* 5 Wis., p. 102.

Some of the properties and incidents of estates by the entirety may be summarized as follows:

1. In the eyes of the law an estate by the entirety is vested in one person—the husband and wife. These two individuals who constitute the one marital relation, are deemed to be seized of the entirety, *per tout et non per my. Bruce v. Nicholson,* 109 N. C., 204. Only husband and wife, in the character as such, may be tenants by the entirety. *Simons v. Bollinger,* 154 Ind., 83. This estate, in its essential features and attributes, is dependent, in legal contemplation, upon the oneness of person of husband and wife. *McKinnon v. Caulk,* 167 N. C., 412.

2. Upon the death of one, either the husband or the wife, the whole estate belongs to the other by right of purchase under the original grant

or devise and by virtue of survivorship—and not otherwise—because he or she was seized of the whole from the beginning, and the one who died had no estate which was descendible or devisable. *Todd v. Zachary,* 45 N. C., 286; *Stelz v. Schreck,* 128 N. Y., 263. It does not descend upon the death of either, but the longest liver, being already seized of the whole, is the owner of the entire estate. *Corinth v. Emery,* 63 Vt., 505.

3. Neither tenant can sever the union of interest so as to affect the right of survivorship without the consent of the other. *Bank v. McEwen,* 160 N. C., p. 419; *Washburn v. Burns,* 34 N. J. L., 18.

4. Lands held by husband and wife as tenants by the entirety are not subject to levy under execution on a judgment rendered against either the husband or the wife alone, nor can the interest of either be thus sold, because the right of survivorship is merely an incident of the estate, and does not constitute a remainder, either vested or contingent; but a judgment rendered against the husband and wife jointly, upon a joint obligation, may be satisfied out of an estate in lands held by them as tenants by the entirety. *Martin v. Lewis,* 187 N. C., 473; 30 C. J., 573.

5. Another peculiar incident of an estate by the entirety is, that if an estate be given to A., B. and C., and A. and B. are husband and wife, nothing else appearing, they will take a half interest in the property and C. will take the other half. *Hampton v. Wheeler,* 99 N. C., 222.

6. Neither the husband nor the wife can convey the estate without the assent of the other, nor is it subject to the lien of a docketed judgment or to be taken for the debt of either party without the assent of the other. *Gray v. Bailey,* 117 N. C., 439; 13 R. C. L., 1127.

The following is taken from the opinion of the Court in *West v. R. R.,* 140 N. C., 620: "Neither husband nor wife during the joint lives can convey or encumber the estate without the assent of the other, nor can a lien be acquired on it without such assent, nor can it be sold under execution." But in *Bynum v. Wicker,* 141 N. C., 95, it was said: "At common law 'the fruits accruing during their joint lives would belong to the husband' (*Simonton v. Cornelius,* 98 N. C., 437), hence the husband could mortgage or convey it during the term of their joint lives, that is, the right to receive the rents and profits; but neither could encumber it or convey it so as to destroy the right of the other, if survivor, to receive the land itself unimpaired. 'He cannot alien or encumber it, if it be a freehold estate, so as to prevent the wife or her heirs, after his death, from enjoying it, discharged from his debts and engagements.' 2 Kent Com., 133; *Bruce v. Nicholson,* 109 N. C., 204."

In *Greenville v. Gornto,* 161 N. C., 342, a lease for ten years made by the husband was held to be valid, the Court saying: "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," citing a number of authorities.

And again in *Dorsey v. Kirkland,* 177 N. C., p. 523, it is said: "If, as appears from these authorities, the husband has the control and use of the property during the life of his wife, and may deal with it as his own, and if he may execute a valid mortgage or a lease for ten years, we see no reason for refusing to uphold his deed, subject to the limitation that all rights thereunder will cease upon his dying before his wife."

On the other hand, in *Gray v. Bailey,* 117 N. C., 439, the following excerpts were quoted with approval: "They are both necessary to make one grantor, and the deed of either without the other is merely void." *Doe v. Howland,* 8 Cowen, 277. "The sole conveyance of the husband, whether in terms broad or narrow, carries with it no estate, and is a mere nullity, not only as against the wife, but also as against himself." Bishop Law Married Women, 621.

But in *Hood v. Mercer,* 150 N. C., 699, it was said: "It is true that where the husband had conveyed the land by deed with warranty, without the joinder of the wife, and survived her, his grantee acquired title, but this was by way of estoppel." And the following reference was made to the same point in *Bynum v. Wicker, supra:* "Whether, if he should be survivor, his deed is valid as a conveyance of his interest by survivorship, is a point as to which authorities are conflicting, but we are not now called upon to decide that point, as it is not before us." See, also, 30 C. J., 569.

Speaking to this question in *Washburn v. Burns,* 34 N. J. L., 18, the New Jersey Court said: "It is true that the husband cannot alien any part of the estate which he holds in the same right with his wife. To do that would be to sever its unity, and thus destroy its peculiar characteristics. The reason he cannot do this is because it would convert the estate into a tenancy in common, and defeat the right of survivorship. But the husband has an interest which does not flow from the unity of the estate, and in which the wife has no concern. He is entitled to the use and possession of the property during the joint lives of himself and wife. During this period the wife has no interest in or control over the property. It is no invasion of her rights, therefore, for him to dispose of it at his pleasure. The limit of this right of the husband is that he cannot do any act to the prejudice of the ulterior rights of the wife."

7. A lease by the husband alone, without the wife's joinder, is valid during coverture, because he is entitled to the possession, income, increase or usufruct of the property during their joint lives. *Greenville v. Gornto,* 161 N. C., 341; *Simonton v. Cornelius,* 98 N. C., 437. "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. And he is the absolute owner of such rents and profits. *Clapp v. Stoughton,* 10 Pick., 463. The husband was considered the owner of such rents and profits at common law, and none of the properties and incidents of this particular estate have been changed or altered in their nature and character by statute or by constitutional provision in North Carolina. It will be observed that Art. X, sec. 6 of the Constitution deals with the "sole and separate property" of married women; and the Martin Act of 1911 (C. S., 2507) has been construed as not affecting estates held by husband and wife as tenants by the entirety. *Jones v. Smith,* 149 N. C., 317.

The source of this right is stated in 30 C. J., 567, as follows: "The right of the husband at common law to the rents and profits of land held by him and his wife as tenants by the entirety does not spring from the peculiar nature of the estate, and is not an incident thereto, but it is a right which inures to the husband from the general principle of the common law which vests in the husband, *jure uxoris,* the rents and profits of his wife's lands during coverture. In other words the common-law rule that the husband is entitled to rents and profits of his wife's lands is as applicable where she holds a joint title as where she holds sole title."

8. Where an estate is conveyed to a man and woman who are not husband and wife, but who afterwards intermarry, as they took originally by moieties, they will continue to hold said estate by moieties after the marriage. Hence, there is nothing in the relation of husband and wife which prevents them from taking originally and thereafter holding their interests as tenants in common, if they so desire. *Highsmith v. Page,* 158 N. C., 226. The intention appearing, a conveyance may be made to husband and wife as tenants in common; but otherwise they will take by the entirety with right of survivorship. *White v. Goodwin,* 174 N. C., 723; *Holloway v. Green,* 167 N. C., 91. However, in the absence of an expressed contrary intention, a tenancy by the entirety arises whenever an estate is conveyed or devised to two persons, they being, when it is so conveyed or devised, husband and wife. Note, Am. Dec., 378.

Whether husband and wife take as tenants in common or as tenants by the entirety is to be gathered from the instrument which passes the estate to them, and when the intention appears therefrom that they should take an estate as tenants in common, it must prevail, and "such has been the rule from an early period in the history of the English law." *Isley v. Sellers,* 153 N. C., 374; *Fulper v. Fulper,* 54 N. J. Eq., 431.

9. An absolute divorce destroys the unity of husband and wife, and therefore converts an estate by the entirety into a tenancy in common.

McKinnon v. Caulk, 167 N. C., 411. But not so in case of divorce *a mensa et thoro,* as such divorce does not destroy the marital relationship of husband and wife. *Freeman v. Belfer,* 173 N. C., 581.

10. It follows necessarily from what is said above that an estate by the entirety is not, and cannot be, subject to dower or curtesy. *Agar v. Streeter,* 183 Mich., 600; *Donovan v. Griffith,* 215 Mo., 149.

11. While the husband is entitled to the possession of an estate held by the entirety and to take the rents and profits arising therefrom during coverture, with immunity of said estate from attachment or sale under execution, yet in a proceeding for alimony without divorce under C. S., 1667, the usufruct of the property may be subjected to the payment of an award for the wife's reasonable subsistence and that of the children of the marriage, together with counsel fees as allowed by ch. 123, Public Laws, 1921. *Holton v. Holton,* 186 N. C., 355. This is not a judgment on a "debt" of the husband in the ordinary sense of the word, but an appropriation or allotment under the police power. *Anderson v. Anderson,* 183 N. C., 143. And to satisfy such a judgment, possession for a time of a reasonable part of the estate may be assigned to the wife. *Holton v. Holton, supra.*

12. Neither party is entitled to partition. *Jones v. Smith,* 149 N. C., 317; 13 R. C. L., 1116.

In 1 Washburn on Real Property (5 ed.), p. 706, it is said: "A still more peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such. If a man and woman, tenants in common, marry, they will continue to hold in common. But if the estate is conveyed to them originally as husband and wife, they are neither tenants in common nor properly joint tenants, though having the right of survivorship, but are what are called *tenants by entirety.* While such estates have, like a joint tenancy, the quality of survivorship, they differ from that in this essential respect, that neither can convey his or her interest so as to affect the right of survivorship in the other. They are not seized, in the eye of the law, of moieties, but of entireties. In such cases, the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other; so that if, for instance, the wife survives and then dies, her heirs would take to the exclusion of the heirs of the husband. Nor can partition be made of the estate."

13. It has been held that an action by husband and wife, involving title or possession to lands held by the entirety, will not be barred by the statute of limitations as to one unless it bars both. *Johnson v. Edwards,* 109 N. C., 466.

14. A sale by husband and wife and a division of the proceeds ends an estate by the entirety. *Moore v. Trust Co.,* 178 N. C., 118. But it may

be otherwise where sale is made and one dies before division of purchase money. *Isley v. Sellars,* 153 N. C., p. 378.

15. A tenancy by the entirety may exist in lands whether the estate be in fee, for life, or for years, and whether the same be in possession, reversion, or remainder (30 C. J., 566); but in this jurisdiction it is held that there can be no estate by the entirety in personal property. *Turlington v. Lucas,* 186 N. C., 283.

16. Where land is conveyed or devised to a husband and wife for and during the term of their natural lives, or during the life of the survivor, with remainder to their heirs in fee, said husband and wife, under the rule in *Shelley's case,* take a fee-simple estate as tenants by the entirety in the property so conveyed or devised. *Roberson v. Griffin,* 185 N. C., 38.

17. The above rules apply to devises to husband and wife, and also to contracts to convey land to husband and wife. *Stamper v. Stamper,* 121 N. C., 252. They likewise apply to a gift or devise to husband and wife "during their natural lives." *Simonton v. Cornelius, supra.*

Bearing in mind the above characteristics and incidents of an estate held by husband and wife as tenants by the entirety, we think it is clear that the trust deed made by plaintiff and her husband to W. T. Bass, trustee, for the use and benefit of plaintiff's husband, is such a contract between a husband and wife, affecting the real estate of the wife, as comes within the provisions of C. S., 2515, requiring the probate officer, as a condition precedent to the validity of the conveyance, to certify in his certificate of probate that, at the time of its execution and the wife's privy examination, such contract was "not unreasonable or injurious to her." This having been omitted, in the instant case, the deed in question is void as to the plaintiff. *Singleton v. Cherry,* 168 N. C., 402. See, also, *Sims v. Ray,* 96 N. C., 87.

In *Needham v. Branson,* 27 N. C., 426, a deed of trust was executed by John Needham and wife to Hugh Maffitt, in which the grantors undertook to convey lands held by them as tenants by the entirety, to secure the payment of a debt; but as to this deed of trust, the wife was not privily examined. There was a foreclosure under the power of sale and the defendants held directly or by mesne conveyances from the trustee. Thereafter, upon the death of John Needham, his wife brought suit to recover the lands, alleging that the deed of trust to Maffitt was void and that she was entitled to the whole estate as survivor of her husband. Plaintiff was allowed to recover. *Daniel, J.,* speaking for the Court, said: "The deed to Maffitt did not convey Mrs. Needham's interest in the land, as she was not privily examined, as the law directs."

In *Cornith v. Emery,* 63 Vt., 505, speaking of the character of the wife's interest in lands held by the entirety, it was said: "Such an

estate is the real estate of a married woman, although her husband is joined with her in the title. It is the real estate of each." And in *Bynum v. Wicker,* 141 N. C., 95, it was held that a conveyance of lands held by the entirety, executed by the husband alone, would give the grantee no right to cut the timber standing thereon.

A tenant by the entirety has been held to be a freeholder within the meaning of that term in a statute relating to public improvements on the petition of a certain number of freeholders. *Maitlen v. Barley,* 174 Ind., 620; *Hinkley v. Bishopp,* 152 Mich., 256.

The judgment in favor of plaintiff must be upheld.

Affirmed.

LEVI H. WADE v. STATE HIGHWAY COMMISSION OF NORTH CAROLINA AND WAYNE COUNTY HIGHWAY COMMISSION.

(Filed 24 September, 1924.)

1. **Condemnation — Compensation — Damages—Statutes—Constitutional Law.**

   The right of the owner of land to compensation for his land, taken by condemnation for a public use, is for compensation in the manner and to the extent fixed by the Legislature.

2. **Same—Benefits—Offsets—Remedies—Amendatory Statutes.**

   The method by which the owner of land is compensated for the taking thereof by condemnation for a public use is the remedy provided by the Legislature by statute to meet the constitutional requirement, which may be changed by the legislative will by allowing as an offset to the amount recoverable either all benefits or those specially accruing to the land, or none at all; and the statute in force at the time of trial is the one applicable, and not a former statute, of which the later one is amendatory.

APPEAL by defendant from *Lyon, J.,* at February Term, 1924, of WAYNE.

Civil action to recover damages resulting from the relocation of a public road through lands of the plaintiff.

From a verdict and judgment awarding plaintiff the sum of $200.00, the State Highway Commission appeals, assigning errors.

Hugh Dortch and Dickinson & Freeman for plaintiff.
Kenneth C. Royall and W. L. Cohoon for defendant.

STACY, J. The single exception stressed on the argument and chiefly relied upon in defendant's brief is the one addressed to the following portion of the charge:

"You have heard the evidence and it is for you to say whether or not the damage to the land has been greater than the special benefit accruing to it, and if you so find whatever amount you find will be your answer to this issue. But if you find the special benefit is greater than the damage you would answer the issue 'Nothing'."

At the time of the relocation of the road in question and when this suit was instituted, the rule for the admeasurement of damages was as stated by the trial court in his charge. Ch. 2, sec. 22, Public Laws, 1921; *Lanier v. Greenville,* 174 N. C., 311. But subsequent to the institution of the suit and before trial, the Legislature amended the law by adding: "And in all instances the general and special benefits shall be assessed as off-sets against damages," etc. Ch. 160, sec. 6, Public Laws, 1923. Hence, the law as amended and in force at the time of trial should have been followed in determining the amount plaintiff was entitled to recover. Such was the holding in *Miller v. Asheville,* 112 N. C., 759, a case presenting practically the same question. There it was said:

"The rule laid down by his Honor has been the settled ruling of this Court, but it was expressly altered as to all condemnation proceedings instituted in behalf of the defendant by sec. 16, ch. 135, Private Laws, 1891. It is true, this was enacted 28 February, 1891, after these proceedings were begun. But the verdict assessing the damages was rendered thereafter, at August Term, 1891. This is merely a change of remedy. Whether the defendant can reduce the damages by all the benefits accruing to the plaintiffs, or only by those benefits special to the plaintiffs, rests with the sovereign when it confers the exercise of the right of eminent domain. When, after proceedings begun, but before the trial, the Legislature struck out all right to any benefits as an offset, it was held valid. *R. R. v. Hall,* 67 Ill., 99. For the same reason, the present act, which extends the assessment of benefits to all received by the landowner, instead of a restriction to the special benefits, is valid. All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has a constitutional and vested right. The Legislature, in conferring upon the corporation the exercise of the right of eminent domain, can in its discretion require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damages. This is a matter which rests in its grace, in which neither party has a vested right, and as to which the Legislature can change its mind always before rights are settled and vested by a verdict and judgment."

And further speaking to the question of policy in *Elks v. Comrs.*, 179 N. C., 241, where the whole matter is discussed at length, *Clark C. J.*, said: "The distinction seems to be that where the improvement is for private emolument, as a railroad or water power, or the like, being only a *quasi*-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but where the property is taken solely for a public purpose, the public should be called upon to pay only the actual damages, after deducting all benefits, either special or general."

For the error as indicated, there must be a new trial; and it is so ordered.

New trial.

J. H. WHITE AND J. E. WHITE, TRADING AS J. H. & J. E. WHITE, v. M. E. EVANS, ADMR. OF J. W. LANGDALE, DECEASED.

(Filed 24 September, 1924.)

Deceased Persons—Evidence—Statutes—Appeal and Error—Prejudice.

Where a father is sought to be held liable as an original promissor to pay a debt for the son for goods sold and delivered to the son, in an action against the administrator of the deceased father, testimony of the plaintiff that the deceased father had sent him to the son for collection of a certain amount thereof is concerning a transaction between the plaintiff and a deceased person, prohibited by C. S., 1795, and is reversible error, though conflicting inferences may be drawn therefrom.

APPEAL by defendant from *Brown, J.*, at May Term, 1924, of BERTIE.

Civil action to recover against the estate of J. W. Langdale for goods sold and delivered to Charles and Frank Langdale, sons of the deceased, it being alleged that the father of the two boys had become responsible, on his original promise, for the payment of the account.

Verdict and judgment for plaintiffs. Defendant appeals.

Gillam & Davenport for plaintiffs.

Winston & Matthews and Craig & Pritchett for defendant.

STACY, J. This is an action brought by plaintiff against the administrator of the estate of J. W. Langdale to recover on an account for goods sold and delivered to Charles and Frank Langdale, sons of the deceased, it being alleged that the father of the two boys, during his lifetime, had agreed to become originally responsible for the account. *Taylor v. Lee*, 187 N. C., 393.

J. E. White, one of the plaintiffs, was permitted to testify that on one occasion he went to Frank Langdale and collected $25.00 on the account. He added: "I told him that I needed some money, and that his father had sent me to him." Motion by defendant to strike out this remark; overruled and exception. It will be observed that this action is not against Charles and Frank Langdale. The administrator of the estate of J. W. Langdale alone is being sued. This bit of evidence permits the inference, and it was so argued to the jury, that the deceased, by sending the witness to his son for payment, thereby recognized his own liability for payment of the account. This necessarily involved a personal transaction or communication with J. W. Langdale, who is now dead, and such may not be offered as evidence against his administrator under C. S., 1795.

In reply to this position, it is said the objectionable part of the testimony of the interested witness is also susceptible to exactly a contrary inference, namely, that the deceased sent the witness to Frank Langdale for collection of the account because he did not recognize any personal responsibility for its payment. It is, therefore, contended that, even if objectionable, the admission of such evidence was harmless, as the jury might have drawn either conclusion from it. To accept this view would be to set the statute at naught by a balance of inferences from incompetent evidence. We are not permitted to disregard the statute on a doctrine of inferential chances or probabilities as to its effect upon the jury. The law is otherwise. No exception of this kind is to be found in the statute.

We think a fair test in undertaking to ascertain what is a "personal transaction or communication" with the deceased about which the other party to it cannot testify is to inquire whether, in case the witness testify falsely as to what transpired between them, the deceased, if living, could contradict it of his own knowledge. *Carey v. Carey,* 104 N. C., 171. Death having closed the mouth of one of the parties, it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the Legislature, in its wisdom, has declared that an *ex parte* statement of such matters shall not be received in evidence. Such is the law as it is written, and we must obey its mandates.

The admission of incompetent evidence, as above indicated, entitles the defendant to a new trial; and it is so ordered.

New trial.

STATE v. ERNEST DOSS.

(Filed 24 September, 1924.)

1. Seduction—Statutes—Instructions—Supporting Evidence.

Where there is supporting testimony of the woman in her statutory action for seduction, to wit, the carnal intercourse with an innocent and virtuous woman, induced by promise of marriage, an instruction which eliminates the necessary supporting evidence of the woman to only the element of the promise of marriage is reversible error. C. S., 4339.

2. Same—Questions for Jury—Statutes.

The weight and credibility of the evidence supporting that of the woman, upon the trial of seduction, under C. S., 4339, is for the jury, if it comes within the requirement of being legal evidence, however slight it may be.

APPEAL by defendant from *Allen, J.*, at March Term, 1924, of LEE.

This was an indictment against the defendant for seduction of Elizabeth Bryant, an innocent and virtuous woman, under promise of marriage. There was a verdict of guilty and judgment was rendered from which defendant appealed to the Supreme Court.

The only material exception and assignment of error will be considered in the opinion.

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

D. B. Teague and H. F. Seawell for defendant.

CLARKSON, J. The defendant was indicted under C. S., 4339; which is as follows: "If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the State Prison not exceeding the term of five years: *Provided,* the unsupported testimony of the woman shall not be sufficient to convict; *provided further,* that marriage between the parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of *nolo contendere,* and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for nonpayment of the same."

There are three elements in this crime: (1) The carnal intercourse; (2) With an innocent and virtuous woman; (3) Induced by promise of marriage.

The statute, however, has this proviso: "*Provided,* the unsupported testimony of the woman shall not be sufficient to convict."

There are three essentials to a conviction. All the elements must be proved by supporting testimony. The court below charged the jury (to which charge exception was taken and error assigned) as follows: "So it is necessary for you to understand this statute, which makes it a felony, that is, an offense punishable by imprisonment in the State's Prison, to seduce a virtuous and innocent woman under a promise of marriage; the law is so careful about it that it goes further and says that the case is not made out unless the State produces and has some supporting evidence as to the promise of marriage."

The vice complained of is that the charge of the court below expressly limited the necessity for testimony to support that of the prosecutrix to one essential of the crime, namely, the promise of marriage, and impliedly states to the jury that as to the other two essentials of the crime the testimony of the prosecutrix need not be supported. Nowhere in the charge is this error corrected. The maxim applies of "*Casus omissus pro omisso habendus est.* A case omitted is to be held as (intentionally) omitted." Tray Lat. Max., 67.

In *State v. Moody,* 172 N. C., 968, it is said:

"There are three essential elements of this crime: First, the seduction; second, the innocence and virtuousness of the woman; third, the promise of marriage inducing consent of the woman to the sexual act. *S. v. Pace,* 159 N. C., 462; *S. v. Cline,* 170 N. C., 751. The prosecutrix testified to the defendant's promise of marriage; that she was persuaded by it to have sexual intercourse with him, and that she was a virtuous and innocent woman, never having committed the act with any other man."

First, as to her virtue and innocence there was supporting testimony, as the State called witnesses who stated that the character of the prosecutrix has always been good prior to this occurrence. We have held this to be sufficient as supporting testimony within the meaning of the statute. *S. v. Mallonee,* 154 N. C., 200; *S. v. Horton,* 100 N. C., 443; *S. v. Cline, supra; S. v. Sharpe,* 132 Mo., 171; *S. v. Deitrick,* 51 Iowa, 469; *S. v. Bryan,* 34 Kan., 72; *Zabriskie v. State,* 43 N. J. L., 644.

Second, the seduction was shown both by the testimony of the prosecutrix and the admission of the defendant and by the circumstances otherwise appearing in the case.

Third, this brings us to a consideration of the main contention of the defendant's counsel, that there is no supporting testimony as to the promise of marriage.

It must be borne in mind that we are not passing upon the weight or strength of the evidence in any of these instances, but only upon the

question whether there is any testimony which is supporting in the sense of that word as used in the statute. We are of the opinion that there is, and however unconvincing or inconclusive it may be, it was for the jury to determine its weight. *S. v. Ferguson,* 107 N. C., 841.

For the reasons given, there must be a

New trial.

GEORGE W. GOLDING v. FOSTER & CAVINESS.

(Filed 24 September, 1924.)

Contracts—Vendor and Purchaser—Conditional Acceptance of Order of Purchase—Carriers.

An offer to buy does not become a contract unless unconditionally accepted, or, when the acceptance is upon condition, until this condition is accepted by the proposed purchaser; and where a carload of potatoes has been ordered by telegraph to be shipped that day, but were shipped several days thereafter without further agreement, the proposed purchaser may refuse to receive it from the common carrier, and no contractual liability will attach to him.

APPEAL by defendants from *Daniels, J.,* at June Term, 1924, of CARTERET.

Civil action to recover the price of a carload of potatoes.

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

C. R. Wheatley for plaintiff.

Graham W. Duncan for defendants.

STACY, J. Plaintiff, a resident of Carteret County, brings this action against Foster & Caviness, partners, doing business in the city of Greensboro, N. C., to recover the value of 150 barrels of sweet potatoes shipped by plaintiff to defendants on 10 February, 1923.

After exchanging telegrams relative to the price of Porto Rico potatoes for prompt shipment, the defendants, on 2 February, sent the plaintiff the following message: "Ship hundred fifty barrels Porto Ricos today. Wire car number." In reply to this order, plaintiff answered on the same day: "Will ship Monday." The potatoes were not shipped on Monday, 5 February. Whereupon defendants wired plaintiff, on Wednesday, 7 February, as follows: "When are you going to ship potatoes? Booked shipment. Answer quick." Plaintiff did not answer this telegram, but shipped the potatoes on 10 February, three

days thereafter. Defendants declined to accept the potatoes, when notified of their arrival by the railroad company on 14 February, because not shipped according to instructions and as they were compelled to go upon the market and purchase other potatoes to supply their trade.

In explanation of why he failed to answer defendants' telegram of 7 February, plaintiff said he had written a letter on Tuesday, 6 February, advising defendants that he was unable to ship on account of weather conditions. There was evidence on behalf of the defendants that they never received this letter. Plaintiff also testified that he wired defendants on Saturday, 10 February, at time of shipment, giving car number, as requested, but receipt of this message was denied by defendants.

Assuming the jury found that plaintiff's letter of 6 February was received by the defendants, there is nothing on the record to show its contents, other than stated above, and such was not sufficient to relieve the plaintiff from the necessity of answering defendants' telegram of 7 February. No binding contract had been made prior to that time (13 C. J., 281), and the defendants' message, in terms, called for "answer quick." Nor would plaintiff's telegram of 10 February suffice, even if sent and delivered, which is denied. *Leffel v. Hall,* 168 N. C., 407.

Defendants' order of 2 February was for 150 barrels of potatoes, to be shipped that day. Plaintiff's reply that he would ship on the following Monday, three days later, amounted to a refusal to accept the offer as made, and constituted a counter-proposal to ship at a later date. *Wilson v. Lumber Co.,* 180 N. C., 271; *U. S. Heater Co. v. Applebaum,* 126 Mich., 296. There was no acceptance of this counter-proposal, unless the defendants' silence could be taken as equivalent to assent. *May v. Menzies,* 184 N. C., 150. But even if this be true, the plaintiff failed to ship according to his own offer. The defendants' telegram of 7 February called for an immediate answer, and there is nothing on the record to justify plaintiff's delay in this respect. 6 R. C. L., 614. The minds of the parties never met, and no binding contract has been established upon which plaintiff may recover.

Speaking to a similar situation, in *Cozart v. Herndon,* 114 N. C., 252, *Shepherd, C. J.,* said: "It is well settled that in order to constitute a contract there must be 'a proposal squarely assented to.' If the proposal be assented to with a qualification, then the qualification must go back to the proposer for his adoption, amendment or rejection. If the acceptance be not unqualified, or go to the actual thing proposed, then there is no binding contract. A proposal to accept, or acceptance based upon terms varying from those offered, is a rejection of the offer. 1 Wharton Cont., 4. 'The respondent is at liberty to accept wholly,

or reject wholly, but one of these things he must do; for if he answer, not rejecting, but proposing to accept under some modification, this is a rejection of the offer.' 1 Parson Cont., 476. 'It amounts to a counter-proposal, and this must be accepted and its acceptance communicated to the proposer; otherwise there is no contract.' Pollock Cont., 10."

And of like tenor is the language of *Mr. Justice Washington,* in *Eliason v. Henshaw,* 17 U. S., p. 228: "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either."

The case is unlike *Crook v. Cowan,* 64 N. C., 743, the "carpet case," for there a contract had been consummated and the parties were not dealing with perishable goods to be sold to the trade, as in the instant case.

The principles of law applicable to the facts here presented are stated, with citation of authorities, in *Green v. Grocery Co.,* 153 N. C., 409; *Rucker v. Sanders,* 182 N. C., 607, and *Jeanette v. Hovey,* 184 N. C., 140. An examination of these cases, and the principles they illustrate, will suffice to show that the plaintiff here has failed to establish any enforceable contract. 23 R. C. L., 1280. Upon the record, the defendants' motion for judgment as of nonsuit should have been allowed.

Reversed.

ATLANTIC COAST LINE RAILROAD COMPANY v. TOWN OF SANFORD ET AL.

(Filed 24 September, 1924.)

1. Appeal and Error—Certificates of Opinions—Procedure.

Where an appeal has been taken to, and decided by, the Supreme Court, wherein an incorporated city has been enjoined from enforcing an order assessing the abutting owner of lands upon a street for improvements thereon, any further action of the city therein before the decision has been certified down to the trial court is void.

2. Municipal Corporation—Cities and Towns—Street Improvements—Statutes—Assessments—Notice.

Where a city has been enjoined in an action from enforcing an assessment against abutting property of the owner for street improvements, under a statute providing for notice and right of appeal from the com-

missioners to the Superior Court, any further proceedings as to the assessments without giving the owner the statutory notice deprives him of his statutory right, and is void; and the fact that the notice given was rendered ineffectual by the injunction does not relieve the city of its statutory obligation to give the notice after the injunction has been made inoperative in the due course and practice of the courts.

DEFENDANTS appealed from a judgment rendered by *Midyette, J.*, at Chambers, 4 June, 1924. From LEE.

Charles G. Rose and Hoyle & Hoyle for plaintiffs.
Williams & Williams for defendants.

ADAMS, J. The disposition of a former appeal in this case is reported in 186 N. C., 466. It was thought advisable, as stated in the opinion, to postpone the final determination of the questions presented until all pertinent circumstances were made to appear in the manner authorized by the acts under which the defendants were then proceeding. The opinion was filed on 14 November, 1923, but was *not certified to* the Superior Court of Lee County until 3 December. Meantime, on 20 November, the defendants passed an ordinance making permanent assessments against the plaintiff for paving portions of certain streets in Sanford.

Judge Midyette held that the attempted assessments of 20 November were invalid. We approve this conclusion. The defendants seem to have proceeded upon the assumption that it was not necessary to await the certification of the opinion rendered on appeal, but in this respect they were in error. They had no legal right to make a final assessment against the plaintiff's property before the opinion had been certified to the Superior Court and while the questions presented on the appeal were yet *in fieri*. C. S., 657, 659, 1413, 1417; Rule 38 (185 N. C., 801); *Johnston v. R. R.*, 109 N. C., 504.

The purported assessments were made under the provisions of chapter 15 of the Private Laws passed at the Extra Session of 1921. Section 5 provides that the board of aldermen shall cause a written notice to be served on all owners of abutting property affected by the improvements at least ten days before the final assessments are made, and that any aggrieved person shall have the right, within ten days after the assessment has been filed with the clerk, to file with the clerk in like manner his objections thereto, and to appeal from the decision to the next term of the Superior Court. The defendants failed to give such notice to the plaintiff. True, they gave notice, on 20 April, 1923, that the final assessments would be made on 15 May, but a restraining order prevented their proceeding at the time designated. Without another notice,

how was it possible for the plaintiff either to know when and where to appear, in order, if it felt aggrieved, to file objections or in due time to exercise its right of appeal to the Superior Court?

The failure to give such notice was equivalent to depriving the plaintiff of rights which are expressly conferred by the statute.

The judgment is

Affirmed.

DAVIS LIVESTOCK COMPANY v. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

(Filed 24 September, 1924.)

1. Carriers — Railroads — Negligence — Livestock—Evidence—Presumptions—Rebuttal.

In an action against the railroad to recover damages for the death of a mule, in a carload livestock shipment, in the bill of lading for which was a provision exempting the carrier from liability for injuries caused by the inherent viciousness of the animals, etc., the receipt of the stock and the death of the mule while in the carrier's possession raises a presumption of its actionable negligence, which the carrier may rebut by showing that the shipment was made in a proper car and that the carrier exercised due care in its transportation.

2. Same—Instructions—Appeal and Error.

Where the bill of lading issued by the carrier for the transportation and delivery of a carload shipment of livestock contains the usual provision exempting the carrier from liability for injuries caused by the inherent viciousness of the animals, etc., and there was evidence on the trial tending to show that one of them had kicked over the transom of the car and was thrown to the floor and found injured *in transitu* by the carrier's employee, a charge of the court that relieves the carrier from exercising due care after discovering the condition of the mule is reversible error.

APPEAL by plaintiff from *Daniels, J.*, at March Term, 1924, of PITT.

The jury returned a negative answer to the issue, "Was plaintiff's mule injured by the negligence of the railroad, as alleged in the complaint?"

Martin & Sheppard and Julius Brown for plaintiff.
Skinner & Whedbee for defendant.

ADAMS, J. On 26 January, 1920, the plaintiff delivered to the defendant twenty-four mules for carriage from Richmond, Va., to Farmville, N. C. One of them died during transportation, and the plaintiff brought this action to recover its value. There was evidence for the

defendant tending to show that while the train was at Emporia, Va., one of the brakemen saw the injured mule, with a hind foot made fast in a transom, or ventilator, presumably by kicking, and with its head and shoulders on the floor; that its face and one eye were disfigured; that it was finally released and then left in the car, and that it was dead when the train arrived at Weldon.

The defendant contended that the loss was due to the mule's viciousness, and relied upon the plaintiff's agreement, set out in the bill of lading, to indemnify the defendant against claims arising out of loss or injury caused by "the inherent vice or the wild and unruly condition or conduct of any of the said livestock, including self-inflicted injuries."

The defendant admitted the contract of carriage, the receipt of the stock, and the death of one of the mules while in its possession. In these circumstances the loss is presumed to have been attributable to the defendant's negligence. *Everett v. R. R.,* 138 N. C., 68; *Hosiery Co. v. Express Co.,* 184 N. C., 478. The learned judge observed this principle, and very clearly instructed the jury as to its application, but in addition he gave the following instruction, to which the plaintiff excepted: "Now, if this evidence satisfies you that this mule kicked over the door, got his foot caught there, in a car that was a standard car and in good condition, in a train that was managed and run without negligence, then the presumption would be rebutted, and you would answer the issue 'No.' "

When the plaintiff offered evidence giving rise to the presumption of negligence, it was incumbent upon the defendant to exculpate itself by rebutting the presumption; but the instruction complained of excluded the jury's determination of the question whether the defendant exercised due care to relieve the situation after discovery of the mule's condition at Emporia. *Teeter v. Express Co.,* 172 N. C., 616, 618. True, the jury were further instructed to answer the issue for the defendant if they believed all the evidence; but under this instruction they were privileged to disbelieve a part of the evidence and yet return a negative verdict merely upon finding that the mule, by kicking, caught its foot above the door of "a standard car, in good condition, in a train that was managed and run without negligence." The instruction as to the operation and management of the train was not comprehensive enough to include the duty which the defendant owed the plaintiff while the train was "set off" and the defendant's employees were trying to release the injured mule. For the error complained of, the plaintiff is entitled to a

New trial.

W. S. SHAW, ADMINISTRATOR OF W. D. SHAW, DECEASED, v. THE NATIONAL HANDLE COMPANY, INC., A CORPORATION OF OHIO, AND M. J. NORTON.

(Filed 24 September, 1924.)

1. Witnesses—Expert—Questions of Law—Evidence—Appeal and Error.

It is a question of law for the court, and not of fact for the jury, whether a witness, who is introduced as such, is an expert; and if there is any evidence tending to establish this as a fact, the affirmative holding of the trial judge is not reviewable on appeal.

2. Same—Negligence—Poison—Gases—Evidence.

Where there is other evidence tending to show that the death of defendant's employee was caused by the negligence of the defendant, in an action to recover damages therefor, a physician, who has qualified as an expert, and who may testify from his personal observation and investigation thereof, is also competent to testify to his opinion that the intestate's death was caused, as in this case, by poisonous gases from an improperly constructed or worn-out parts of a gas engine operating a motor boat in which the intestate was riding in an enclosed cabin, when relevant to the inquiry.

3. Same—Evidence—Questions for Jury—Trials.

The testimony of an expert is not admissible upon matters of judgment within the knowledge or experience of ordinary jurymen.

4. Same.

Where there is evidence tending to show that the plaintiff's intestate met his death by poisonous gases from an improperly constructed gas engine in a boat wherein he was riding, and furnished by the defendant, his employer, to be used within the scope of his duties, testimony of an expert in such matters that he had examined the engine after the injury, and its imperfect condition was such as to give out the poisonous gases, is competent, when there is also evidence tending to show that the conditions testified to by him had existed at the time of the intestate's death.

5. Same—Nonsuit.

Where there is evidence tending to show that the defendant, in an action to recover damages for the wrongful death of plaintiff's intestate, alleged to have been caused by the defendant's negligence, had hired, through its vice-principal, a gas motor boat for the use of the intestate in the scope of his employment, on which the gas engine, owing to its worn-out or imperfect condition, gave off poisonous gases under circumstances that caused the death of the intestate: *Held*, sufficient to take the case to the jury and to deny defendant's motion as of nonsuit.

ADAMS, J., dissenting.

APPEAL by defendants from *Devin, J.*, at April Term, 1924, of CHOWAN.

The material facts are:

W. D. Shaw, plaintiff's intestate, was employed by the defendant, the National Handle Company, and had the superintendency of its logging

business—"log foreman." He was in charge of logs in the woods, seeing the logs cut down and rafted. The raft was turned loose on Roanoke River to float down to Plymouth. A colored man in a canoe went along with the raft until it was met by the defendant company's boat. At the time of his death Shaw was in the employ of defendant, the National Handle Company, and had been for two years. Joe Dixon was superintendent under the defendant M. J. Norton, who was manager. Shaw frequently went to Plymouth and returned to his logging work on the Coast Line train, which leaves Plymouth about 7 o'clock a. m. On the Sunday before Shaw's death he started up the river in the company's boat with one Curby, an employee of the company, but did not go, as it was out of order and needed repairs. Joe Dixon, the superintendent, witness for plaintiff, testified, in part, that under the direction and orders of M. J. Norton, the manager, he saw Elmer Jackson, and a boat was obtained from Jackson, who said the boat was in perfect condition. Jackson would not let the boat go without his employee, a colored man, named John Parker, an engineer, to run it. The colored man and Shaw left in the Jackson boat between 10 and 11 o'clock on Sunday morning. The gas to run the boat, about 62 to 72 gallons, was drained out of the defendant's boat that was then out of repair.

"Q. Did you know for what purpose he was going? A. For convenience, to get to his raft—that is all I know. He had no business in the boat, so far as I know. That was the National Handle Company's raft.

"Q. Was that part of his duty, looking after the raft? A. Yes, sir; logging. The company's boat was broken down that Sunday. I found out this between 8 and 9 o'clock Sunday morning. I did not see Shaw when he went and undertook to go in the company's gas boat, or when he went on the company's gas boat.

"Q. Mr. Dixon, there was a boat that the company had that was ordinarily furnished him for the purpose of making these trips? A. In what way do you mean?

"Q. The boat he was usually permitted to use in making these trips—the one you say was broken down? A. Yes, that was the National Handle Company's boat.

"Q. That was the boat he was permitted to use? A. Shaw never used any; it was used by Mr. Curby to haul logs.

"Q. The boat you say he undertook to use—it was out of shape that day? A. Yes. Shaw left in the boat of Mr. Elmer Jackson, of Plymouth. I saw Mr. Jackson about getting the boat. I went to Mr. Jackson; asked him was his boat in running condition. He said, 'In perfect condition.' I asked him could we get it to go up the river for a raft—ours was broken down. By we I mean the National Handle Company. He said, 'No, unless my crew goes.' Parker was his crew.

"Q. Did you agree for Parker to go? A. I didn't have anything to do with it. . . . I did not know where they were going—to what point on the river. I don't remember Norton telling me where he wanted the boat to go. He told me to tell Jackson that he wanted the boat to go until he met the raft. . . . Mr. Shaw did not have anything in the world to do with operating the gas boat. He did not have any duties to perform on the gas boat. He usually came from the log woods and went back on the Coast Line train. . . . Neither I nor anybody representing the company told him to go out with Curby on our boat. After our boat broke down, he went on Jackson's boat, just for convenience, on his own accord. He had no direction from the company to go, and no duties to perform. I do not know when he and Curby started out in the gas boat. They came to see me about 8 or 9 o'clock. I do not know whether Shaw came with Curby or not. Curby reported to me that the gas boat was broken down, and suggested that I would have to get another boat if he had to go up and get the raft. Then I went to see Mr. Norton, and he told me to see if I could get a boat. Then I went to see Mr. Elmer Jackson, to see if I could get his boat. When I told Jackson I wanted the boat, Jackson absolutely refused to hire the boat to me or the company, and told me that the only condition under which the boat could tow this raft was that he send it with his own crew, reserving absolute operation and control, at so much per hour. Jackson's boat was regularly engaged in towing logs, and had been for a long time—operated by Jackson with his own crew. I have never been on the boat and know nothing about gasoline engines. The only thing I heard about the boat, it was one of the best that run up the Roanoke River. . . . He (Shaw) could have gone on the train. I could not tell you whether it was his duty to be at the raft; however, he got there. I said he was going up for convenience, was all I know. I just said I could not tell about that. If Shaw had not gone, Curby was going by himself. I do not know whether it was, or was not, his duty to go after that raft. He was log foreman.

"Q. As log foreman he was supposed to look after the raft? Didn't you say that it was his duty to look after his raft? Didn't you call it Shaw's raft? A. I might have called it Shaw's logs; I think that was as far as he had to go—was to raft the logs.

"Q. Don't you know? A. That was his job, to get the logs and raft them.

"Q. Don't you know that it was not his business? A. Yes.

"Q. Why did you permit him to go? A. I didn't have anything to do with it. Mr. Curby was going. Mr. Curby was going after the raft. Shaw did not have any duty there, as far as I know.

"Q. Was it not his duty to see that the raft was equipped to come? A. To get the logs, haul them to the river, and then raft them. You did not understand me to say he could have met the raft on the Roanoke River on the Coast Line train. I ain't said it. . . . The only reason it was necessary at all for Shaw to go back to the woods was to get more logs. His duties with reference to the raft were complete. The only man to go after the raft was Curby, with a gas boat, to get it back. When the boat could not go, I contracted with Mr. Jackson to get his boat. The boat was going up the river. The raft was turned loose on Roanoke River to float down, and a colored man in a canoe would always go along with it until it was met by the boat. Shaw was going to the woods.

"Q. Is it not a fact that Shaw himself fixed up that raft, turned it aloose, and came back to Plymouth to get the boat to meet it? A. I do not know about that. I do not know. I had no information about it."

Elmer Jackson, witness for plaintiff, testified, in part:

"I am Elmer Jackson referred to in this testimony. I have owned this boat about sixteen years. I had a four-cycle twelve-horse power Globe engine. I bought it from Thomas R. Curby, Berkley, Va. Prior to buying it I had known it about thirty minutes. I have not the slightest idea how old it was when I bought it. It was not new. Both the boat and engine had been used before. I have used it ever since.

"Q. Have you owned it since the unfortunate accident? A. Yes, it is still running now every day. It has the same engine. I have replaced the valves about a dozen times. I have replaced the two exhaust valves since the accident, and the two intake valves I have had reseated. I remember no other changes since December, 1922, except that I have repaired the pipe. I have replaced the exhaust valves, had the intake valves reseated and replaced the exhaust pipe. Have made no other changes that I recall, except possibly some minor changes, such as tightening a bolt. Since Mr. Shaw's death I have used the boat pretty near every day. . . . Sunday was the day Mr. Dixon came to see me. I told him the only way I would send the boat was under the control and operation of my own man—to tow the raft down for him. I would not permit him to take control, or the boat to go without my man on it. Mr. Norton had nothing to do with it. I did not see Mr. Norton. Parker was in control of the boat acting for me. I sent the boat with Parker off on my business. I had taken the contract. I had contracted with Dixon and was going for the National Handle Company's logs. . . . Since I have owned the boat I have repaired the windows. I have not enclosed it more. With the exception of the windows being broken, it was enclosed as it was at the time of the accident. I have had it enclosed six or seven years. I repaired the exhaust pipe

about three weeks prior to the time Mr. Leary came there, or maybe a shorter time. I broke off the gas pipe, and that is why I repaired it. It was about three weeks prior to Mr. Leary's going there."

Mack Gregory, witness for plaintiff, testified in part:

"I live in Edenton. I am an automobile and gas engine mechanic. I have been engaged in repairing gas engines more than fifteen years. I know the construction of and am familiar with the operation of four-cycle engines. If the exhaust pipes are tight and mufflers tight and good joints, they don't give off any gases unless certain parts of the engine are worn. The exhaust pipe is on the other side of the engine. I saw the boat in controversy at Plymouth on Wednesday, 19 March, 1924, to the best of my recollection possibly a week before the 19th. . . . The engine did not appear to be new. It was a four-cycle Globe engine. That engine is not being manufactured; it is obsolete. This engine was built some twenty or twenty-five years ago. It was a gas boat that I would judge to be about thirty or thirty-five feet long; had a cabin-house built over it; engine inside; had glass windows around the front; door on the back. The life of an ordinary valve in a motor is, I should say, ten years. Possibly the valves were in there when the motor was built. I examined the valve stems and valves particularly. I would say that the valves in that engine had been running around ten years. I examined the engine thoroughly outside. I didn't take it down. I lifted the exhaust pipe up and examined it. It had been repaired."

The following questions were asked Mack Gregory and allowed by the court below, and exceptions taken:

"Q. I was asking you, Mr. Gregory, in your examination of this gas engine, tell us please what condition you observed about that engine? A. We found that the valves and valve guides were badly worn, and we found the exhaust pipe, between the engine and muffler, there is a flange union or connection where the two pipes are made together with the joints, which had become discolored from exhaust blowing. That was inside the boat. We found marks on this something like a tightening operation, if you would hammer it.

"Q. To what extent was the discoloration from the exhaust? A. Turned nearly black from escaping gas. The two sections of galvanized pipe, one about five inches long, another seven, and the sleeve union in between those two sections, and a new galvanized elbow.

"Q. What was that for? A. That takes the exhaust from the engine—from the muffler—outside of the boat. In other words, that is the exhaust pipe.

"Q. What other places did you observe through which the exhaust could leak? A. It could leak out of the worn valve.

"Q. Was there a crack on top of the cylinder head? A. It did not show anything. It was soldered or chinked. There was a small break.

"Q. About the discoloration? A. It was slightly black. The plate was not in the back; it was known as an open base engine and the original plate closed in by the engine was not there.

"Q. What effect, if any, would that have on exhaust leakage? A. If the cylinder and rings of that was worn, it would naturally blow gas fumes out of the engine into the cabin.

"Q. What do you mean by gas fumes? The fumes of exploded gas? A. Some of it would be exploded; some of it live gas.

"Q. Directing your attention to the things you observed, if those connections had been snugly made, would there have been leakage? A. No, sir.

"Q. If the valves, etc.? A. If the joints in the exhaust pipe and the pipe, good pipe, not rust-eaten or porous, it could not have leaked into the cabin—would have gone outside.

"Q. How about the plate? A. That would not have stopped the gas from going out. I did not observe the pistons. We had to take a screwdriver and lift the valves so that we could remove them around into the guides to see how much they were worn. . . .

"Q. I ask you, would there have been more than the average amount of leakage of gas fumes, from the conditions you observed? A. In my opinion, it would throw off far more gas fumes than an engine that is apparently new and tight. The valves were worn when I examined them in March. In my opinion the valves were worn a good deal more than an ordinary valve would have worn in that period of time—from December until the times I was there. In my opinion I found the wear on the valves more than would have been due to wear on the valves during that period of time. I said the valves appeared to be worn more than in the ordinary wear and tear since December, 1922, a year and three months. The extent to which they have been worn between December, 1922, and March, 1924, would necessarily depend upon the extent to which the boat was used. I do not know to what extent the boat was used. I could not know. I do not attempt to say when the valves were put there, but can say that they were badly worn."

Dr. F. H. Garriss, for plaintiff, testified in part:

"I am a graduate of Jefferson Medical College, Philadelphia, and have been a practicing physician since 1913. I am licensed by the State of North Carolina and practicing in Bertie County. I did not know the deceased, Mr. Shaw, nor have sufficient acquaintance to know him when I saw him. I was coroner of Bertie County at the time of his death, and as such had occasion to examine his body. This was 19 December, 1922. When I first saw the body it was in a gasoline boat at

Quitsna Landing, on Roanoke River, on the Bertie side. The boat was closed by frame work, doors, windows and glass. Inside the enclosure was the wheel, the usual seats and the engine. There was only one deck, the bottom deck. It was on Wednesday, 19 December, that I went with the deputy sheriff of Bertie County, and saw the boat on the Bertie side. The boat had been entered before I went there; the door was opened. I found in the boat the corpses of two men, a white man and a colored man. The white man was identified by letters or other witnesses as Shaw. . . . When I found them the colored man was back of the engine. It appeared that he was sitting on a seat back of the engine. When he became unconscious he slipped down off of the seat and his head and shoulders off on the side with his coat rolled up under his shoulders. One foot was slipped by the engine and the other rested against the engine, preventing him from slipping entirely to the floor. It was John Parker. . . . The white man was in front of the boat on his hands and knees, his head resting on the bottom of the boat between a high stool and the steering wheel; his pipe had fallen out of his mouth. His head, feet, hands and knees were all resting on the bottom of the boat. It was one of these stools that you sit on to steer the boat. He was dead. Both of the men were dead, and their bodies stiff. The weather was cold, and it had snowed the day before. Immediately preceding this it had been pretty cold. There was snow on the ground, and it was cold. . . . The engine was cold; we found the clutch in gauge with forward position. The oil cups were open and the switch was on. The boat was tied at a wharf at the time when I saw it. . . . I found a bottle in the boat, about a six and one-half ounce pop bottle. There were two or three drops of some liquid in it. I smelled the bottle, but could not swear what was in it. There were possibly five or six drops of liquid that you might see when you turned the bottle about. The bottle had a slight acid odor. There was no other bottle in the boat. There was no evidence of nausea or vomiting on the floor, and no other indications that any one had been sick.

"Q. Of course you conducted the investigation as coroner as to whether there had been any foul play? A. Yes.

"Q. What evidence did you find as to foul play? A. None whatever. There were no marks, except that Shaw's head was white from the pressure on the boat. I made the examination for that purpose. There were no marks on the other man's body. In the course of my preparation for the practice of medicine I had occasion to study chemistry, action of gases on the body—the human system. I have studied chemistry and have been practicing for thirteen years. Carbon monoxide is poison to the human system. It is a gas generated by incomplete combustion. Of course it is made commercially by the action of CO_2 on

live coal. Imperfect combustion gives off carbon monoxide. Its effect is poisoning to the human system. The physiological effect is that it unites with the hemoglobin of the red cells in the blood, preventing the uniting of the oxygen with same. The hemoglobin of the red corpuscles, when carried to the lungs, absorbs oxygen ..... the heart, and carries it back to the tissues. It is impossible for a human being to live without oxygen. The hemoglobin is the oxygen carrier. Carbon monoxide combines with the hemoglobin shutting out the room necessary for the oxygen to combine with the hemoglobin. When the hemoglobin is combined with the carbon monoxide there is no room for it to combine with the oxygen. That effects poison. Carbon monoxide poisons the body in two ways, acutely and chronically. Acutely depends upon the saturation of the air. In some instances the amount of carbon monoxide in a garage gives a chronic monoxide, the explosion of any product—wood, coal."

The following questions were asked the witness, allowed by the court, and exceptions taken:

"Q. What effect, so far as increasing or decreasing the saturation of the air, would the turning of the discharge from the combustion into the apartment itself have? A. Physiologically? When carbon monoxide is eliminated, regardless of by gasoline engine, or gas plant, if eliminated into a closed room, if the saturation is as much as three per cent it will kill inside of ten or fifteen minutes. That is an acute poison. It is colorless, odorless, and tasteless gas. I know that from medicine as well as chemistry. There is no unusual odor from it nor necessarily any warning in the case of poisoning until the person is overcome. Of course, we are not considering pure carbon monoxide. Illuminating is made of carbon monoxide and other gases. The combination of carbon monoxide and other gases usually gives an odor.

"Q. From your examination of the boat, the condition in which you found them, and your observation of the condition when you came upon them, the condition of the boat as you observed it, and the other surrounding conditions, if you have an opinion satisfactory to yourself as to the cause of the death of the deceased, I would be glad if you will give it to us. A. In that case it was my opinion—of course my investigation was at that time only far enough to decide whether it was homicide. I didn't conduct the investigation far enough to decide what, but believe it came nearer being gas poisoning, monoxide gas poisoning, than anything else. The only other thing that could have caused death was the empty bottle. The size of the bottle, and not but one bottle, it could not have contained enough liquor or whiskey (if whiskey) to have produced death, and also if it had been liquor or other poison there would have been other signs present, as one person dying, or taken sick before

the other, the other trying to assist him. There were no other signs. The effect of alcoholic poison on the human system is nausea, vomiting, wrenching—they vomit, as a general thing. I do not know Mr. Norton personally."

On cross-examination the witness said in part:

"I can say that both of these men died at the same time—I mean both of them became unconscious at the same time, because both of them were in exactly the same position in which they became unconscious. I mean if two men were in one boat and one became unconscious the other would try to do something for him. This is a medical opinion and not an argument. . . . I gave them a careful examination. I stripped both of them on the boat and found no unusual marks on Shaw's body. . . . I did not make any blood test, nor go inside his lungs, stomach or heart. The real understandable cause of death by inhalation of carbon monoxide is asphyxiation. Asphyxiation means that when—it means he has been poisoned unto death by inhaling poison, which means that a man has been poisoned by inhaling a poisonous gas. It is this way, the carbon monoxide gas unites with the blood, preventing it from taking up oxygen, therefore the body dies from starvation of oxygen. That is all that I learned about it in my examination, since this autopsy. I treated a case of carbon monoxide poisoning in 1912 and 1913, in Philadelphia and Norfolk. I do not remember the names of the patients. . . . The external post mortem symptoms are about the same, whether a man is hanged, drowned, or dies from inhaling gas. . . . In determining the question of death, we have to use all the evidence we can collect around the body and everything else. I am not drawing my conclusion entirely from the gasoline boat. I drew that inference in making the examination. I could not swear that they died from carbon monoxide; I do not swear to it now. If I told the jury you could not tell whether he died from carbon monoxide it was to the best of my opinion; you can have an opinion, but you cannot be positive. To my knowledge, I said at the coroner's inquest that they died from some common poison, from gas from an engine, or a combination of both. That was my opinion at the time. I did not know I had changed my opinion; I have not. I could not swear whether these men died from gas or from poison, or what they died from. I only have my opinion as to what it is. I would not say it was very inconclusive."

For the purpose of corroboration, a letter from Dr. Garriss to Mrs. W. D. Shaw was introduced, dated 20 December, 1922, which is as follows:

"Today held inquest over your husband.

"It appears that he was in a closed gas boat with a negro going up Roanoke River Monday morning. They were found Tuesday morning

with the boat stuck in the bank. They both appeared as though they died simultaneously. There was nothing to show that they were damaged or that there had been a fight of any kind. Mr. Shaw was lying where he fell off the stool where he was steering the boat, and the negro was lying partly on a bench back of the engine.

"We decided that as the boat was closed up tightly they were asphyxiated by escaping gas from the engine. Am writing you this because, according to the way he was sent home am afraid you would not get a true description of his death."

The usual issues of negligence, contributory negligence, and damages were submitted to the jury; found for the plaintiff and judgment rendered in accordance with verdict. Exceptions and assignments of error were duly made by defendants to certain evidence introduced by plaintiff during the trial. The defendants introduced no evidence, and, at the close of the evidence made a motion for judgment as of nonsuit, which was refused by the court below. Defendants excepted, assigned errors and appealed to the Supreme Court.

H. R. Leary, and Ehringhaus & Hall for plaintiff.
Z. V. Norman, and McMullan & Leroy for defendants.

CLARKSON, J. The first group of exceptions and assignments of error by defendants are to the court below permitting Dr. Garriss, plaintiff's witness, to answer the following questions:

"Q. What effect, so far as increasing or decreasing the saturation of the air, would the turning of the discharge from the combustion into the apartment itself have? A. When carbon monoxide is eliminated, regardless of by gasoline engine or gas plant, if eliminated into a closed room, if the saturation is as much as three per cent, it will kill inside of ten or fifteen minutes.

"Q. From your examination of the boat, the condition in which you found them, and your observation of the condition when you came upon them, the condition of the boat as you observed it, and the other surrounding conditions, if you have an opinion satisfactory to yourself as to the cause of the death of the deceased, I will be glad if you will give it to us. A. In that case it was my opinion—of course, my investigation was at the time only far enough to decide whether it was homicide. I didn't conduct the investigation far enough to decide that, but I believe it came nearer being gas poisoning, monoxide poisoning, than anything else. The only other thing that could have caused death was the empty bottle. The size of the bottle, and not but one bottle, it could not have contained enough liquor, or whiskey, if whiskey, to have produced death; and also if it had been liquor or other poison, there

would have been other signs present, as one person dying or taken sick before the other, the other trying to assist him. There were no other signs."

From the testimony, not denied, Dr. Garriss was a duly licensed and practicing physician of many years standing, and a graduate of a leading medical college. Whether or not a witness is an expert is a question for the court below to decide, and if there is any evidence that a witness is an expert, the decision of the court below will not be reviewed on appeal.

Defendants in their brief say: "There is no finding in the record that Dr. Garriss is an expert, but no point is made as to this."

Dr. Garriss saw the boat, the condition of the two men, how they were lying, the windows down, and, by personal observation, had knowledge of the entire situation. With this personal knowledge and observation of all the facts, and Dr. Garriss' training and experience as a physician, we think his evidence competent. Its probative force was for the jury.

In *Flaherty v. Scranton Gas and Water Co.*, 30 Pa. Superior Court Rep., 446, it was said: "Two reputable physicians of long practice and high standing, each of whom saw and carefully examined the child, one at the beginning, the other near the fatal termination of its sickness, and each of whom was apprised of the conditions under which the sickness began, gave it as their deliberate opinion and judgment that the child died from the effects of an inhalation of gas. . . . That was an action against a gas company to recover damages for the death of an infant. It appeared that the employees of the defendant went into plaintiff's cellar to make some repairs in the gas service, and while so engaged permitted the escape of a volume of gas, which found its way into an upper room, where the infant inhaled it."

In that case, nor in the case at bar, was there an autopsy. The examination in each case was external and all the surrounding facts known to the physicians. They knew the facts, and on the known facts gave their opinion. Their education and training were for the purpose of enabling them to deal with and express their opinion as to what ills and the causes that constantly threaten and affect humanity.

In *Davenport v. R. R.*, 148 N. C., p. 294, *Hoke, J.*, says: "Even if it should be regarded as more strictly 'opinion evidence,' when it comes from a source of this kind, from one who has had personal observation of the facts, and from practical training and experience is qualified to give an opinion which is likely to aid the jury to a correct conclusion, such evidence is coming to be more and more received in trials before the jury. McKelvey speaks of it with approval as 'expert testimony on the facts.' McKelvey, p. 230." *State v. Morgan*, 95 N. C., 641; *Jones*

v. Warehouse Co., 137 N. C., 337; *Jones v. Warehouse Co.*, 138 N. C., 546; *Lynch v. Mfg. Co.*, 167 N. C., 98; *Ferebee v. R. R.*, 167 N. C., 290.

A recent interesting discussion of opinion evidence, by *Stacy, J.*, is in *S. v. Hightower*, 187 N. C., p. 307. The entire Court concurred in this aspect of the case. It was there said: "Applying these principles to the instant case, we think the better practice would have been for Latham and Coursey to have stated the facts or to have detailed the data observed or discovered by them, before drawing their conclusions or giving their opinions in evidence, but we shall not hold it for legal or reversible error that such was not required as a condition precedent to the admission of their opinions in evidence before the jury. *S. v. Felter*, 25 Ia., 75; *S. v. Foote*, 58 S. C., 218. Speaking to a similar question, in *Commission v. Johnson*, 188 Mass., p. 385, *Bradley, J.*, said: 'By this form of examination no injustice is done; for whatever reasons, even to the smallest details, that an expert may have for his opinion can be brought out fully by cross-examination.'"

The evidence in *Summerlin v. R. R.*, 133 N. C., p. 551, was excluded in the lower court, and sustained, "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." *Mule Co. v. R. R.*, 160 N. C., 252; *Hill v. R. R.*, 186 N. C., p. 475.

It is well settled that "The testimony of an expert is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen." Greenleaf Evidence, sec. 440a; *DeBerry v. R. R.*, 100 N. C., 315.

These assignments of error cannot be sustained.

The second group of exceptions and assignments of error by defendants are to the court below permitting Mack Gregory, plaintiff's witness, to answer the following questions:

"Q. I am asking you, Mr. Gregory, in your examination of that gas engine—tell us, please, what condition you observed about that engine. A. We found that the valves and valve-guides are badly worn, and we found the exhaust pipe between the engine and muffler—there is a flange union or connection where the two pipes are made together with the joints which had been discolored from exhaust blowing. That was inside the boat. We found marks on this, something like a tightening operation, if you would hammer it." (And like questions, all set forth in the material facts in the case.)

The witness Gregory testified, in effect, that he made an examination of this boat, on or about 19 March, 1924, in the presence of Mr. Leary, the plaintiff's attorney, the plaintiff himself, Elmer Jackson, who owned the boat, and others; that at this time he found both the two intake valves and the two exhaust valves much worn, and also found the exhaust pipe in a defective condition; and that by reason of the worn and defective condition of the exhaust valves and exhaust pipe, the boat, when in operation, would probably give off into the cabin fumes or exploded gas. He further testified that it would have been impossible for such fumes to enter the cabin from the intake valves, in any event, or from the exhaust valves or exhaust pipe, if they had been in proper condition, and that even in the worn and defective condition in which the exhaust valves and pipe were found, fumes could have been prevented from entering the cabin from these sources by the presence of a plate which he testified was absent. That is to say, according to this witness' testimony, that the danger from escaping gas arose solely from the worn and defective condition of the exhaust pipe and exhaust valves, and that had these been in reasonably safe condition all danger from such gas poisoning would have been eliminated.

This testimony was to the condition of the boat about fifteen months after the inquest of Dr. Garriss over the body of plaintiff's intestate. It is conceded that this testimony would have been competent if directed to the time of the deceased's death.

The defendants contend that the conditions were the same at these two widely separated periods is not to be assumed. The witness Gregory frankly states that he has no knowledge and cannot say what the condition of the exhaust pipe and valves were at the time of deceased's death; nor is there other testimony in the record tending to show a similarity of conditions in these appliances. On the other hand, testimony of Elmer Jackson, owner of the boat and witness for plaintiff, makes it clear that conditions were utterly dissimilar at these two periods. He testified that, since the accident and before Gregory's examination of the boat, he had reseated the intake valves—a matter of no importance, since Gregory testified that gas fumes could in no event have entered the cabin from the intake valves; also, that within the same limits of time he had wholly replaced the exhaust valves; and also that within the same period—about three weeks before Gregory's examination—the exhaust pipe had broken off and had been repaired or replaced. It thus conclusively appears that, with reference to the exhaust valves and exhaust pipe, from which alone Gregory testifies danger was to be apprehended, conditions had materially changed between the time of the accident and Gregory's examination, and that no inference as to

their condition at the time of deceased's death can be drawn from Gregory's testimony.

The plaintiff contends, on the other hand, the questions to which these exceptions were taken were all asked of plaintiff's witness, Mack Gregory, an experienced mechanic, who had made personal inspection of the gas boat in question. The court declined to permit the introduction of any of this testimony until after it had been made to appear from examination of the witness Elmer Jackson, owner of the boat, that the condition of the boat at the time of Gregory's examination was the same as at the time of the accident, with the few exceptions noted by the witness Jackson. After stating that he had owned the boat ever since the unfortunate accident under consideration, he said: "It was the same engine. I have replaced the valves about a dozen times. I have replaced the two exhaust valves since the accident, and the two intake valves I have had reseated. I remember no other changes since December, 1922, except that I have repaired the pipes. I have replaced the exhaust valves, had the intake valves reseated, and replaced the exhaust pipe; have made no other changes, that I recall, except possibly some minor changes, such as tightening a bolt."

With this evidence before the Court, we think the testimony of the witness Mack Gregory competent, even though the information was gathered some time after the accident complained of, and the following charge of the court below was correct: "There is one matter to which I should call your attention. Some evidence has been offered as to changes and repairs on the gasoline engine of the boat. This is submitted to you solely for the purpose of aiding you in ascertaining the condition of the engine in December, 1922, and must not be considered by you as in anywise tending to show the engine was defective by reason of any evidence that any additions or repairs were made to it after the death of the intestate. You will observe this caution in the consideration of evidence along this line."

In *Blevins v. Cotton Mills,* 150 N. C., p. 497, it was said: "On the admission of testimony as to the condition of the machine not long before the trial of the cause, and twenty-two months after the occurrence, the authorities are very generally to the effect that when the condition of an object at a given time is the fact in issue, its condition at a subsequent period may be received in evidence when the circumstances are such as to render it probable that no change has occurred. There are decisions which hold that after a long period the subsequent conditions should be rejected as a circumstance too remote (*R. R. v. Eubanks,* 48 Ark., 460), but this qualification of the principle does not obtain when there is direct evidence, as in this case, that no change in the meantime has occurred. Wigmore on Evidence, sec. 437; Thompson's

Commentary on Negligence, sec. 7870. It may be well to note that the doctrine we are now discussing refers to the objective conditions, where, from the facts and circumstances, it is reasonably probable that no change has occurred, and must not be confused with the position which obtains with us, that voluntary changes made by an employer after an injury to an employee, and imputed to the employer's negligence, are not, as a rule, revelant on the trial of an issue between them. *Myers v. Lumber Co.*, 129 N. C., 252. This position involves facts and considerations of a different character, and in this State, as stated, has been subjected to a different ruling." *Tise v. Thomasville*, 151 N. C., p. 281; *Boggs v. Mining Co.*, 162 N. C., p. 394; *Person v. Clay Co.*, 162 N. C., p. 224; *Morton v. Water Co.*, 168 N. C., p. 587; *Balcum v. Johnson*, 177 N. C., p. 213.

These exceptions cannot be sustained.

The third grouping of exceptions and assignments of error by defendant are "to the refusal of the court to allow defendants' motion for judgment as of nonsuit, made at the conclusion of plaintiff's testimony."

The main and most serious question in the case is, "Was there *any* evidence to be submitted to the jury to support plaintiff's claim?" If there was, it was the duty of the court below to submit the evidence, and the weight of such evidence was for the jury to determine.

In *Shell v. Roseman*, 155 N. C., p. 94, it was said: "We are not inadvertent to the fact that the plaintiff made a statement, on cross-examination, as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury. *Ward v. Mfg. Co.*, 123 N. C., 252." *Loggins v. Utilities Co.*, 181 N. C., p. 227.

The inference and conclusion from the evidence could be that Shaw went to look after the raft that he had put in the river to be floated down to Plymouth. He alone went with the negro engineer on Jackson's boat. For some reason, Curby did not go. The defendants made all arrangements for him to go. Surely the jury could infer he was about his master's business and in the scope of his employment and not there for his convenience. The court below left this aspect to the jury, and gave this charge: "But if you find that the plaintiff's intestate went on the boat on which he lost his life, and went on the boat without any arrangements with the defendants for him to do so, and was not at the time in the service of the defendants or in the performance of any duty for the defendants, and was traveling for his own convenience or pleasure, defendants would owe him no duty, except not to do him any wilful or wanton injury, of which there is no evidence in this case."

We think the charge fully meets the requirements of *Gardner v. R. R.*, 186 N. C., p. 64, and like cases.

The inference and conclusion from the evidence could be that Shaw was asphyxiated. This was a question for the jury, from all the facts and circumstances surrounding the case. While nobody saw the plaintiff's intestate die, and there was no physical sign of the gas, from the position of Shaw and the colored man, their death in this cabin was under such circumstances that they died as a result of being asphyxiated by poisonous gas; that the boat was found with its nose in the bank of the river; that it must have remained there for some time. The coroner, Dr. Garriss, and others, went there, opened it up; there was a colored man in the act of slipping off the seat, showing some instantaneous means had caused his death—not by external violence. Shaw had dropped off the stool on which he was sitting to steer the boat, with his forehead touching the floor and his pipe on the floor. Both of them in this situation lead to the conclusion that they died practically simultaneously; that it would be unreasonable that one had died and the other had not attempted to aid him; therefore, that they died practically at the same time, without any external violence; that they were poisoned by gas; that there is no evidence of anything else, and that the condition of the engine would have generated gas. The physician, Dr. Garriss, the coroner, gave his opinion that, while he could not testify positively about the facts—he was not present—that in his opinion, according to his belief, from inspection, it was a case of poison by carbon monoxide, a product given off by incomplete combustion of gasoline from a gasoline engine. That the gasoline engine was open, oil cups turned, dry; that the coroner and jury made a careful examination of the cabin; they found only a pop bottle; that it did not have the odor of whiskey or any intoxicating liquor or poison, but had a slight acid odor, and that they could not have taken poison and died in such a sudden manner; that the positions of the dead men bear out the only reasonable hypothesis—that it was due to gas.

In *Beal v. Coal Co.*, 186 N. C., 756, it was said: "It was the duty of the plaintiff to use ordinary care to furnish a reasonably safe place for 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.*" (Italics ours.)

The principle is laid down in *Gaither v. Clement*, 183 N. C., p. 450, as follows: "That the duty of the employer to furnish his employee safe tools with which to perform his services, and a safe place to do so, depends upon the exercise by him of ordinary care in providing them, and an instruction that imposes upon the employer an absolute duty to furnish them, without qualification, leaving out the ordinary care re-

quired of him in their selection, is reversible error." *Owen v. Lumber Co.*, 185 N. C., p. 614; *Murphy v. Lumber Co.*, 186 N. C., p. 747.

Labatt, in his work on Master and Servant, vol. 3 (2d Ed.), p. 2835, part of section 1073, says: "The broad ground relied upon is simply that, as between a servant and his employer, all appliances which he is authorized or directed to use ought in fairness to be placed upon the same footing as those which actually belong to the employer. In other words, the owner of the appliance, and his servants, are, for the purpose of determining the injured person's right of action, treated as being constructively the agents of that person's employer for the performance of a nondelegable duty incumbent on the latter. The mere fact that the employer, having no control over the appliance, is unable to remedy defective conditions, is in this point of view manifestly insufficient to absolve him, since he always has in his power to safeguard his servants by refraining from giving them orders which will put them in a position where their safety will be imperiled by those conditions. . . . In many, perhaps most, instances there is no real ground for contending that his want of control over an instrumentality constitutes a serious obstacle to his obtaining sufficient knowledge of its condition to enable him to see whether it will unduly endanger his servants or not, and there would therefore be no hardship or injustice in requiring him to make such investigations as may be necessary for that purpose. Even where an adequate examination by his own employees is practically impossible—as where the injury was caused by defects in the track of a railway not belonging to him—it seems not an unreasonable application of the doctrine of nondelegable duties to treat the servants of the owner as his agents. If he desires to protect himself from the consequences of the negligence of persons not in his service or under his supervision, it is easy for him to do so by making specific arrangements with their master for indemnification in the event of his being obliged to pay damages. To relegate the servant to his action against the party who owns the instrumentality must, in many cases, be productive of serious inconvenience, and will occasionally deprive him of all remedy." *Leak v. R. R.*, 124 N. C., 457; *Deligny v. Furniture Co.*, 170 N. C., 202.

In *Ridge v. R. R.*, 167 N. C., 522, *Walker, J.*, said: "It was the plain duty of the defendant to have made a reasonable inspection of this car, even though it was a foreign car or one belonging to another road. Any other rule would expose its employees to great hazards. We have held that the failure to properly inspect such a car is negligence, and if damage ensue therefrom, it is culpable or actionable negligence (*Leak v. R. R.*, 124 N. C., 455); and the same principle was recognized and applied in *B. & O. R. R. v. Mackey*, 157 U. S., 72. The inspection must

not only be made, but it must be done with due care. *Leak v. R. R., supra; Sheedy v. C. M. & St. Paul R. R.,* 55 Minn., 357." *Cotton v. R. R.,* 149 N. C., p. 231.

On this phase of the case the court below charged the jury as follows: "It was the duty of defendants to exercise due care to furnish reasonably safe means and safe place for this purpose. And if you further find from the evidence, the greater weight, that the defendants failed in the performance of this duty and furnished a boat with a gasoline engine which was old, obsolete, worn and defective, so that by reasonable inspection and the exercise of the reasonable care it could have been ascertained that it was likely to cause injury by the emission of poisonous gases to persons using it in weather so cold as to require the windows to be closed, and you find as the proximate result of this failure of this duty poisonous gases, to wit, carbon monoxide, were generated and thrown off, causing the plaintiff's intestate injury and death, it would be your duty to answer this issue 'Yes.' But unless you find these are the facts, if you are not so satisfied, you should answer it 'No.' Unless you find by the greater weight of evidence that plaintiff's intestate's death was caused by poisonous gases thrown off, plaintiff's action being based upon the allegation that that was the cause of his death, and unless you find that defendant failed to exercise due care with respect to such engine, it would be your duty to answer the issue 'No.' "

We think the court below charged the law applicable to the facts. The motion for judgment as of nonsuit was properly refused. The evidence was sufficient to be submitted to the jury. They passed on the facts, and we can find

No error.

ADAMS, J., dissenting.

Z. Z. GRANTHAM v. R. A. NUNN, TRUSTEE; C. K. TAYLOR, MRS. MARY BRYAN AND T. W. HOLTON.

(Filed 24 September, 1924.)

1. Injunction—Equity—Findings of Fact—Issues—Trial by Jury—Appeal and Error.

In dismissing a preliminary order restraining the sale of land under a mortgage, wherein the controversy is as to whether an outstanding note it secures has been paid by the plaintiff or another who claims, in subrogation of the mortgagee's right, it is reversible error for the Superior Court judge to attempt to deprive the plaintiff of his right to a trial by jury of the issuable matter, unless he has waived his right thereto.

2. Same—Mandamus.

The remedy by mandamus is not the remedy available for the enforcement of equitable rights concerning only the pecuniary interest or the proprietary rights of litigants; and where the equitable right by injunction is sought by the plaintiff in the action to enjoin the foreclosure of a mortgage on his lands, and the temporary order has been issued and dissolved, the trial judge may not, as in mandamus, exclude the rights of the plaintiff from a trial by jury on the issues arising on the pleadings.

CIVIL ACTION, heard on return to a preliminary order restraining sale of land by defendant, trustee, heard before *Daniels, J.*, holding the courts of the Fifth District. From CRAVEN.

On the hearing it was made to appear that on 8 April, 1918, Judge Henry R. Bryan, now deceased, and his wife, Mary N. Bryan, sold and conveyed to L. T. Grantham a tract of land in said county for $5,900.00, evidenced by eleven serial notes for $500.00 each, due on 1 March in successive years from 1919 to 1929, inclusive, and a $400.00 note due 1 March, 1930, the interest payable annually on 1 March, and secured by deed of trust to secure said notes to defendant R. A. Nunn, with power of sale by him in case of default in paying the taxes and the respective amounts and interest as they became due, etc.

Second, that on 4 December, 1918, said L. T. Grantham sold and conveyed the land, subject to said deed of trust, to defendant C. K. Taylor; and as part of the purchase money the latter assumed the payment of the Bryan notes, and in addition promised to pay to L. T. Grantham $6,545.50, which last sum was secured by a second mortgage on the property.

That default having been made on this second mortgage, the trustee therein foreclosed by sale, when Z. Z. Grantham became the purchaser and took a deed for said property, subject to the first mortgage.

That in December, 1923, said purchaser, Z. Z. Grantham, instituted the present action, seeking to redeem the property, and alleged, among other things, that he had satisfactorily arranged with the beneficiaries of the first mortgage, Mrs. Bryan, *et als.*, for the payment of all the notes now outstanding and unpaid, and demanded of the trustee that he cancel of record the first deed of trust, which said proper and reasonable request was declined by the trustee on the alleged ground that two of the $500.00 notes now past due were held by defendant T. W. Holton, who claimed that he had advanced the money to pay the same, under an agreement with defendant Taylor that the same should continue to be a lien on the land through the original purchase-money mortgage. Said T. W. Holton was made a party defendant by reason of said claim, and plaintiff in his verified complaint averred that said claim was

entirely invalid, as said notes had been paid outright by C. K. Taylor, and defendant Holton had no interest or claim on the property, etc.

As ancillary to the principal suit, plaintiff applied for and obtained an order to show cause in the form of a mandatory injunction requiring defendant to appear and show cause why said deed of trust should not be canceled of record on payment of the amount actually due, as claimed and alleged by plaintiff.

Defendant appeared and filed his affidavits in response, making averment of his having lent the money to C. K. Taylor with which to pay said notes, and under an agreement that same should continue to be secured by the original purchase-money mortgage.

On the hearing before Judge Frank A. Daniels, at January Term, 1924, his Honor finds the facts to be as alleged by defendant Holton, and denied plaintiff's application for an order directing present cancellation of the deed of trust. From this order plaintiff appealed, and the judgment of his Honor was affirmed here, the Court holding that on the facts as stated by defendant Holton and sustained in the findings of the lower court, a right of subrogation would arise to said defendant. This opinion having been certified down, the trustee, Nunn, advertised the land for sale under the purchase-money mortgage or deed of trust for default in paying interest, taxes, and the unpaid purchase money. Thereupon plaintiff applied for and obtained from Judge Daniels a preliminary injunction with an order to show cause why same should not be continued to the final hearing. At such hearing defendants appeared and claimed that the former order made by Judge Daniels, and affirmed by the Supreme Court was a final determination of the matters in dispute in defendant Holton's favor. The court, being of a contrary opinion, entered judgment that on payment of all taxes due, etc., the restraining order be continued to the hearing, from which judgment defendant Holton appealed.

Guion & Guion for plaintiff.
J. H. Stringfield and T. D. Warren for defendant Holton.

HOKE, C. J., after stating the case: While the findings of fact made by Judge Daniels on 24 January, 1924, and affirmed by this Court are definite in form and presently sustain the position of T. W. Holton, the appellant, a proper perusal of the record will disclose that these findings were made on the hearing of a preliminary restraining order and for the purposes only of the questions as therein presented, and in such case it was by no means the purpose nor was it within the power of the learned judge to conclude the parties on issuable matters which might arise on the pleadings and be presented by the parties at the final hear-

ing. *Owen v. Board of Education,* 184 N. C., 267; *Sutton v. Sutton,* 183 N. C., 128; *Moore v. Monument Co.,* 166 N. C., 211.

In *Sutton v. Sutton, supra,* wherein the lower court dissolved the restraining order and entered judgment for defendant, the governing principle is stated as follows: "Upon the hearing by the judge upon the question of continuing a restraining order to the hearing, the judge, upon proper findings (and it may be added on the evidence presented and without findings), may dissolve the temporary order, but in doing so it is error for him also to determine an issue of fact material to the rights of the parties and which should be reserved for the jury to pass upon at the trial."

And in *Owen v. Board of Education, supra,* the Court said: "The facts in evidence are fully sufficient to support and justify the conclusions of the trial judge, and his judgment dissolving the restraining order must be upheld, but we think his Honor went beyond the powers conferred upon him when he undertook to make final determination of the rights of the parties and adjudged that defendants go without day."

In the case before us as now presented the issuable matter determinative of the rights of these litigants is whether the purchase money notes now held and claimed by appellant Holton were paid outright by C. K. Taylor, the second mortgagor, or were paid with money advanced by appellant to said Taylor under circumstances which conferred upon appellant the right of subrogation as indicated in our former opinion. On this issue, and in ordinary civil actions, the parties are entitled to a jury trial unless waived by them, and on careful examination we find no such waiver on the record as the law permits and requires. *Wilson v. Bynum,* 92 N. C., 717; C. S., 556.

It is contended for appellant that the first hearing before Judge Daniels was in reality an application for a mandamus in which by our statutes a party litigant is not entitled to a jury trial unless the same is demanded in apt time. *Tyrrell v. Holloway,* 182 N. C., 64; C. S., 868. It will be noted, however, that this statutory provision applies to actions of mandamus proper, a writ allowable only for the enforcement of clearly defined legal rights and more usually in matters of public or *quasi*-public concern. So far as examined, it is never available for the enforcement of equitable rights which concern only the pecuniary interest or proprietary rights of individual litigants. *Person v. Doughton,* 186 N. C., 724; *Service Co. v. Power Co.,* 179 N. C., 330; *Wall v. Strickland,* 174 N. C., 298; *Telephone Co. v. Telephone Co.,* 159 N. C., 9; *Edgerton v. Kirby,* 156 N. C., 347; *Turnpike Co. v. McCalla,* 119 Ind., 382; High on Injunctions, sec. 2; Beach on Injunctions, sec. 9.

It now appears that in this action, brought originally to redeem the land from the encumbrance of a purchase-money mortgage, plaintiff has paid off all the notes secured other than those held by appellant, and the only question now remaining is whether, as stated, appellant is entitled to enforce the lien for the notes claimed and held by him under the principles of subrogation, both being clearly for the enforcement of equitable rights and for which mandamus does not lie.

There is no error, and the judgment below is

Affirmed.

STATE v. CHARLES FARMER.

(Filed 24 September, 1924.)

Appeal and Error — Rules of Court — Docketing Appeals—Certiorari—Record Proper.

The rules of practice regulating the docketing of appeals in the Supreme Court will be enforced uniformly regardless of any agreement to the contrary that the attorneys for the parties may have made in any particular case; and when for any reason the case itself may not reasonably have been docketed by the appellant within the time prescribed by the rules, he must docket the record proper within that time, and move for a *certiorari*, which may be allowed by the court on sufficient showing made. Constitution, Art. IV, sec. 8.

MOTION to reinstate the appeal of Charles Farmer, dismissed at the present term of the Court for failure to comply with the rules of the Court, the cause not having been docketed here at the term next succeeding the trial and sentence.

It appears from an inspection of the record now offered that defendant was convicted at January term of Wayne Superior Court of murder in the second degree, and was then and there sentenced to the penitentiary for not less than ten nor more than fifteen years; that the trial was concluded and judgment entered on the closing day of the Superior Court term, to wit, 2 February, 1924, and this Court convened for Spring Term, 1924, on 5 February; that no record or case on appeal was docketed nor any motion here made in the case prior to 1 September, 1924, after the commencement of the Fall Term of this Court, 1924. The appeal having been dismissed, there was motion by defendant to reinstate; the same is denied.

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

Murray Allen and J. Faison Thompson for defendant.

HOKE, C. J. It is the established rule of our procedure that an appeal from a judgment rendered prior to the commencement of a term of this Court must be brought to the next succeeding term of this Court, and in order to a hearing in regular order, the same shall be docketed seven days before the calling of the docket of the district to which it belongs, with the proviso to Rule 5, in Volume 185 of the Reports, that appeals in civil causes from the First, Second, Third, and Fourth Districts, tried between the first day of January and the first Monday in February, or between the first day of August and the fourth Monday in August are not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal shall stand regularly for argument. In numerous decisions of the Court dealing directly with the subject, it has been held that these rules governing appeals are mandatory and must be uniformly enforced, the only modification permitted or sanctioned by these decisions being to the effect that where from lack of sufficient time or other cogent reason, the case on appeal may not be in shape for docketing in the time required, the appellant may within such time docket the record proper and move for a *certiorari,* which may be allowed by the Court on sufficient showing made.

In the recent case of *Byrd v. Southerland,* 186 N. C., 385, it was held: "That the rules of practice in the Supreme Court regulating appeals are mandatory on all appellants alike, and are necessary for the proper and expeditious consideration of causes by the Supreme Court." And in the *Per Curiam* opinion prepared by our late *Chief Justice* it is said among other things: "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." And to the same effect are *S. v. Butner,* 185 N. C., 731; *S. v. Dalton,* 185 N. C., 606; *Cooper v. Commissioners,* 184 N. C., 615; *Rose v. Rocky Mount,* 184 N. C., 609; *Mimms v. R. R.,* 183 N. C., 436; *S. v. Ward,* 180 N. C., 693; *S. v. Trull,* 169 N. C., 363-370; *Lee v. Baird,* 146 N. C., 361-363. And many such cases could be readily cited.

In *S. v. Butner, supra,* it was said: "Besides, we have often held, and ought not to be called on to repeat, that when for any really excusable ground a 'case on appeal' is not made up in time, the appeal should be docketed nevertheless at the regular time and an application made for a *certiorari.* It is out of the power of the judge or solicitor to dispense with the rule of this Court requiring such docketing at the time prescribed by the rules of this Court. While the Legislature can extend

the time for settling a case on appeal, it cannot impinge upon the rules of this Court (*Herndon v. Ins. Co.*, 111 N. C., 384), specifying the time in which an appeal must be docketed, unless the Court shall see fit to grant a *certiorari*, which is a matter within its discretion."

In *S. v. Dalton:* "The decisions of this Court have been uniform that on failure to docket the appeal in the time prescribed it will be docketed and dismissed unless a motion is made for *certiorari* at the next succeeding term and sufficient cause shown for the failure."

In *Cooper v. Commissioners, supra,* it was said: "The rules of practice in the Supreme Court expressly require petitions for rehearing to be filed within forty days after the filing of the opinion in the case. 174 N. C., 841, Rule 52. In *Lee v. Baird,* 146 N. C., 363, *Hoke, J.,* said: 'There is no doubt of the power of the Court to establish the rules in question, and in numbers of decisions we have expressed an opinion both of their necessity and binding force. Thus, in *Walker v. Scott,* 102 N. C., 490, *Merrimon, J.,* for the Court, said: 'The impression seems to prevail to some extent that the rules of practice prescribed by this Court are merely directory; that they may be ignored, disregarded and suspended almost as of course. This is a serious mistake. The Court has ample authority to make them. Const., Art. IV, sec. 12; Code, sec. 691; *Rencher v. Anderson,* 93 N. C., 105; *Barnes v. Easton,* 98 N. C., 116. They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Court will certainly see that they have effect, and are duly observed whenever they properly apply.' "

In *Rose v. Rocky Mount, supra,* it was held: "Appeals to the Supreme Court are only within the rights of the parties when the procedure is in conformity with the appropriate statutes or rules of court, and neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals in the Supreme Court; and where the appellant has failed to docket his appeal or move for a *certiorari* under the rules regulating the matter, the appeal will be dismissed."

In *Mimms v. R. R.,* 183 N. C., 436, *Associate Justice Stacy,* delivering the opinion, said: "It also appears that this case was tried in April, 1921. The appeal, therefore, should have been docketed and heard at the last term; or, at least, the record proper should have been seasonably docketed here and motion duly made for a *certiorari.* This latter writ is a discretionary one, and counsel may not dispense with it by agreement. *In re McCade, ante,* 242; *S. v. Johnson, post,* 730; *S. v. Hooker, post,* 763." And quotes with approval from *Trull's case,* as follows: "We note that this trial was had in June, 1914. Under the statute and rules of the Court this appeal was required to be docketed at the fall term of this

Court before the call of the docket of the district to which it belongs, under penalty of dismissal. Rules 5 and 7, 140 N. C., 540, 544; Rev., 591; *Pittman v. Kimberly,* 92 N. C., 562, and numerous cases thereto cited in the Anno. Ed., and *Burrell v. Hughes,* 120 N. C., 277, citing numerous cases, and with numerous annotations in the Anno. Ed. It appears in the record that the solicitor agreed with the prisoner's counsel that the case might be postponed and docketed at this term (Spring Term, 1915). This was an irregularity, and was beyond his authority. The statute must be complied with and the cause docketed at the next term here after trial below. If in any case there is any reason why this cannot be done, the appellant must docket the record proper and apply for a *certiorari,* which this Court may allow, unless it dismisses the appeal, and may then set the case for trial at a later day at that term or continue it, as it finds proper. It is not permitted for counsel in a civil case, nor to the solicitor in a State case, to assume the functions of this Court and allow a cause to be docketed at a later term than that to which the appeal is required to be brought by the statute and the rules of this Court."

Recurring to the facts as presented in the record, this cause was tried and determined on 2 February, 1924. The next term of this Court commenced on 5 February. There was no appeal or record docketed nor any motion for *certiorari* or other made till 1 September, 1924, after the commencement of the Fall Term, and under the rules, as stated, the appeal must be dismissed. We do not discover an instance when this ruling has been departed from.

It is urged for appellant that the case required six days for its trial, constituting a voluminous record, and it was impossible to have prepared a case on appeal within the time required by the rule, and that the statutory time allowed for serving case and countercase would not permit the docketing of the case seven days before the calling of the district. While this would present cogent reason for granting a writ of *certiorari* on proper application, it does not relieve appellant of the requirement that the record proper be docketed within the time, and the writ of *certiorari* applied for.

It is only by timely issuance of this writ that an extension of time can be procured, and this is by no means a formal and meaningless requirement. By application for *certiorari* the cause is brought within the cognizance and control of the Court, and a criminal cause can thereby be brought up and heard at a day certain or at furthest at the end of the appeals from the Twentieth District, as provided in Rule No. 6. Its proper issuance is essential to give this Court proper control of the action of the lower courts as provided and contemplated by Art. IV, secs. 8 and 12 of the Constitution, and the principles which apply to it and the

decisions of the Court concerning it are just as imperative as the time fixed for docketing a perfected appeal under the express terms of the rule.

Again it is insisted that by agreement between counsel for appellant and the solicitor, the time for preparing the case on appeal was extended beyond the opening of the fall session of this Court, and that as a matter of fact the solicitor of the district is still engaged in preparing the countercase for the State on defendant's appeal. But such a position cannot for a moment be allowed. These rules, prepared pursuant to the powers vested in this Court by the Constitution, and designed to promote the expeditious and orderly hearing of causes on appeal, are in no wise subject to the agreement of counsel. As held in *Rose v. Rocky Mount, supra,* neither parties litigant nor their attorneys have authority by agreement among themselves to disregard them.

Both positions of appellant come clearly under the condemnation of the authorities heretofore cited and must, therefore, be overruled.

While for the reasons and on the authorities stated we are constrained to adhere to our decision dismissing the appeal, owing to the great importance of the questions involved, we have examined the case on appeal prepared by defendant and submitted as the principal basis for his motion to reinstate, and the issue of defendant's guilt or innocence seems to have been fairly submitted to the jury, and even on defendant's statement, reversible error has not been clearly shown.

Motion to reinstate is

Dismissed.

M. G. TAYLOR v. J. A. EVERETT, W. J. WHITAKER, JAMES H. WYNN, AND GEORGE H. HARRISON.

(Filed 24 September, 1924.)

1. Banks and Banking—Corporation Commission—Bank Examiner—Conditions Under Which Bank May Continue.

Among other powers conferred by statute, the Corporation Commission may, without taking possession of the business and property of a State bank, upon its appearing to the commission to be in imminent danger of insolvency, direct upon what conditions its officers may continue in its management and control, and thus, upon the bank's complying therewith, avoid losses to depositors, creditors, and stockholders, necessarily incident to the closing of its doors.

2. Same—Impairment of Capital Stock—Directors—Stockholders—Agreement—Contracts—Actions—Parties.

Where, upon the examination of a State bank by the chief examiner of the Corporation Commission, it appears that its continued management by

its officers would result in loss to its creditors, depositors, or stockholders, unless upon compliance with certain conditions, and the directors, also stockholders therein, have passed a resolution and have separately and individually agreed to restore the impairment of its capital stock, as directed by the bank examiner, according to their several holdings of shares of stock therein, the members thus assenting, become liable to the bank under the terms of their agreement, as the beneficiaries of the agreement, jointly and severally, to the extent they have assumed the liability; and where some of them have paid the liability of others under this agreement, each one of them may maintain his action against each of the defaulting members (C. S., 446), and such is not a misjoinder of parties prohibited by statute.

3. Same—Stockholder's Liability.

The agreement of the directors to make good the impairment of the capital stock of a State bank as a condition precedent to the management of its business by its own officers, and at the instance of the State Bank Examiner, acting according to the power conferred by the statute upon the Corporation Commission, renders such directors, as stockholders, liable to the extent of the obligations they have thus assumed, this liability is independent of, and not contemplated by, the statute creating an additional liability to the amount of stock held by them in the banking corporation.

4. Same—Subrogation.

An agreement of the board of directors of a State bank, both by resolution and individually, to comply with the order of the State Bank Examiner in making good an impairment of the capital stock of the bank and putting the bank in a safe condition for the continuance of its business, may be enforced by the bank, or in subrogation to its rights by those of the directors who have paid the obligations of others who have failed in the performance of their individual agreement, the contract thus made being for the benefit of them all.

APPEAL by defendants from judgment rendered by *Lyon, J.*, at May Special Term, 1924, of MARTIN.

This action was instituted by the plaintiff M. G. Taylor against the defendants J. A. Everett, W. J. Whitaker, and James H. Wynn, to recover the sum of $331.50, with interest thereon from 22 April, 1921. The defendant W. J. Whitaker having died since the institution of the action, by consent, his executors, John D. Biggs and H. H. Cowen, were made parties defendant. Judgment was rendered in favor of the plaintiff and against the defendants.

It is admitted that plaintiff and defendants, citizens and residents of Martin County, were, during the month of April, 1921, and for some time prior and subsequent thereto, stockholders and directors of the People's Bank, a corporation organized under the laws of North Carolina and doing a general banking business in said State, with its place of business at Williamston, in Martin County.

It is further admitted that, on or about 4 April, 1921, the officers and directors of the said bank were notified by the Chief Bank Examiner of North Carolina that it would be necessary that $160,000, in cash and securities, to be approved by the Banking Department of the Corporation Commission of North Carolina, be immediately put up and into said bank to strengthen the credit of said bank and "put it in condition to avoid the closing of its doors and the winding up and settling of its affairs and liquidating its business."

It is alleged in the complaint that said notice was given the said officers and directors, by and with the authority of the Corporation Commission of North Carolina, after previous examination of the said People's Bank, that said bank examiner had full power and authority, under the laws of North Carolina, to close the said People's Bank upon the failure of the directors and stockholders to comply with said notice, and that upon such failure the said bank examiner would have closed said bank, "to the inevitable and great and irreparable loss to plaintiff and defendants, in money, property, credit, and public confidence."

The further allegations in the complaint are as follows:

"3. That immediately upon the receipt of said notice from said Chief Bank Examiner, to wit, on 5 April, 1921, there was held a meeting of the directors of the said People's Bank at its banking house in the town of Williamston, in said county, at which meeting there were present, in person, and participating in the discussion had and action taken, nineteen out of twenty-three directors of, and shareholders in, said bank, including plaintiff and defendants; and then and there it was mutually agreed, not impliedly, but expressly, upon roll-call, that each of said shareholders and directors would pay into said bank his pro rata part of the amount required to keep said bank a going concern and to avoid the closing of its doors, said pro rata part being based upon the number of shares of stock held by each; the amount to be paid by each director present being then and there fixed and stated in figures, and expressly assented to, with the express promise by each to pay in the amount so fixed and stated, upon the terms as to cash and deferred payments prescribed by said bank examiner; and the defendants, and each of them, then and there contracted and agreed with plaintiff, in consideration of plaintiff's agreement to pay in the sum of $1,578.00, representing plaintiff's pro rata part, that they would pay in the amounts of their respective pro rata parts, to wit, $15,780 as to defendant J. A. Everett, $7,890 as to defendant W. J. Whitaker, $2,630 as to defendant James H. Wynn.

"4. That thereafter, in compliance with his agreement with defendants, and in full performance thereof on his part, and relying on the agreement of defendants so to do, plaintiff paid into said bank his agreed pro rata part of said sum of $160,000, in accordance with condi-

tions prescribed by said State Bank Examiner, and, as plaintiff is informed and believes, all others who were present or parties to said agreement have done likewise, with the exception only of these defendants.

"5. That the said defendants J. A. Everett, W. J. Whitaker, and James H. Wynn, and each of them, notwithstanding their express promise and agreement so to do, and in breach and violation thereof, and notwithstanding their knowledge that their codirectors and coshareholders, in reliance upon the agreement of defendants, had paid into said bank the respective amounts for which they had made themselves and become liable, refused and failed to put up or pay in the amounts agreed to be paid in by them, or any part thereof, notwithstanding repeated requests and demand that they do so.

"That the said defendants, as plaintiff is informed and believes, after having contracted with plaintiff, as heretofore alleged, and notwithstanding said contracts, but in disregard and in violation thereof, and without the knowledge of plaintiff at the time plaintiff made payment of his pro rata part of said sum of $160,000, as aforesaid, wrongfully and unlawfully agreed among themselves to violate said agreement with plaintiff and others, and to breach the said contract with plaintiff; and each of the said defendants did wrongfully, unlawfully and maliciously induce his codefendants to violate said original agreement and to breach the contract entered into with plaintiff, as hereinbefore alleged.

"6. That upon and because of such default by said defendants, and because of the imperative necessity of prompt compliance with the condition prescribed by said bank examiner, and to avoid loss to plaintiff and his codirectors, coshareholders, including defendants and others, and as the only alternative, and as a necessary consequence of said defendants' default, plaintiff was obliged to, and did, on 22 April, 1921, pay and put into said bank the additional sum of $331.50, representing plaintiff's pro rata part of the deficiency existing because of the breach of their contract by defendants.

"7. That by reason of the payment into said bank by plaintiff of the aforesaid sum of $331.50, together with the sums paid by others who complied with said agreement, making good the deficiency created by the default of defendants, the said bank was saved from insolvency and a receivership to wind up its affairs, and defendants have received the benefit thereof as fully in all respects as though they had themselves complied with their agreement, and are still such beneficiaries.

"8. That by reason of the default and breach of contract by the defendants in the respects hereinbefore alleged, and as a natural consequence flowing from said breach, plaintiff has been damaged in the

sum of $331.50, with interest thereon from 22 April, 1921, at the rate of 6 per cent per annum."

The complaint, duly verified, was filed on 14 June, 1922.

Thereafter the defendants filed demurrer, upon the following grounds:

"1. For that on the face of the complaint there is an apparent misjoinder of parties and of causes, the plaintiff alleging several promises to the three defendants, alleging both joint and several liabilities. This action, upon the allegations of the complaint, should be brought under the laws of this State against each defendant severally.

"2. For that the complaint alleges a mutual contract and agreement of nineteen parties as a single contract, whereas only four of the parties to the said alleged contract are parties to this action, results in a non-joinder of parties."

The demurrer was overruled by the clerk, and upon appeal by the defendants, his Honor, John H. Kerr, judge presiding in the courts of the Second Judicial District, heard said appeal, and on 15 February, 1923, "ordered that the demurrers be overruled and that defendants have sixty days within which to file answers."

To the order and judgment overruling the demurrer the defendants and each of them excepted, and this was defendants' first exception.

Thereafter defendants filed answer to the complaint, and the action was tried before his Honor, C. C. Lyon, and a jury, at Special May Term, 1924, upon the issues raised by said answer.

The evidence offered at the trial showed that an audit of the People's Bank, made early in 1921, disclosed that its capital stock had become impaired. Plaintiff and defendants and seventeen others were directors of said bank. A meeting of all the directors was held on 2 April, 1921, at which the report of the auditors was discussed, and at which, as a result of said discussion, the following motion was unanimously adopted, as appears in the minutes of the said board of directors:

"That the directors will, subject to the approval of the State Bank Examiner, provide additional assets to the amount of $150,000 in lieu of similar amount of paper now in the bank, regarded as unsound or doubtful, the said $150,000 to be payable 10 per cent in cash and the balance in deferred payments, to be adequately secured."

On 4 April, 1921, the Chief State Bank Examiner of North Carolina dispatched a letter to the president of the said bank, advising him that "Your bank has sustained a heavy loss on account of the manipulations of your former cashier, and also on account of several bad loans." The loans upon which losses had been sustained were specifically referred to in said letter, the aggregate amount being in excess of $160,000. The said president is further advised that, "For the purpose of strengthening your credit, which is absolutely necessary, if you expect to continue

business, your Liberty Bonds will have to be sold and provision made to absorb this loss. In order that the solvency of your bank may not be questioned, it is necessary that $160,000 be put up to take care of the loss that may accrue from the above, and any other loss that may develop on account of the condition that your bank is now in. Ten per cent of this amount will have to be paid in cash within the next fifteen days, and the balance properly secured with collateral, the security to be passed upon by this department."

Clarence Latham, Chief State Bank Examiner, testified that an audit of the said bank had been made, under his supervision, prior to the date of the said letter.

Immediately upon receipt of this letter, the president of the bank called the board of directors to meet on 5 April, and at said meeting the said letter was read and discussed. Plaintiff and defendants were present at said meeting, heard the discussion, and participated in the business transacted.

As a result of said discussion it was agreed among the directors present—nineteen out of twenty-three—that they would put up the sum required, in order that the bank might continue business, to wit, $160,000, the motion recorded in the minutes of the said meeting being as follows:

"That the board of directors assume the obligation as outlined in the letter of the State Bank Examiner of 4 April, 1921, assuming $160,000 upon the basis of stock as held by the directors, totaling 304½ shares, $526 per share, and that members not present be required to comply on the same basis as the directors present."

This motion was carried unanimously.

Thereupon the pro rata amount to be paid by each director, of the sum required, to wit, $160,000, was ascertained and the apportionment was made, the amount to be paid by each director being announced and recorded in the minutes. This apportionment was unanimously approved, and the following record was made in the minutes of the said meeting:

"After each director was polled, then the following motion was made and unanimously carried: That the directors assume the above-mentioned $160,000, and assume and agree to pay the amount set opposite their names, the said amount having been stated to each director, and his apportionment being duly understood by him."

The amounts thus apportioned to the plaintiff and the defendants were as follows: M. G. Taylor, three shares, $1,578.00; J. A. Everett, thirty shares, $15,780.00; James H. Wynn, five shares, $2,630.00; W. J. Whitaker, fifteen shares, $7,890.00.

Thereafter, and before 21 April, 1921, all of the said sum of $160,000 was paid or secured with collateral satisfactory to the State Bank Examiner, except the amounts apportioned to the defendants and assumed by them at the meeting of 5 April.

A meeting of the directors was held on 21 April, 1921, at night. The State Bank Examiner was present, and upon learning that the full amount of $160,000 had not been paid in, as required, as a condition of the bank's continuing business, he notified the directors present that unless the amount was made up they would not be allowed to open the doors the following morning.

The State Bank Examiner testified that "The capital stock of the bank was impaired at that time. With that impairment existing, the bank was in an unsafe and unsound condition to continue business. I did not consider the bank at that time insolvent, but bordering on insolvency. I had full and complete knowledge of its financial status at that time. A bank can have an impairment of capital stock, under the laws of North Carolina, and still not be insolvent. I did not consider that there was enough loss to absorb the capital stock, surplus and profits.

"The meeting of 21 April was for the purpose of making up the shortage caused by the default of these three men who failed to put it up. I know that the collateral was placed in the bank, and that 10 per cent was paid in cash on the day I was there. I approved the collateral taken as worth $160,000. I had no interest in the bank, except as to the welfare of the depositors and stockholders. I had no concern as to who put up the $160,000. If my requirement had not been complied with, I would have closed the bank.

"Neither of the defendants attended the meeting held on 21 April, at which the deficiency caused by their failure to pay the amounts apportioned to him was made good by the other directors."

W. S. Ryland testified that during the early part of 1921 he was vice-president of the National State and City Bank, of Richmond, Va.; that this bank was a creditor of the People's Bank at Williamston, N. C.; that, representing his bank, he was on several occasions in Williamston while the audit of the People's Bank was being made, and that he made, more or less, an individual examination to satisfy himself as to the "goodness of our claim against the bank, and was more or less closely in touch with the accountants during their examination, going over the securities of the bank at different times, and was fairly familiar with them."

That on 5 April, 1921, the capital stock of the People's Bank was, in his opinion, impaired. The payment of the $160,000 was sufficient to make sure the solvency of the bank at that time.

That he was present at the meeting held on 2 April. The subject of discussion then was the question of making good the shortage. Everett, Wynn, Whitaker, and Taylor were all there. The question was pretty generally discussed in anticipation of a demand from the bank examiner. The board was canvassed, as a whole and individually, as to whether or not it would be to the interest of the directors to raise enough money to keep the bank going. He heard Mr. Everett's name called, and heard him answer, stating that he would put up his pro rata part. Mr. Whitaker and Mr. Wynn did the same.

A. Anderson testified that he was a director of the People's Bank in 1921; that he was present at the meeting held on 2 April, when the report of the auditors was discussed and the directors agreed to put up $150,000. All the directors were present. Later "we got notice from headquarters that we would have to make it $160,000."

That he was present at the meeting held on 5 April. Mr. Everett, Mr. Whitaker, and Mr. Wynn were there. It was decided to put up the $160,000, as required by the State Bank Examiner. The matter was put to a vote, on roll-call of each man. Wynn, Whitaker, and Everett all agreed to put up their pro rata parts.

At the breaking up of the meeting, Mr. Staton, the president, said: "I want it thoroughly understood, because I have got to make a report. Anybody not willing to what has been done, say so now." Whitaker replied: "I am going to do it, but I can't say I am willing to it."

Whitaker, Wynn, and Everett did not put up their parts. The directors were to have fifteen days to put up collateral and notes. "During the fifteen days I carried mine in, and supposed the rest were carrying theirs in, but just before we had to have a final meeting that Saturday Mr. Everett, Mr. Wynn, and Mr. Whitaker had not put up theirs. They appointed me to go to see Mr. Everett and see if I could get him to live up to his agreement. He would not agree to anything. My best recollection is that Wynn agreed that it was his duty and that he would put up. This was just before we had our final meeting. I had paid mine. Mr. Wynn told us to go back, and that he would be there. We came back, had the meeting, waited a considerable time for Wynn, then went to look for him and found him at Whitaker's. They came to town, but did not come to the meeting."

Henry D. Peele testified that he was a director of the People's Bank and was present at the meeting after the auditor's report was filed. The plaintiff, Mack Taylor, and the defendants Everett, Wynn, and Whitaker were there. The proposition to put up $150,000 was discussed, and all present definitely agreed to put up the said sum, each director agreeing to put up his pro rata share. The bank examiner had not been in Williamston since the audit was completed. Subsequently he came down,

and on 5 April a meeting of the directors was held, at which his letter requiring the directors to put up $160,000, if they wished to continue business, was read. The plaintiff and all three defendants were at this meeting. The letter was discussed and talked about. The roll was called, and each man agreed to put up his part. I put up my part. Neither of the defendants paid his part. Their failure to do so caused a shortage of about $27,000. The plaintiff had to put up $331.50 more on account of their shortage. This was done on the night of 21 April. If they had not agreed to put up their pro rata part, witness would not have agreed to put up his part. At the time witness put up his part, he did not know defendants were not going to put up theirs.

J. J. Manning testified that he was a director of the People's Bank and was present at the meeting held on 2 April, when it was agreed to put up $150,000. All the directors, except George Harrison, were present. He claimed to have sold his stock.

Witness was also present at the meeting on 5 April, when the letter of the bank examiner requiring that the directors put up $160,000 was read. Plaintiff and defendants were at this meeting. The matter was gone into and talked about, and it was agreed by all that the $160,000 should be paid in, and that the bank should continue business. Witness paid his share. Witness thought everything was settled, but was called to another meeting and learned that defendants had not paid their parts. Everett, Wynn, and Whitaker failed to pay in their shares, and the other directors had to raise the money to make good the deficiency, for "We were already tied. I had put up mine at that time. I went to see the defendants, but they failed and refused to do anything."

Mack G. Taylor testified that he was the plaintiff; that he was a stockholder and director of the bank, owning three shares.

Witness was present at the meeting held on 2 April, at which the report of the auditor was read, and the question of putting up $150,000 was discussed. All three defendants were present. All agreed to put up the $150,000, each paying his pro rata share, in money and collateral.

On the following Tuesday, 5 April, another meeting was held, at which a letter was read by Mr. Staton, the president, from the bank examiner. "We were informed that we had to raise $160,000 instead of $150,000. All agreed to pay that amount. I paid my part. If I had not relied upon the promise of Everett, Wynn, and Whitaker to pay their pro rata part, I would not have put up mine."

Witness further testified that he had to put up $110.50 more on each share, on account of the default of the three defendants. He has paid this and does not now owe the bank a cent. The extra amount was $331.50. Something was said about the directors being personally and

individually liable for all damages growing out of the bank's default, but I understood that we were voluntarily putting up the $160,000 to save the bank from breaking.

J. G. Staton, president of the bank, was tendered to the defendants for cross-examination, and testified that a very substantial portion of the $160,000 had been paid in money, probably $25,000 not yet paid in cash. The collateral put up was satisfactory to the committee and to the bank examiner.

Mr. Latham, the bank examiner, was present at the meeting held on 21 April. The three defendants had not paid their shares. "Mr. Latham said, in no uncertain words: 'This money must be arranged tonight and agreed to be paid, and if it is not the bank will not be allowed to open tomorrow.'" After this the deficiency was made good. Taylor, the plaintiff, has paid all his share of the default.

Some days after 5 April, Mr. Everett gave his note for the share apportioned to him of the $160,000. His note was good. Some time before the expiration of the fifteen days Everett came to witness and asked for his note, saying that he wanted to show it to some one, or to see something about it. The witness, having confidence in Everett, gave him the note. It has not been returned. Everett promised to return the note.

At the close of evidence offered by plaintiff, defendants moved for judgment of nonsuit. Motion denied. Defendants excepted. This is defendants' second exception.

The defendants then offered evidence, as follows:

James A. Everett testified that he was one of the defendants; that he did not vote against putting up the $160,000, because he "owned a right smart of the stock in the bank, and the bank owed him money. Mr. Latham and Judge Bragaw recommended it so high, saying that the putting up of $160,000 would make the bank as good as new." He relied on what they said, and next morning gave the president of the bank a note for the full amount of his part, but later learned that the condition of the bank was bad. He then got his note back. The bank "busted in about a year after that."

"I rather think that they read a letter to the effect that every one of the stockholders was liable for all that the bank lost. I had been fooled so bad that I promised myself that they were not going to fool me any more. I did not attend any more meetings of the directors. I found out that the bank was in bad condition. I made a mistake, because I ought to have found out before I gave the note. I left the note at the bank one day and got it back the next day. I did not say a word at the meeting, but, being silent, that gave consent. I let them put up

theirs, relying on my silence, and when the time came to put it up I did not put up my share. I did not tell the others anything about not going to put up my share."

James H. Wynn testified that he was one of the defendants; that he was at the $160,000 meeting, but does not remember whether he was at the $150,000 meeting. "I did not agree to anything. My understanding was that the bank would be closed if something was not done. I carried check for 10 per cent and told Mr. Staton that that was as far as I was going. I think I remember Mr. Staton reading a letter from the bank examiner at a meeting. I remember that each man's name was called, and that it was stated how much his pro rata part would be."

Defendants then offered in evidence the summons, dated 3 June, 1922.

At the conclusion of all the evidence, defendants renewed motion for judgment as of nonsuit. Motion denied, and defendants excepted. This was defendants' third exception.

The defendants tendered issues, which the court declined to submit. No exceptions are noted in the case on appeal to the refusal of the court to submit these issues.

Issues were then submitted by the court, which, with the answers of the jury, were as follows:

1. Did defendant J. A. Everett enter into the agreement to contribute his pro rata part of $160,000 to be put in the bank, as alleged in the complaint? Answer: Yes.

2. Did defendant J. H. Wynn enter into the agreement to contribute his pro rata part of $160,000 to be put into the bank, as alleged in the complaint? Answer: Yes.

3. Did W. J. Whitaker enter into the agreement to contribute his pro rata part of $160,000 to be put in the bank, as alleged in the complaint? Answer: Yes.

4. Did the defendants breach the said agreement, as alleged in the complaint? Answer: Yes.

5. If so, what amount is plaintiff entitled to recover of defendants by reason of such breach? Answer: $331.50.

To the issues submitted, defendants in apt time objected. Objection overruled. Defendants excepted. This was defendants' fourth exception.

Defendants in apt time excepted to the following instruction given in the charge of the court, and assigned same as error:

"If you answer the first, second, third, and fourth issues 'Yes,' then you would answer the fifth issue whatever amount you may find that he paid, and had to pay, in consequence of the default of the three defendants, and on whatever amount you may find that he paid, he is entitled to interest from 21 April, 1921." This was defendants' fifth exception.

The remaining three exceptions of defendants appearing in the case on appeal, and upon which assignments of error are made, are formal.

Dunning, Moore & Horton, and Stephen C. Bragaw for plaintiff.

Stubbs & Stubbs, Critcher & Critcher, and Ward & Grimes for defendants.

CONNOR, J. Defendants demurred to the complaint, and excepted to judgment of the court overruling their demurrer; thereafter they filed an answer, and, upon the trial of the issues before a jury, at the close of plaintiff's evidence, moved for judgment as of nonsuit. Upon the overruling of this motion, defendants offered evidence, and at the close of all the evidence again moved for judgment as of nonsuit. This motion was denied, and defendants again excepted. C. S., 567.

The first and second assignments of error are based upon these exceptions, and defendants rely upon them chiefly upon their motion for a new trial.

The evidence introduced upon the trial supports the allegations of the complaint; therefore these assignments of error, and the exceptions upon which they are based, may be considered together, for defendants thus present the question as to whether or not plaintiff can recover of the defendants in this action.

Plaintiff and defendants were stockholders and directors of the People's Bank, a corporation organized and doing a banking business at Williamston, N. C., under the laws of North Carolina. The said bank was under the general control and supervision of the Corporation Commission of North Carolina. C. S., ch. 21, sec. 1035, subsec. 7; Laws 1921, ch. 4, sec. 63. The Corporation Commission is authorized by chapter 4, section 72, Public Laws 1921 (ratified 18 February, 1921), to appoint a Chief State Bank Examiner, whose duties and powers are prescribed by law. The commission is expressly authorized by section 16 of said chapter to take possession forthwith of the business and property of any bank under its control and supervision, whenever it shall appear that said bank—

"2. Is conducting its business in an unauthorized or unsafe manner.

"3. Is in an unsafe or unsound condition to transact its business.

"4. Has an impairment of its capital stock.

"Such banks may, with the consent of the Corporation Commission, resume business upon such terms and conditions as may be approved by it."

An audit made of the People's Bank, under the supervision of the State Bank Examiner, completed about 1 April, 1921, disclosed that the capital stock of the bank was impaired and that the bank, while not

insolvent, was bordering on insolvency. At a meeting of the board of directors of the bank, held on 2 April, at which defendants were present, as members of the said board, the report of the auditor was discussed; the directors accepted this report as correct and thereupon, unanimously, agreed, "subject to the approval of the State Bank Examiner, to provide additional assets to the amount of $150,000 in lieu of similar amount of paper regarded as unsound or doubtful."

A condition thus existed, under which the State Bank Examiner, acting under the authority of the Corporation Commission, was empowered by law to take possession of the business and property of the People's Bank, and to determine upon what terms and conditions it might resume business.

By his letter of 4 April, 1921, the State Bank Examiner advised the president and directors of the People's Bank of the terms upon which the bank would be permitted to continue business. The statute expressly authorizes the Corporation Commission to permit a bank, whose business and property it has taken possession of, to resume business, upon compliance with terms and conditions approved by the commission. Where the condition of a bank, under its supervision and control, is such that the Corporation Commission is authorized to take possession of its business and property, and then upon terms and conditions approved by the commission, to permit it to resume business, the commission, or the bank examiner, acting under its authority, instead of first taking possession of the bank, and thus closing it, may impose terms and conditions upon which the bank may continue business, and thus avoid losses to depositors, creditors and stockholders necessarily incident to the closing of the bank.

The condition prescribed by the State Bank Examiner in his letter of 4 April, 1921, upon which the People's Bank would be permitted to remain open and continue its business, was that $160,000 "be put up to take care of the loss that may accrue from the above (the manipulations of the cashier and bad loans specified) and any other loss that may develop on account of the condition of the bank. Ten per cent of this amount will have to be paid in cash, within the next fifteen days and the balance properly secured with collateral, the security to be passed upon by this department.

This condition was imposed solely for the purpose of strengthening the credit of the bank and in order that its solvency might not be questioned. The directors, at a meeting held on 5 April, at which the defendants were present, accepted the condition and so notified the bank examiner. Upon the agreement of the directors to put up the $160,000, as required by the bank examiner, the bank was permitted to continue business for fifteen days.

By accepting the terms and conditions contained in the proposal of the bank examiner, the members of the board of directors agreed to pay into the bank, to strengthen its credit, and in order that it might continue business, the sum of $160,000, the said members thus becoming liable to the bank, as the beneficiary of the agreement, jointly and severally, for said sum. As a result of said agreement, the bank was allowed to remain open and to continue business.

On 21 April, 1921, the fifteen days having expired, it was ascertained by the directors and reported to the bank examiner that the whole amount had not been paid in; the deficit being due to the failure of these three defendants to pay in the sums which they had agreed with the other directors to pay. This deficit amounted to about $27,000. The directors who had complied with their agreement to pay in the sums apportioned to each of them, were called upon by the State Bank Examiner to pay in the amount of this deficit and were notified that unless they did so at once, the bank would not be permitted to open for business the following morning. The deficit was immediately made good by the directors other than defendants and the bank opened for business the next morning, with its capital stock restored and its solvency no longer questioned.

The amount for which the defendants had become liable to their codirectors, by virtue of the agreement entered into on 5 April, was paid by these directors, all of whom had paid in their pro rata shares, in accordance with the agreement. The plaintiff in this action paid $331.50 of the deficit and now sues the defendants to recover the sum.

Defendants' first contention, as stated in their brief, is that upon the facts alleged in the complaint they should have been sued "severally because their liabilities appear on the face of the complaint to have been several instead of joint."

This is not an action to recover of defendants because of their liability, as stockholders, for the contracts, debts and engagement of the bank, under C. S., 237, such liability being limited "to the extent of the par value of the stock owned by them." By their contract, made at the instance of the State Bank Examiner, for the benefit of the bank, all the members of the board of directors became liable, jointly and severally, for the payment into the bank of $160,000. Their liability was fixed by their contract, and is not limited by the statute. The bank examiner had no concern as to who put up the $160,000. His requirement was that as a condition of the bank remaining open and continuing business this sum should be put up to take care of losses already sustained and that might develop by reason of the then condition of the bank. This requirement was met by the directors, who assumed the obligation as outlined

in the letter of the bank examiner, not as a board, but as individuals. They became and were jointly and severally liable for the whole amount which they assumed.

The liability of defendants, by virtue of their contract, being joint and several may be enforced either by a joint action against them all, or by separate action against any one or more of them at the election of the creditor. Black's Law Dictionary (2 ed.), p. 662; 33 C. J., 868; *Hanstein v. Johnson,* 112 N. C., 254.

Defendants' second contention is that the liability of defendants upon the facts alleged in the complaint is "to the other directors, including plaintiff, as a unit, and therefore the directors should sue jointly, or one for all."

The beneficiary of the contract made by the directors, including the defendants, is the bank. The contract, however, has been fully performed, the $160,000 has been paid into the bank, and the bank now has no cause of action on the contract against these defendants or any of their codirectors. These defendants not only agreed with the bank examiner, acting for the benefit of the bank, to put up the $160,000, but they also agreed with their codirectors and each of them that they would, each, pay into the common fund, to be raised by all, a sum in proportion to the number of shares owned by each. This they failed to do, and by reason of such failure the plaintiff, acknowledging his liability upon his contract, together with the other directors, except the defendants, have paid in the amount of such default. The plaintiff's share of this amount has been ascertained and fixed definitely. No accounting is necessary to determine it. He alone is interested in the recovery of this amount, to wit, $331.50, from the defendants, under their contract, made with the bank examiner for the benefit of the bank. Plaintiff and defendants, together with their codirectors, were liable for the deficit, due to the default of defendants. The plaintiff having already paid his pro rata share of the $160,000 as fixed by agreement of all the directors, assumed and paid his proportionate part of the deficit, such part being ascertained and fixed in accordance with the agreement entered into by the members of the board of directors. The other directors, although they may have claims against the defendants because of amounts which they have paid in because of default of defendants, have no interest in or liability for the amount which plaintiff paid in as his pro rata part of the deficit.

This action may therefore be maintained by plaintiff against the defendants, without joining his codirectors, for the plaintiff is the only person who has an interest in this cause of action. C. S., 446.

The order and judgment of Kerr, J., overruling the demurrer, is affirmed.

Defendants except to the overruling by Lyon, J., of their motions to nonsuit, and assign same as error.

Defendants contend that the payment by "plaintiff and his associate directors of the amount which defendants had agreed to put up, on 21 April, 1921, was voluntary, without authorization and without necessity because the original agreement at the directors' table was several and not joint."

It is true that the original agreement, entered into on 5 April, 1921, was voluntary. The members of the board of directors were under no obligation, as directors or as stockholders, to put up $160,000 to strengthen the credit of the bank and to remove any question as to its solvency. If the bank was at the time, or should thereafter become, insolvent, the liability of the members of the board, as stockholders, was fixed and limited by statute; C. S., 237. However, the condition of the bank was admittedly such that the bank examiner, acting under authority of the Corporation Commission, had full authority to take possession of its business and property, and if an investigation showed that it would be to the interest of creditors, depositors and stockholders that a receiver be appointed, to apply to the court for appointment of a receiver for the People's Bank. Public Laws 1921, sec. 17.

The members of the board of directors, however, having voluntarily agreed to put up the $160,000, and thus complied with the condition prescribed by the bank examiner for the continuance in business of the bank, they became, jointly and severally, liable for the sum which they had agreed to put up. Having thus induced the bank examiner to allow the bank to continue in business, and the bank having continued its business because of the agreement, they were each and all liable for the payment into the bank of the sum required by him.

The right of the bank to enforce in the courts liability of all the directors for the sum which they had agreed to pay is admitted, but, in view of the situation brought about on 21 April, 1921, by default of defendants, it cannot be said that there was no necessity for action by the other directors, including the plaintiff. There was an admitted default on the part of the directors. They had not put up $160,000, in cash and securities, within fifteen days, and the bank examiner was not only well within his rights, but was performing his duty when he notified these directors that unless the deficit was paid that night the bank would not be permitted to open the next morning. The directors had not paid in all the sum required, $160,000, although each, except the three defendants, had paid in his pro rata part; they were not only liable for the deficit of about $27,000, but were about to lose the benefit which induced them to enter into the agreement, and to pay in their respective shares; for if the bank should be closed, as stockholders they would assuredly

have suffered "inevitable, great and irreparable loss, in money, property, credit, and public confidence." The plaintiff, although the number of shares of stock owned by him was not large, would have shared in this loss, and his share of the loss would not have been necessarily in proportion to the number of his shares. Men often pay their own debts *without necessity,* but they do not often pay the debts of others voluntarily.

The transaction out of which this action arose is not an ordinary subscription contract, which is defined in 25 R. C. L., p. 1407, as "where the undertaking is to pay the amount set opposite the respective signatures of the parties, the contract of each subscriber being generally regarded as separate from that of others, so as to sustain an action against each subscriber individually." Here the Chief State Bank Examiner advises the "president and chairman of the board of directors of the People's Bank" that "in order that the solvency of your bank may not be questioned, it is necessary that $160,000 be put up to take care of the loss that may accrue from the above and any other loss that may develop on account of the condition that your bank is now in. Ten per cent of this amount will have to be paid in cash within the next fifteen days, and the balance properly secured with collateral, the security to be passed upon by this department.

"You are directed to call your board together at once and take the matter up with them, advising me of their action, in order that I may be guided in my decision with reference to allowing this bank to remain open."

This was the proposal. The acceptance was embodied in a motion passed by the board and recorded in their minutes, as follows:

"That the board of directors assume the obligation as outlined in the letter of the State Bank Examiner of 4 April, 1921, assuming $160,000 upon the basis of stock held by the directors, totaling 304½ shares, $526 per share."

The apportionment of the said sum to the several directors was thereupon made and recorded in the minutes. The State Bank Examiner was informed of the action of the directors. He was not concerned with the apportionment of the sum among the individuals who jointly and severally undertook to pay in the whole amount required.

The plaintiff, having paid $331.50, for which, as between himself and the defendants, the defendants are liable, seeks in this action to recover the same from the defendants.

The People's Bank, for whose benefit plaintiff and defendants, with their codirectors, agreed to raise and put up the $160,000, could have maintained an action against the said directors to recover the full

amount which they agreed to pay. *University v. Borden,* 132 N. C., 476; *Rousseau v. Call,* 169 N. C., 173; *Boushall v. Stronach,* 172 N. C., 273.

The defendants were in default upon their agreement. The plaintiff, although he had paid his pro rata share of the common fund, was liable to the bank for the deficit. He and others, under like liability, paid the sum for which, as between defendants and their codirectors, defendants were primarily liable. Plaintiff and his codirectors, who paid the sum for which defendants were liable, are subrogated to the rights of the bank.

"Subrogation is the substitution of one who, under the compulsion of necessity for the protection of his own interest, has discharged a debt for which another is primarily liable, in the place of the creditor, with all the security, benefits and advantages held by the latter with respect to the debt." *Fidelity Co. v. Jordan,* 134 N. C., 236.

There being no necessity for an accounting in this case to determine the amount which plaintiff paid for defendants, the said amount having been ascertained by the method adopted by all the parties to the agreement for determining the amounts for which each was to be liable, the plaintiff may maintain this action without joining his codirectors.

"Where several sureties pay the debt, and there is no evidence of a partnership, or joint interest, or of payment from a joint fund, the presumption of law is that each paid his proportion, and a joint action cannot be maintained." 6 R. C. L., p. 1061.

"At common law, the several persons who have discharged the common obligation cannot sue jointly one who has not paid his share. Each must sue separately for his portion." 13 C. J., 834.

"In a suit for contribution in equity, or under The Code practice, brought by the obligor who has discharged the debt, all the other obligors should be made defendants." 13 C. J., 834.

The evidence in this case fully sustains the allegation of the complaint. The demurrer was properly overruled. The exceptions to the refusal of the motion for judgment as of nonsuit are not sustained.

The exception to the issues submitted by the court is not sustained. There was no error in refusing to submit the issues tendered by defendants. All matters of defense set up in the answer and supported by evidence were submitted by the court to the jury upon the trial of the issues set out in the record. Nor was there error in the portion of the charge excepted to by defendants.

We have carefully considered all the grounds urged in defendants' brief in support of their motion for a new trial, but are of the opinion that no error has been committed in the trial of this action, and that the judgment should not be disturbed.

No error.

NORFOLK-SOUTHERN RAILROAD COMPANY v. BOARD OF COMMISSIONERS OF CARTERET COUNTY ET AL.

(Filed 1 October, 1924.)

1. Taxation—Assessments—Actions—Suits—Statutes.

Under the provisions of C. S., 7979, a taxpayer may pay the tax assessed by the proper county agents under protest, and bring an action at law to recover the amount so paid upon the ground of its illegality, having observed the statutory provisions as to time, notice, etc., or he may apply for injunctive relief upon the ground of the illegality or invalidity of the assessment so made, or that it was for an unauthorized purpose. C. S., 858.

2. Same—Unlawful Assessments—Statutes—Notice.

Where the county list-taker has changed the report made by the proper clerk of a railroad company in increasing the amount of taxable personalty given in for taxes, which has been adopted by the county commissioners at its proper meeting, and notice thereof given to the said agent of the railroad, and the notice of this change has been turned over to the company's legal department but not acted upon until the list has been placed in the sheriff's hand for the collection of the tax thus increased: *Held*, in the suit of the railroad company to restrain the collection of the tax by the sheriff, the plaintiff may not resist the dissolution of the temporary restraining order upon the ground that it had not received the legal notice of the increase after appropriate action had been taken thereon by the county commissioners. C. S., 7897.

3. Same—Municipal Corporations—Cities and Towns.

The valuations properly fixed under the statute by the proper county authorities for purposes of taxation, C. S., 7897, are binding upon cities and towns within the same county.

4. Same—Injunctions—Pleadings—Allegations—Evidence.

Where a taxpayer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation.

APPEAL by plaintiff from *Daniels, J.*, at June Term, 1924, of CARTERET.

Civil action to restrain the collection of an alleged unlawful tax and to correct an alleged error in the assessment of plaintiff's property for taxation.

From an order denying the relief sought, plaintiff appeals.

Moore & Dunn and J. F. Duncan for plaintiff.

E. W. Hill, M. Leslie Davis and E. H. Gorham for defendants.

STACY, J. In this jurisdiction, a taxpayer may contest the validity of an assessment or collection of tax upon his property in one of two ways:

1. He may pay the alleged illegal or invalid tax under protest and then bring an action to recover it back, observing, of course, the requirements of the statute with respect to time, notice, etc. C. S., 7979; *Murdock v. Comrs.*, 138 N. C., 124; *Hilliard v. Asheville,* 118 N. C., 845; *Schaul v. Charlotte,* 118 N. C., 733; *Range Co. v. Carver,* 118 N. C., 328.

2. He may, if the tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, apply for injunctive relief without paying the alleged illegal or invalid tax in advance. C. S., 858; *Sherrod v. Dawson,* 154 N. C., 525; *Lumber Co. v. Smith,* 146 N. C., 199; *Purnell v. Page,* 133 N. C., 129.

It has been held that the validity of a Federal tax or assessment may not be tested by injunction. *Graham v. Dupont,* 262 U. S., 243; *Seaman v. Bowers,* 297 Fed., 371.

In the instant case, plaintiff has applied for injunctive relief, alleging an unlawful assessment. The appropriateness of the remedy is not questioned.

The facts are these: In May, 1922, J. R. Pritchard, chief clerk in the executive office of the Norfolk-Southern Railroad Company, mailed to the proper list-taker for Carteret County and Morehead City, a tax return (enclosing two carbon copies), listing certain personal property of the plaintiff, located in the Atlantic Hotel at Morehead City, and valuing the same at $1,000.00. The said list-taker having made a personal investigation as to the value of the property in question and noting that the same was listed at $10,000.00 the year before, which he deemed to be its fair value, changed the valuation upon said return from $1,000.00 to $10,000.00, and on 29 May mailed one of the carbon copies, as thus changed, to J. R. Pritchard, chief clerk, having direct charge of the matter for plaintiff company. The property was thereupon reported by the list-taker and listed for taxation at the higher value. Mr. Pritchard noted the change in valuation, which had been made by the list-taker upon the carbon copy returned to him, and immediately turned it over to the law department of the plaintiff company for attention. No further steps were taken in regard to the matter until plaintiff was notified by the sheriff of Carteret County of the amount of tax due upon its property; whereupon this suit was instituted to restrain the collection of said tax and to correct the alleged error in assessment.

Plaintiff takes the position that the increased valuation of its property was made by the list-taker without any proper notice and that the same was approved by the board of commissioners, sitting as a board

of equalization on the second Monday in July (C. S., 7938), without giving plaintiff an opportunity to be heard.

The facts are, however, as found by the court below, that the plaintiff's agent did have notice of the action of the list-taker in making the change in question and the matter was referred by him to the legal department of the plaintiff company for attention. Such notice was sufficient, at least, to put plaintiff upon inquiry, and this carries with it a presumption of notice of everything which a reasonable investigation would have disclosed. *Blackwood v. Jones,* 57 N. C., 54; *May v. Hanks,* 62 N. C., 310. A party having notice must exercise ordinary care to ascertain the facts, and if he fail to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interests. *Wynn v. Grant,* 166 N. C., p. 45.

No complaint was made to the board of commissioners, as provided by C. S., 7939, and the report of the list-taker was approved by the board of equalization on the second Monday in July, as a matter of course. Due notice is required to be given of this July meeting, to the end that all taxpayers, who are dissatisfied with the valuation of their property, may appear and make complaint and have the same corrected or equalized, if found to be unjust or unequal. *Comrs. v. R. R.,* 86 N. C., 541.

Section 18 of the Machinery Act of 1921 (same as C. S., 7897), the law in force at the time of the present assessment, contains the following with respect to the powers and duties of list-takers: "The township list-taker and assessor shall obtain from each taxpayer a full, complete, and detailed statement of each and every piece and kind of property, real, personal, and mixed, which said taxpayer shall own on the first day of May, together with, as near as possible, the true value in money of all such property owned by him or them, or which may be under his or their control as agent, guardian, administrator, or otherwise, and which should be listed for taxation; and it shall be the duty of said township list-taker and assessor to ascertain by visitation, investigation, or otherwise the actual cash value in money of each piece or class of property in his township, and to list such property at its actual value for taxation."

Thus it would appear that the list-taker was authorized to increase the valuation of plaintiff's property. This he did and mailed notice to plaintiff of such action on his part.

There is still another ground upon which the judgment entered below should be upheld. Plaintiff is seeking injunctive relief, and it is nowhere alleged that the property in question is not worth $10,000.00. The suit is based upon the single allegation that the action of the list-taker in

increasing the assessment, as above set out, was unlawful. We have discovered no valid reason for disturbing the judgment.

The restraining order having been properly dissolved as against the sheriff and commissioners of the county, it follows that the same judgment was correctly entered as against the tax collector and town of Morehead City. The valuations fixed by the county authorities, for purposes of taxation, are binding upon the cities and towns and must be adopted by them. Such was the holding in *Guano Co. v. New Bern*, 172 N. C., 258.

Affirmed.

ASBURY TYER, ADMINISTRATOR OF IRVING TYER v. J. B. BLADES LUMBER COMPANY.

(Filed 1 October, 1924.)

1. **Administration — Clerks of Court — Jurisdiction—Executors and Administrators—Proceedings to Revoke Letters—Domicile—Findings of Fact—Appeal and Error.**

   The finding of fact by the clerk of the Superior Court, upon petition to revoke letters of administration upon the ground that intestate was domiciled in a different county from the one having issued the letters, is conclusive in the Supreme Court on appeal from the judgment of the Superior Court adopting the affirmative findings of fact found by the clerk and sustaining his judgment as to jurisdiction, when there is legal evidence upon which his findings may be sustained.

2. **Administration—Executors and Administrators—Clerks of Court—Appointment by Clerk—Priority of Right.**

   Upon petition to revoke letters of administration the petitioner may not avail himself of the fact that the deceased left a widow who was entitled to administer upon his estate instead of a brother of deceased to whom the letters were duly granted, when she has shown no disposition to set up this right before the clerk having issued the letters and has apparently acquiesced in the appointment of the clerk. C. S., S (2).

PETITION to revoke letters of administration issued to the plaintiff by the clerk of the Superior Court of BEAUFORT. Heard by *Brown, J.*, upon appeal from the clerk's order.

The plaintiff brought suit to recover damages for the alleged negligent killing of his intestate while operating a saw in the defendant's mill. The complaint and answer were duly filed. Thereafter the defendant made a motion before the clerk of the Superior Court of Beaufort to vacate and set aside the plaintiff's letters. The plaintiff filed an answer to the petition and at the hearing the clerk heard evidence from which he found the following facts:

1. That Irving Tyer was killed on Friday, 11 August, 1922, while working in the sawmill of the J. B. Blades Lumber Company, at Bridgeton, N. C.

That at the time of his death the said Irving Tyer was living in a cottage on the mill premises of the J. B. Blades Lumber Company, which said cottage was rented to him by the J. B. Blades Lumber Company, while he worked at said mill. That the said Irving Tyer had four minor children who were living with him in said cottage. That at the time of his death the wife of the said Irving Tyer, Annie Jordan Tyer, was not living with the said Irving Tyer, but was residing in the city of Philadelphia, State of Pennsylvania; that the said Annie Jordan Tyer had not resided with her husband and children for several years prior to the death of the said Irving Tyer.

2. That on 21 September, 1922, Asbury Tyer, a brother of the deceased, Irving Tyer, duly qualified as administrator of the said Irving Tyer before the clerk of the Superior Court of Beaufort County, North Carolina, giving the necessary and required bond and promptly thereafter instituted an action for damages against the J. B. Blades Lumber Company for the wrongful death of his intestate.

3. That at the time of the death of the said Irving Tyer, the said Irving Tyer was domiciled in Beaufort County, and did not at any time change his domicile from said county to any other county; that the said Irving Tyer was temporarily working in Bridgeton, N. C., and had his children with him at said time, but intended to retain his domicile in Beaufort County and to return to Beaufort County as the place of his domicile.

That at the time of his death the said Irving Tyer had part of his personal effects, including his cooking stove, in Beaufort County. That the said Irving Tyer had often explained his absence from Beaufort County as being for a temporary purpose and frequently stated that he intended to retain his domicile in Beaufort County. That the said Irving Tyer preferred to work in and around mills and gins to working in crops, and at certain seasons of the year when he could not obtain work in mills and gins temporarily worked in Bridgeton, N. C., for the J. B. Blades Lumber Company and others, but always with the intention to return to Beaufort County.

The judgment was as follows:

From the foregoing findings of facts it is ordered, adjudged and decreed, by the court that the said Irving Tyer was domiciled in the county of Beaufort at the time of his death, and that letters of administration upon the estate of said Irving Tyer are duly and properly issued to the said Asbury Tyer by the clerk of the Superior Court of Beaufort

County, and it is, therefore, ordered adjudged and decreed that the petition to revoke the said letters of administration be dismissed at the cost of the petitioner, J. B. Blades Lumber Company. This the 1st day of October, 1923.

The defendant excepted and upon appeal Brown, J., adopted the clerk's findings of fact and affirmed his judgment. The defendant excepted and appealed to this Court.

Ward & Grimes, W. A. Thompson, and Harry McMullan for plaintiff.
O. H. Guion for defendant.

ADAMS, J. The clerk of the Superior Court of each county has jurisdiction, within his county, to grant letters of administration in cases of intestacy, where the decedent at or immediately previous to his death was domiciled in the county of such clerk, wherever such death may have occurred. The place of the intestate's domicile was put in question by the defendant's petition (*Reynolds v. Cotton Mills,* 177 N. C., p. 424) and was considered and determined by the clerk and by the judge on appeal. It is stated in the judgment that although the deceased had been temporarily at work for the defendant in Craven County, he died domiciled in the county of Beaufort; and as the findings of fact are supported by competent evidence they are as conclusive as the verdict of a jury. *Matthews v. Fry,* 143 N. C., 384; *Stokes v. Cogdell,* 153 N. C., 181; *In re Martin,* 185 N. C., 472. The deduction that the deceased was domiciled in Beaufort County is fortified, in our opinion, by abundant authority. *Reynolds v. Cotton Mills, supra; Roanoke Rapids v. Patterson,* 184 N. C., 135; *In re Martin, supra; Thayer v. Thayer,* 187 N. C., 573. It is only in the absence of a domicile in this State that assets in the county will confer jurisdiction to grant such letters. *Reynolds v. Cotton Mills, supra,* p. 420. However, it appears that a part of the intestate's personal effects were in Beaufort County at the time of his death. It follows, then, that the clerk of the Superior Court of Beaufort had jurisdiction to grant letters of administration upon the intestate's estate.

The defendant contends that the widow of the deceased had the prior right to letters of administration; but the judgment recites that she made her home in Philadelphia and for several years had not lived with her husband and children, and the plaintiff contends that for this reason she was without right to administer. *Hall v. R. R.,* 146 N. C., 345; *Boynton v. Heartt,* 158 N. C., 488; C. S., 8 (2). We deem it unnecessary to consider this question. The appointment of Asbury Tyer, a brother of the deceased, was not void, and the widow has not applied in this

proceeding to effect his removal. On the contrary it appears from papers on file in this cause that she has no purpose to intervene or to interfere with the present administration of her husband's estate. *Garrison v. Cox*, 95 N. C., 353; *Lyle v. Siler*, 103 N. C., 262; *Williams v. Neville*, 108 N. C., 559.

The judgment is

Affirmed.

J. H. HARDY v. C. H. HEATH.

(Filed 1 October, 1924.)

Appeal and Error—Rules of Court—Docketing Appeals—Record Proper—Motions—Certiorari — Constitutional Law—Statutes—Agreement of Parties.

The rules of practice regulating the docketing in the Supreme Court cases appealed thereto is exclusively left to that Court by the Constitution, Art. IV, secs. 8 and 12, which cannot be affected or changed either by statute or the agreement of parties; and in order to properly bring the case before the Court for it to exercise its discretionary power to afford relief under peculiar circumstances arising in a particular case, the record proper must be docketed in strict accordance with the requirements of the rule, and a *certiorari* accordingly applied for on motion to the Court and in the time required.

APPLICATION for *certiorari* to obtain extension of time to docket appeal, filed 13 September, 1924, and presented and heard by the court 23 September, 1924. Application denied. Appeal by plaintiff.

Manning & Manning for plaintiff.

Stevens, Beasley & Stevens, R. D. Johnson for defendant.

HOKE, C. J. From a perusal of the affidavits and summary of the record now presented it appears that this was an action of claim and delivery tried and determined at Superior Court of Duplin County, March Term, 1924. Verdict and judgment for defendant. Appeal by plaintiff. By agreement of counsel, time for tendering case on appeal and countercase has been extended to 13 September, 1924, when the papers will be handed to the judge for the purpose of settling case on appeal, and his Honor now has the papers for such purpose.

Our rules provide in effect that appeals in causes tried below during a term of this Court shall be brought to such term or the next succeeding term, and when to the next succeeding term, same must be docketed at

such term seven days before the call of the docket of the district to which it belongs. Rules of Practice, 185 N. C., p. 787 *et seq.*

In numerous decisions of the Court in which these rules were construed and applied, it has been held that a record and case on appeal not docketed at the time required by the rule will be dismissed on motion unless the appellant within the time provided shall docket the record proper and apply for a writ of *certiorari* and thereby obtain an extension of time. *S. v. Farmer, ante,* 243; *S. v. Butner,* 185 N. C., p. 731; *S. v. Dalton,* 185 N. C., p. 605; *Rose v. Rocky Mount,* 184 N. C., p. 609; *Mimms v. R. R.,* 183 N. C., p. 436; *S. v. Johnston,* 183 N. C., p. 730; *S. v. Brown,* 183 N. C., p. 789; *S. v. Barksdale,* 183 N. C., p. 785; *S. v. Ward,* 180 N. C., p. 693.

In *Rose v. Rocky Mount, supra,* it was held: "Appeals to the Supreme Court are only within the rights of the parties when the procedure is in conformity with the appropriate statutes or rules of court, and neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals in the Supreme Court; and where the appellant has failed to docket his appeal or move for a *certiorari* under the rule regulating the matter, the appeal will be dismissed."

In *Mimms v. R. R., supra:* "When a case on appeal has not been docketed by appellant within the time required by the rule of practice in the Supreme Court regulating it, and a motion has not been made for a *certiorari,* it will be dismissed, it being discretionary with the Court as to whether the motion for this writ will be allowed, which the consent of the parties cannot affect."

In *S. v. Johnson, supra:* "The procedure in the Supreme Court is vested by constitutional authority entirely with this Court, without power of the Legislature to modify it. Whether the appellant has legal excuse in not docketing his case on appeal in time for it to be regularly heard at the call of the district to which it belongs is a matter for the Supreme Court to determine upon his docketing the record proper and moving for a *certiorari* under the rule. Where the appellant has not docketed the record proper and moved for a *certiorari* under the rules, he may not successfully resist appellee's motion to dismiss for not having his case docketed in the required time by attempting to show that such failure was caused by the trial judge in extending the time for the preparation and service of the case and countercase. *Semble,* an unreasonable time given for such purpose will not be recognized by the Supreme Court."

In *S. v. Brown, supra:* "A case on appeal will be dismissed in the Supreme Court when the appellant has not conformed to the rule requiring that it be docketed in a certain time before the call of the district,

at the first term of the Supreme Court beginning after the trial, and has failed to apply for a *certiorari* on good cause shown."

In *S. v. Barksdale, supra:* "In this case, held that the appeal be dismissed in the Supreme Court on motion of the State for the failure of the appellant to docket his case at the first term of this Court beginning after the trial below, or apply for a *certiorari* upon filing a transcript of the record proper, in accordance with the requirements of the rules of Court regulating such matters."

In the case before us, the case on appeal has not yet been prepared nor has the record proper been docketed, on which alone an extension of time may be obtained by means of the writ of *certiorari*. A mere summary of the record taken from the minute docket and consisting chiefly of the names and respective dates of the different processes and pleadings in the cause is by no means a compliance with this requirement that the record proper be docketed. Speaking to this question in *S. v. Farmer, supra,* the Court said: "It is only by timely issuance of this writ that an extension of time can be procured, and this is by no means a formal and meaningless requirement. By application for *certiorari,* the cause is brought within the cognizance and control of the Court, and a criminal cause can thereby be brought up and heard at a day certain or at furthest at the end of the appeals from the Twentieth District, as provided in Rule No. 6. Its proper issuance is essential to give this Court proper control of the action of the lower courts as provided and contemplated by Const., Art. IV, secs. 8 and 12, and the principles which apply to it and the decisions of the Court concerning it are just as imperative as the time fixed for docketing a perfected appeal under the express terms of the rule."

And in order to a proper exercise of the discretionary power to issue the writ referred to, it is necessary for the Court to have opportunity to inspect the record proper, which should contain at least the summons, pleadings, verdict and judgment below and any ancillary orders made in the cause in case the validity of such orders are involved in the appeal. See *Cressler v. Asheville,* 138 N. C., p. 482.

Again, a proper consideration of the authorities cited will disclose that these rules of practice and the decisions concerning them will be uniformly enforced and that even when the record proper has been duly docketed an extension of time for docketing also the case on appeal will only be allowed when good and sufficient cause is shown why there has not been a full compliance with the rule. In the case before us it appears that the cause was heard and determined at March term, Superior Court of Duplin County; that time for serving case and countercase on appeal has been extended by agreement of counsel from time to time

through the entire Spring term of the Sixth District, through the summer vacation, and was only submitted for the consideration of the judge below on 13 September, too late for his Honor to have settled the case within the time required by the rule.

As said in *Farmer's case,* these rules, prepared pursuant to the powers vested in this Court by the Constitution and designed to promote the expeditious and orderly hearing of causes on appeal, are in no wise subject to the agreement of counsel or parties litigant, and no sufficient reason is shown to justify an issuance of the writ of *certiorari* in the cause even if the record proper had been docketed in apt time.

For reasons stated the application for writ is

Denied.

ANNIE TYER, ADMINISTRATRIX OF IRVING TYER v. J. B. BLADES LUMBER COMPANY.

(Filed 1 October, 1924.)

1. Administration—Letters—Clerks of Court—Executors and Administrators—Jurisdiction.

Where applied for and granted to separate applicants for letters of administration in two counties, the one first acquiring jurisdiction has the sole and exclusive jurisdiction, though the decedent, at the time of his death, had his fixed domicile in both counties. C. S., 2, subsec. 1 (2); and this jurisdiction, when once acquired, cannot be collaterally impeached.

2. Same—Appeal and Error.

Where the clerks of two counties have granted letters of administration to separate parties, and in the Superior Court of each county, the judgment of the respective clerks has been affirmed, the Superior Court will determine which of the letters were properly granted.

APPEAL by defendant from *Midyette, J.,* denying defendant's motion to revoke plaintiff's letters of administration on the estate of Irving Tyer, deceased. From CRAVEN.

Ernest M. Green for plaintiff.
O. H. Guion for defendants.

ADAMS, J. The death of the intestate occurred on 11 August, 1922, in Craven County. On 21 September, 1922, letters of administration were granted by the clerk of the Superior Court of Beaufort County to Asbury Tyer, a surviving brother, and on 8 December, 1922, the clerk of the Superior Court of Craven County likewise issued letters of

administration to Annie Tyer, the intestate's widow. On 21 September, 1922, Asbury Tyer as administrator brought suit against the defendant in Beaufort County to recover damages for wrongful death, and thereafter Annie Tyer as administratrix brought a similar suit in Craven. On 22 December, 1922, the defendant filed a petition before the clerk of the Superior Court of Beaufort County to revoke the letters issued to Asbury Tyer, and the clerk's denial of the petition was approved by the Superior Court on appeal. On 7 April, 1924, the defendant instituted a like proceeding before the clerk of the Superior Court of Craven for the recall of the letters issued to the intestate's widow. The clerk's order denying this motion was in like manner approved on appeal to the Superior Court.

We have therefore the singular situation of two suits for the recovery of damages against one defendant, pending in different counties and separately prosecuted by two personal representatives of one decedent. It hardly need be said that both administrations cannot be maintained. One must yield to the other, and the prevailing jurisdiction is defined by statute. The clerk who first gains and exercises jurisdiction of the administration of an estate thereby acquires sole and exclusive jurisdiction even if the decedent at the time of his death had his fixed place of domicile in more than one county. C. S., 2; subsec. 1 (2). And such jurisdiction when once acquired cannot be collaterally impeached. *Batchelor v. Overton,* 158 N. C., 396; *Fann v. R. R.,* 155 N. C., 136.

We have held that the judgment approving the appointment of Asbury Tyer was free from error, and as the clerk of the Superior Court of Beaufort had exclusive jurisdiction the letters of administration granted to Annie Tyer should be revoked.

The judgment is

Reversed.

A. L. JACKSON AND L. G. COOPER, RECEIVERS, v. INTERNATIONAL HARVESTER COMPANY ET AL.

(Filed 1 October, 1924.)

1. Evidence—Nonsuit—Trials.

Upon a motion to nonsuit upon the plaintiff's evidence, the evidence must be viewed in the light most favorable to the plaintiff.

2. Limitation of Actions—Actions—Principal and Agent.

The burden of proof is on the plaintiff to show that his cause of action is not barred by the statute of limitations when the defendant sets up this plea as a bar thereto; and where a principal has been sued, and after the statute has run against his agent, the plea of the statute is available to the latter.

JACKSON *v.* HARVESTER CO.

APPEAL by plaintiffs from *Daniels, J.*, at May Term, 1924, of PITT.

Civil action to recover for an alleged breach of warranty and fraud in the sale of an automobile truck.

From a judgment of nonsuit entered at the close of all the evidence, plaintiffs appeal.

P. R. Hines and Julius Brown for plaintiffs.
F. G. James & Son and H. C. Carter for defendants.

STACY, J. Without stating the facts, which are somewhat complicated and make a rather long story, we are convinced, from a careful perusal of the record, viewing the evidence in its most favorable light for plaintiffs, the accepted position on a motion to nonsuit, that the case was properly dismissed or nonsuited.

Suffice it to say, the action was originally instituted against the International Harvester Company of America as sole defendant. Upon the trial, plaintiffs' counsel, Mr. Hines, learning that his witnesses would not say they were agents of the defendant as he had been led to believe they would, stated that he "looked around and saw he was in a bad fix"—meaning that plaintiffs were thereby unable to prove their case; whereupon he asked the court to order a mistrial and allow him to bring said witnesses in and make them parties defendant, to the end that he might charge them with fraud in the sale of said truck and also with breach of warranty. This was done, but not until four and a half years after the alleged cause of action for breach of warranty arose.

There was no evidence of any fraud on the second hearing, from which this appeal is prosecuted. The following is taken from the record: "In answer to an inquiry from the court, attorneys for plaintiff stated that they didn't consider there was sufficient evidence of fraud to submit such an issue to the jury." The new defendants interposed a plea of the statute of limitations in bar of plaintiff's right to recover as against them. The trial court held the plea to be good, and this ruling must be approved. In the face of such a plea the burden was on the plaintiffs to show that the suit, as against the defendants making the plea, was brought within three years from the time of the accrual of the cause of action against them, or that otherwise it was not barred. *Rankin v. Oates,* 183 N. C., 517; *Tillery v. Lumber Co.,* 172 N. C., 296. Having failed to make out a valid cause of action against any of the defendants, the judgment of nonsuit was properly entered.

Affirmed.

J. F. HOLTON v. KINSTON-CAROLINA RAILROAD COMPANY.

(Filed 1 October, 1924.)

Carriers—Railroads—Crossings—Negligence—Evidence—Nonsuit.

It is the duty of a person driving an auto-truck to look and listen in both directions for approaching trains before attempting to drive across a railroad track; and in an action to recover damages to the truck, caused by colliding with a passing train, under such circumstances, a motion as of nonsuit should be granted when it appears from all the evidence that the proximate cause of the injury was his attempting to cross the track when there were no obstructions to his view and he had heard the train approaching and could have perceived it in time to have prevented the injury if he had observed the duty required of him.

CIVIL ACTION, tried before *Horton, J.*, at June Term, 1924, of LENOIR.

The action is to recover damages for destruction of plaintiff's auto truck, caused by alleged negligence of defendant in backing one of its trains on the track at a railroad crossing at or near the city of Kinston, N. C., in April, 1920. On issue of negligence, contributory negligence and damages there was verdict for plaintiff. Appeal by defendant, assigning for error refusal of its motion for nonsuit.

Sutton & Greene for plaintiff.
Rouse & Rouse for defendant.

HOKE, C. J. On careful consideration of the record and evidence contained therein, the Court is of opinion that defendant's motion for nonsuit should have been allowed. It is the recognized duty of a person on or approaching a railroad crossing to "look and listen in both directions for approaching trains if not prevented from doing so by the fault of the railroad company or other circumstances clearing him from blame," and where, as to persons other than employees of the company, there has been a breach of this duty clearly concurring as a proximate cause of the injury, recovery therefor is barred. *Plyler v. R. R.*, 185 N. C., pp. 358-361; *Davidson v. R. R.*, 171 N. C., p. 634; *Coleman v. R. R.*, 153 N. C., p. 322; *Trull v. R. R.*, 151 N. C., p. 545.

In the present case the evidence on part of plaintiff shows that he was driving his truck along the highway approaching a crossing of defendant road at about eight miles an hour, the railroad being on a rise two feet or more above the general grade of the highway, and he ran his truck up on the crossing in the way of a train backing on the crossing, thus bringing about a collision by which the truck was destroyed. Plaintiff saved himself from personal harm by jumping from the truck as the front wheels got on the track.

According to the facts in evidence the train was running 15 or 20 miles per hour and the employees of the company testify that the engine bell was ringing as the train backed towards the crossing and plaintiff could easily have seen the train if he had looked.

Plaintiff does not deny that the bell was ringing, and he himself testifies that he could have seen down the track thirteen to fifteen hundred feet the way the train was approaching and didn't look that way. And while he says that he heard no signal whistle, he also testifies, as we understand his testimony, that he had heard the whistle of the train some distance back but thought it was an automobile.

In our opinion and according to plaintiff's own showing, the collision was clearly due to his own default in not keeping a proper lookout, and in such case, on motion, in apt time a judgment of nonsuit should have been entered. *Davis v. R. R.*, 187 N. C., pp. 147-153; *S. v. Fulcher*, 184 N. C., p. 665.

This will be certified that motion for nonsuit be allowed.

Reversed.

ELIZABETH CITY WATER AND POWER COMPANY v. CITY OF ELIZABETH CITY.

(Filed 1 October, 1924.)

1. Courts — Pleadings — Jurisdiction — Orders—Answers—Discretion of Court—Statutes.

Under the provision of C. S., 534, 537, the Superior Court judge may, in his sound discretion, allow defendant's motion, after answer filed, to make the complaint more definite and certain as to the grounds upon which the relief is sought, especially when it affects book records and other written data easily accessible to the plaintiff.

2. Same—Jurisdiction—Cause of Action.

Objection to the jurisdiction of the court or that the complaint does not allege facts sufficient to constitute a cause of action is not waived by proceeding with the trial, and may be taken advantage of in the Supreme Court, or this Court may act thereon *ex mero motu* and dismiss the action.

3. Contracts — Constitutional Law — Vested Rights—Statutes—Amendatory Statutes—Corporations—Charters.

The provisions of Art. VIII, sec. 1, of the State Constitution, affecting the organization of corporations, and specifically providing that all "such laws or special acts may be altered from time to time or repealed," etc., enters into every charter taken out or corporation formed thereunder, and any such corporation may not complain when a statutory repeal or amendment has been made, on the ground that it works a hardship on

it or impairs the value of its property, unless vested rights have been prior acquired by it which have been impaired or destroyed by the repealing or amendatory act complained of.

4. Same — Municipal Corporations — Cities and Towns — Water Companies—Competition—Constitutional Law.

An incorporated water company obtained a franchise from an incorporated city, and contracted with the city for furnishing it and its inhabitants a water supply for a term of years. Thereafter the city, by complying with the provisions of a statute authorizing it, undertook to furnish its own system such as water, sewerage, electric lights, etc., with certain charges therefor, and to take care of a bond issue, therefor, interest thereon, etc. *Held*, the plaintiff could not restrain the defendant city from operating its own water system upon the ground that it would create an unfair competition under circumstances that would destroy or impair the value of its property.

5. Same—Navigable Streams—Prescriptive Rights—Vested Rights.

A water company cannot acquire a prescriptive right to the use of a dam on a navigable stream for its supply of water to its customers, and it may not prevent a city from the exercise of its valid right to enter into competition in supplying its own inhabitants, upon the ground that it would necessarily have to use the water of the navigable stream in like manner, and that the plaintiff had an exclusive right by prescription to such waters at a point where such use was alone available.

6. Same—Statutes—Amendments.

Where a city has entered into a contract authorized by statute to contract with a water company for its water supply, etc., the city may, after the expiration of this contract, in pursuance of authority conferred by statute erect and maintain its own water plant for this purpose, without impairing any vested right of the water company, under Art. I, sec. 10 of the Federal Constitution, or under the Fourteenth Amendment thereof known as the due process clause, or under Art. I, sec. 7, of the State Constitution prohibiting the taking of private property for a public use except by the law of the land. The question of whether during the life of the contract with a water company, the city could so act under a statute authorizing it, and the question of monopolies, discussed by CLARKSON, J.

APPEAL by plaintiff from *Devin, J.*, at March Term, 1924, of PASQUOTANK.

The facts as set forth by plaintiff, appellant, are as follows:

The plaintiff was chartered in 1903 for the purpose of supplying water and power, and then acquired a 60-year franchise that in 1902 had been granted by Elizabeth City. This franchise, granted in 1902, received legislative recognition, sanction, and ratification in 1903, and has municipal recognition by express contract, acquiescence, and estoppel.

The plaintiff has a modern and efficient water system, with nearly thirteen miles of mains in service, a plant with a capacity of 1,440,000

gallons per day, while the average daily consumption of water in Elizabeth City is only 400,000 gallons, the investment being $173,577.68.

The plaintiff serves the city, its inhabitants, and persons beyond the city limits, especially those living within a radius of a mile beyond the boundaries. The bill alleges that the city has passed the ordinances authorizing a municipal bond issue of $800,000 to provide for the construction of city electric, water, and sewer plants. It is stated that the bond ordinance is invalid, in that the purpose is not in fact a public purpose, and that the city did provide in accordance with the requirements of the Municipal Finance Act, but did acts prohibited by the State and Federal constitutions. The plaintiff states that the only practicable and available source of water supply is Knobb's Creek, which the company, from the beginning of its operations in 1903, as well as did the predecessors of the company, the rights of which predecessors the company acquired, have made use of said stream.

The company has long had a dam across the creek, and in 1919 obtained from the Legislature of North Carolina permission to erect a permanent dam. The city has prepared, introduced and caused to be passed a bill repealing the company's right to dam the stream, the act giving the city right to construct a dam across Knobb's Creek.

It is stated that the subsoil of Elizabeth City is such that the laying of duplicate water mains and pipes will cause great damage and injury to the distributing system of the plaintiff company and prevent it from serving its customers, and from carrying out its contractual and franchise obligations. The bill states that the defendant city has prepared and caused to be passed by the Legislature a city charter, which authorizes the city to construct and operate a municipal water system, and that by said charter is effected a studied and consistent discrimination against the plaintiff, amounting to destruction and confiscation, and in favor of the municipal water system.

The requirements that all property holders pay for the installation and cost of connection with the pipes of the municipal plant, and the restriction against the taking-up of paving when once laid, are particularly complained against.

The bill of complaint states that the plaintiff company is a large taxpayer; that the issuance of said bonds by the city, and dedication of the proceeds to the purposes intended, with no requirement that the rates charged shall pay all operating expenses, allow for depreciation and provide for the payment of the principal and interest, violate the rights of the plaintiff, which company is under regulation by the Corporation Commission of North Carolina, and the municipal plant by law made exempt from regulation.

It is charged that the issuance of the bonds without a vote of the people is in violation of the State Constitution, as construed by the highest State Court at the time of the organization of plaintiff and the issuance of its securities.

The bill prays that the issuance and sale of the bonds be enjoined; that the construction of the dam across Knobb's Creek and the use of the stream as a source of supply be denied; that damage to the pipes and mains be prevented; that the levying of the taxes to pay the principal and interest of the bonds be prohibited; that the inhabitants and property holders of Elizabeth City be not required to use the municipal water supply, and that the city be prohibited from using any unfair methods of competition. General relief is also prayed.

The bill of complaint was filed on 4 February, 1924. As part of the bill, there were filed seven exhibits. The defendant answered on 23 February, 1924. On 27 February, 1924, the defendant gave notice that it would on 17 March, 1924, move to dismiss the bill, on the ground of insufficiency of facts to constitute a cause of action; and on 27 February, 1924, the defendant gave a second notice that it would, on 8 March, 1924, move for an order requiring the plaintiff to file a bill of particulars and to make the bill more specific. The motion itself, as made on 8 March, 1924, is contained in the record.

The court heard the motion to file particulars and to make more specific, on 18 March, 1924, and granted the same. Immediately thereafter, on the same day, the court heard the motion to dismiss, with the amendments and particulars considered as made and filed, and thereupon passed an order dismissing the bill. The final judgment dismissing the bill followed, the court "being of the opinion that the complaint, as so amended and amplified, does not state facts sufficient to constitute a cause of action, and that the action should be dismissed." The plaintiff appealed from this judgment.

The facts set forth by defendant, appellee, are as follows:

The plaintiff, Elizabeth City Water and Power Company, was duly incorporated under the laws of North Carolina on 25 February, 1903, for a period of sixty years. On 6 October, 1902, the respondent city attempted to grant to C. M. Ferebee and his assigns a franchise to furnish to said city and its inhabitants an adequate supply of pure, potable and wholesome water, and an efficient, sanitary sewerage and waterworks in said city, and to use the streets and public grounds of said city for that purpose.

On 18 February, 1903, the General Assembly of North Carolina, by private act, authorized the city, upon ratification by popular vote, to contract with the said Ferebee and his assigns for electric lights, water, sewerage, and gas, or for any of same, for such time, not exceeding

thirty years, and upon such terms and conditions, and for such consideration, in each case, as the board of aldermen of said city might deem just and expedient.

Said act further empowered the city to agree with said Ferebee or his assigns that no pipe, etc., for a water supply or sewerage should, under the authority of said city, be placed in, under, or across any of the streets, etc., of said city at any time within ten years from 1 May, 1903, which in any way should interfere with the pipes, etc., of said Ferebee or his assigns, laid for the purpose of performing any contract made under the authority of said act.

On 4 March, 1903, the General Assembly, by private act, further empowered the city, upon prescribed conditions, to erect public utilities of its own. This act of 4 March provided that "No contract or agreement made at any time hereafter by the corporation of Elizabeth City, under the authority contained in the aforesaid act (private act of 18 February, aforesaid), shall, during the period or term for which said contract or agreement shall be made, be in any manner terminated or impaired, or by virtue of any power or authority vested in the board of town aldermen of Elizabeth City by the provisions of this act."

On 1 June, 1903, the respondent city entered into a contract with the complainant, as the assignee of said Ferebee, to furnish to the city and its inhabitants an adequate supply of good, wholesome, potable water, suitable for all domestic purposes.

This contract, as will appear from the terms thereof, expired by limitation on 31 May, 1913. Since the expiration of this contract no new contract has been entered into between said parties, though the respondent city and its inhabitants have continued to use, so far as possible, water furnished by the complainant, upon the terms agreed or fixed by appropriate authority. No further contract between said parties is set out in the record. Nor does the complainant allege with particularity any facts constituting a renewal of said contract; complainant contenting itself with the contention that a renewal of said contract for a like period of time is to be presumed from the continuance of service after 31 May, 1913.

On 5 September, 1922, the city, in conformity with the Municipal Finance Act, passed by the General Assembly of North Carolina at its sessions of 1919 and 1921, duly passed two ordinances—one providing for the issue of bonds in the sum of $550,000 to provide a combined water, electric light and power system for said city, and the other providing for the issue of bonds in the sum of $250,000 to provide a sewerage system for said municipality and its inhabitants. These two ordinances, as shown by the record, were, under the authority of said Municipal Finance Act, subsequently consolidated by ordinance of

9 October, 1922. Thereupon this suit was instituted, seeking the relief prayed in the bill of complaint.

A brief resumé of the history of the litigation, of which this case forms a part, is neither inappropriate nor amiss. This is especially true, because the decisions and opinions heretofore rendered in the Federal courts upon the identical questions here raised are respectfully cited in support of the correctness of the ruling of the court below.

On 15 December, 1922, John T. Hill and others, alleging themselves to be bondholders of Electric Light Company of Elizabeth City, filed in the United States District Court a bill of complaint, on the equity side of the docket, attacking the same, or substantially the same, acts of the defendant city which are under attack in this case, and seeking injunctive relief. This cause was heard by the *Hon. H. G. Connor,* District Judge, upon defendant's motion to dismiss, and an opinion rendered, which appears in *John T. Hill et als. v. Elizabeth City et al.,* 291 Fed Rep., 194.

On the same day said suit was instituted another bill of complaint was filed in the same court and against the same defendants, the city and its mayor and aldermen, by Elizabeth City Water and Power Company, one of the allied corporations. This suit followed the same course as the Hill suit and met with the same decision by the learned judge of the District Court. Subpœnas and copies of the bills of complaint in these cases were caused to be served upon the mayor and aldermen while engaged in opening bids for bonds, after advertisement thereof under the provisions of the Municipal Finance Act.

From *Judge Connor's* decision the complainants appealed to the Circuit Court of Appeals, which court, on 10 March, 1924, affirmed the decision of the District Court, dismissing the suits. *Hill v. Elizabeth City,* 298 Fed., 67; *Elizabeth City Water and Power Co. v. Elizabeth City,* 298 Fed., 70.

Almost simultaneously with the institution of these suits in equity, the Elizabeth City Sewerage Company filed its petition with the State Corporation Commission, seeking permission to abandon and discontinue its sewer service in Elizabeth City. That petition, after being heard upon evidence and argument, is still pending. The next suit brought is the one at bar, in which the record is almost identical with those in the equity suits in the Federal courts.

The court below rendered the following judgment:

"This cause coming on to be heard this 18 March, 1924, having been by consent continued from 17 March, upon defendant's motion to dismiss the action, and being heard in open court, after the hearing upon defendant's preliminary motion to make the complaint more specific and definite, which motion was allowed as therein requested, and as

appears from the record, and being heard upon the complaint, as made more definite in compliance with said motion, and as amended in the particulars requested by counsel for plaintiff, and upon the documents and other paper-writings referred to in the complaint and motion, and offered by plaintiff in accordance with said order requiring it to make the complaint more definite, and the court being of the opinion that the complaint, as so amended and amplified, does not state facts sufficient to constitute a cause of action, and that the action should be dismissed: It is therefore ordered, decreed and adjudged by the court that this action be and the same is hereby dismissed, and that the defendant recover its cost, to be taxed by the clerk of the court."

To the foregoing judgment plaintiff excepted, assigned errors, and appealed to the Supreme Court.

(1) The plaintiff excepted for that the court allowed the motion made by the defendant to make the complaint more specific, as set out in the said motion and order filed.

(2) The plaintiff excepted for that the court sustained the motion made by the defendant to dismiss the action and signed the judgment as set out in the record.

Aydlett & Simpson and Maloy, Brady, Howell & Yost for plaintiff.

J. B. Leigh, McMullen & LeRoy, and Thompson & Wilson for defendant.

CLARKSON, J. From the oral argument of this case we were impressed with the idea that perhaps the city of Elizabeth City had violated some legal rights of the plaintiff, the Elizabeth City Water and Power Company. From a thorough examination of the record, we are of the opinion that the defendant, city of Elizabeth City, was in its legal rights, and under the law had full power and authority to do all the acts and things complained of by the plaintiff.

The plaintiff's complaint, stripped of all technicalities, in a "nutshell," is that the defendant, the city of Elizabeth City, is about to start a rival business by establishing a water system, etc., and as a consequence the plaintiff's business will be seriously affected; that the competition will be unfair, in that the municipal-owned water system will be free of taxes and the plaintiff will have to pay taxes; that the plaintiff is under regulation by the Corporation Commission, and the municipal plant will be free from regulation; that the discrimination will amount to destruction and confiscation; that at Knobb's Creek, where plaintiff obtains its supply of water, it fears defendant will interfere with its water rights. The plaintiff has invested large sums in its plant, and that this will deteriorate and become less valuable. The plaintiff

charges that it will suffer irreparable damage to its property, and asks the court to interfere by injunction. This the court below refused to do, and in this we think there was no error.

If the contention of plaintiff was sustained, under the facts and circumstances of this case, it would be practically impossible for a municipality ever to own a utility where a privately owned one then existed. Every rival business in every-day life affects its competitors, sometimes destructively, by having cheaper rent, better location, more efficient help, better marketable product, etc. How far the city of Elizabeth City should imparl, looking towards purchase before erecting a new plant, we have nothing to do. We can only declare the law.

In discussing the contentions of plaintiff *seriatim,* we feel that we are doing what has already been substantially done by *Hon. H. G. Connor,* United States District Judge, and for many years a member of this Court. In the *Hill case, supra,* brought by the bondholders, *Judge Connor,* in a very able, learned and carefully prepared opinion on almost the identical facts, dismissed the bill in equity filed by Hill and others. On appeal, the Circuit Court affirmed the decision. *Judge Charles A. Wood* (United States Circuit Judge, formerly on the Supreme Court bench of South Carolina) wrote the opinion. This opinion was concurred in by *Circuit Judge Rose* and *District Judge Webb.*

Judge Wood, in closing his opinion, said: "The court is constrained to say that the loss which a failure of the parties to agree will entail ought to be averted. There is an amount of money, as everybody knows, which expresses the value of the existing plants to the municipality for use in its own construction. The hope is indulged that some one will have the wit to find that amount, even in the cloud of feeling, and make the rightness of it so plain that it will be paid and accepted."

This much-contested and irreconcilable conflict now comes to this Court.

Plaintiff's first exception is to the court below making an order, upon motion of defendant, that plaintiff file a bill of particulars and make its complaint more specific. This motion was made after defendant filed answer. The complaint was filed on 4 February, 1924. Defendant filed its answer on 23 February, 1924. The motions were made on 27 February, 1924, and on 8 March, 1924, and continued to 18 March, 1924, and the motions allowed on that date.

The latter part of C. S., 534, is as follows: "The court or judge may order a further account when the one delivered is defective, and may, *in all cases, order a bill of particulars of the claim of either party to be furnished.*" (Italics ours.)

C. S., 537, is as follows: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out, on motion of any person

aggrieved thereby; but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. *When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.*" (Italics ours.)

A motion of this kind was allowed in *Bristol v. R. R.*, 175 N. C., p. 509, some time after answer was filed. The better practice is to make the motion before demurrer or answer is filed, and the motion should be made in apt time. In *Allen v. R. R.*, 120 N. C., p. 550, it is said: "It is too late after demurrer or answer. *Stokes v. Taylor*, 104 N. C., p. 394." Although the opinion seems to hold that it can be done after answer is filed. A careful reading of the *Stokes case, supra*, does not sustain the position. We think this matter was in the sound discretion of the court below.

It is apparent that whatever action might have been taken by the city, and which might have been alleged as constituting or as an impairment of contract obligations, or an invasion or violation of property rights, must have been a corporate act and thus appear of record. It was clearly possible and, in fact, easy for plaintiff to set forth, by proper incorporation or specific reference, those records or documents which constitute the official action granting, creating, impairing or violating the plaintiff's rights of property.

The motion made by defendant, set forth with particularity, was a request for all agreements, corporate resolutions, ordinances, writings, legislative acts, etc., on which the allegations of the complaint were based. The plaintiff substantially complied with this request. The allegations in the complaint were all in substance based on writings, legislative acts, ordinances, resolutions of the board of aldermen, etc. It was to require frankness and openness in plaintiff's claim for relief, and matters in its knowledge and easily produced. We can see no error in the rulings of the court below, and this exception cannot be sustained. There was no gross abuse of the discretion. *Barbee v. Davis*, 187 N. C., p. 78.

The second exception: "The plaintiff further excepted for that the court sustained the motion to dismiss, and rendered judgment dismissing the complaint."

C. S., 518, is as follows: "If objection is not taken, either by demurrer or answer, the defendant waives the same, *except the objections to the jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action.*" (Italics ours.)

We think it well settled, under our practice and procedure, that objection to the jurisdiction of the court and that complaint does not state facts constituting a cause of action are not waived and can be taken advantage of at any time, even in the Supreme Court, in writing or *ore tenus*. The Court may, *ex mero motu*, dismiss when lack of jurisdiction or when complaint fails to state a cause of action.

The main contest narrows down: Does the complaint and record evidence, on which it is mainly based, in substance, constitute a cause of action?

Article VIII, section 1, of the Constitution of North Carolina, in regard to corporations other than municipal, is as follows: "No corporation shall be created nor shall its charter be extended, altered or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State, but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending and forfeiture of all charters, except those above permitted by special act. *All such laws and special acts may be altered from time to time, or repealed;* and the General Assembly may at any time, by special act, repeal the charter of any corporation."

The above article was an amendment of the Constitution of 1868 and ratified at the polls, and went into effect 10 January, 1917.

In the Constitution of 1868 was the following: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes; and in cases where, in the judgment of the Legislature, the object of the corporation cannot be attained under general laws. *All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed.*"

"The purpose and effect of this section is to enable the State to control, modify or repeal corporate powers, thus avoiding the effect of the doctrine announced in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.), 518. The language of this section is read into charters issued to corporations since its adoption (1868), so that the Legislature has a right to amend or repeal from time to time any and all rights thereby conferred. *S. v. Cantwell*, 142 N. C., 604, construing the charter of the Wilmington Fire Company, ratified 8 March, 1869. All acts of incorporation, subsequent to this section and partaking of the nature of contracts between the State and the incorporators, are granted and taken in reference to this power of alteration or repeal by the Legislature, so that this power of change or repeal is a part of the contract itself. *S. v. Morris*, 77 N. C., 512; *Power Co. v. Whitney Co.*, 150 N. C., 31. Notwithstanding a constitutional provision of this character, the power

of the Legislature cannot be unlimited and arbitrary. Where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted. *S. v. Morris,* 77 N. C., 512." Connor & Cheshire's Const. of N. C. (Anno.), pp. 339, 340, 341.

Article I, section 7, Constitution of North Carolina, is as follows: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service." Section 31 is as follows: "Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed."

In *Thrift v. Elizabeth City,* 122 N. C., p. 35, it was held: "Those provisions of the ordinance granting the *exclusive* privilege to construct and maintain water-works within the corporate limits of the town, and the *exclusive* use of its streets, alleys, sidewalks, public grounds, streams and bridges come within the condemnation of section 31 of Article I of the Constitution of this State, which declares that 'Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.' . . . All authorities hold that no such exclusive privilege can be granted by a municipal corporation without express legislative authority, and this of itself would settle the case at bar; but we feel compelled to go further and say that, while the point is not now directly before us, we do not wish to be understood as conceding the power of the Legislature itself to grant such exclusive privileges. In our opinion, they come directly within the meaning of monopolies, as construed in the light of our institutions, the genius of our people, and the spirit of our laws. We are not inadvertent to some decisions to the contrary in other jurisdictions, but in all of them, where the power is admitted, it is strictly construed." *Robinson v. Lamb,* 126 N. C., p. 492; McQuillan on Municipal Corporations, vol. 1, sec. 1633, and cases cited; *Durham v. Public Service Co.,* 182 N. C., p. 333, affirmed by Supreme Court of United States, 261 U. S., p. 149.

In *Simonton v. Lanier,* 71 N. C., p. 503, it was contended that the charter of the Bank of Statesville was given the special privilege to lend money at a higher rate than the general State law. Referring to Article I, sections 7 and 31, *supra, Bynum, J.,* said: "The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government."

With these fundamental safeguards in the Constitution of 1868, the plaintiff entered into the water-system enterprise now under consideration.

The plaintiff is a corporation, organized under the laws of North Carolina on 25 February, 1903, and alleges:

"In the year 1902 franchises for the construction and operation of a water system were granted by the city of Elizabeth City to one C. M. Ferebee and his assigns, which franchise grants, running for a period of sixty years, were acquired and are now held by the plaintiff corporation; that by chapter 99 of the Acts of 1903 of the General Assembly of North Carolina the defendant city was authorized to contract with the said C. M. Ferebee and his assigns for water service for not longer than thirty years, subject to submission to and ratification by the voters of said city; that by a majority the voters of said city ratified the proposed contract for water service at an election held on 13 April, 1903, and that subsequently a contract, dated 1 June, 1903, was entered into; that the plaintiff corporation immediately began the construction of its plant and the laying of its mains." It has built and operated its present water system.

The contract entered into between plaintiff and defendant expired by limitation on 31 May, 1913. Since that time the contract has not been extended.

The General Assembly of North Carolina, on 31 January, 1923 (Private Laws, ch. 15, secs. 122 and 129, inclusive), passed an act giving Elizabeth City (inside or outside the corporate limits) the authority to construct and operate municipal utilities, including a water system.

It is held in certain jurisdictions that when the contract has not expired, a municipal corporation cannot during its life become a competitor.

The case of *Westminster Water Co. v. Westminster,* 64 L. R. A. (Md.), 630, decided in 1904, holds void a perpetual contract for the water supply of the defendant city. The opinion contains a brief summary of some of the cases deciding what are reasonable periods for such contracts. It thus shows that "In the case of *New Orleans Waterworks Co. v. Rivers,* 115 U. S., 674, a contract for fifty years was sustained; in *Walla Walla v. Walla Walla Water Co.,* 172 U. S., 1, a contract for twenty-five years was sustained; in *Vicksburg Waterworks Co. v. Vicksburg,* 185 U. S., 65, a contract for thirty years was held not unreasonable." The case of *City of Vincennes v. Citizens Gas Light Co.,* 132 Ind., 114, expresses this well-established principle by saying: "A city has power to contract for a supply of gas or water for a stated period of time extending beyond the tenure of office of the individual members of the common council making such contract. . . . We cannot say that twenty-five years is an unreasonable time for which to contract for a supply of light or water." Pond on Municipal Control of Public Utilities, p. 84; *Owensboro v. Owensboro,* 243 U. S., p. 166.

The most recent case of unexpired contract relationship is *Superior Water, Light and Power Co. v. City of Superior,* U. S. Supreme Court Reporter (15 December, 1923), p. 86. *Mr. Justice McReynolds,* delivering the opinion, says: "The integrity of contracts—matter of high public concern—is guaranteed against action like that here disclosed by section 10, Article I of the Federal Constitution: 'No State shall . . . pass any . . . law impairing the obligation of contracts.' It was beyond the competency of the Legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract. *Vicksburg v. Vicksburg Waterworks Co.,* 206 U. S., 496; 27 Sup. Ct., 762; 51 L. Ed., 1155; *Detroit United Ry. v. Michigan,* 242 U. S., 238, 253; 37 Sup. Ct., 87; 61 L. Ed., 268." The decisions are collected in that opinion and need not be recited here.

This question does not arise here, as the time limit of the contract fixed and agreed upon in writing has expired.

McQuillan on Municipal Corporations, vol. 4, sec. 1779, says: "It is well settled that the Legislature, where not forbidden by the Constitution, has power to authorize a municipal corporation to own and operate any public utility such as is generally owned and operated in a city by public-service corporations. . . . A grant by the Legislature to villages of the power to construct and operate waterworks held not in excess of its power merely because of the existence of a private corporation engaged in the same business which had obtained its franchise under a legislative act providing for the creation of waterworks companies in towns and villages. *Skaneateles Waterworks Co. v. Skaneateles,* 161 N. Y., 153; 55 N. E., 562; 4 L. R. A., 687; rehearing denied in 161 N. Y., 658; 57 N. E., 1124; affirmed in 184 U. S., 354; 22 Sup. Ct., 400; 46 L. Ed., 585." See, also, *Knoxville Water Co. v. Knoxville,* 200 U. S., 22; *Norfolk County Water Co. v. City of Norfolk* (Fourth Circuit), 246 Fed., 650; *City of Joplin v. Southwest Missouri Light Co.,* 191 U. S., 150; *Helena Waterworks Co. v. Helena,* 195 U. S., 383. In the two last-cited cases it was held a city had the right to construct and operate its own plant before its contract with the public-service corporation has expired. There was nothing in the contract with the public-service corporation that provided that the city would not erect its own plant.

Ohio has its constitutional provisions similar to ours.

In *Hamilton Gas Light and Coke Co. v. Hamilton,* 146 U. S. Rep., 258, *Mr. Justice Harlan,* delivering the opinion of the Court, in sustaining the right of the city of Hamilton to erect its own gas works under circumstances similar to those of the instant case, amongst other things, said: "This conclusion is required by other considerations. By

the Constitution of Ohio, adopted in 1851, it was declared that 'no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly'; that 'the General Assembly shall pass no special act conferring corporate powers'; and that 'corporations may be formed under general law, but all such laws may be from time to time altered or repealed.' Const. Ohio 2, Art. I; par. 1, 2, Art. XIII. If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law of supplying gas light to the city of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects at least its exclusive character, was subject to the power of the Legislature, reserved by the State Constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation. These views are supported by the decisions of this Court."

Plaintiff complains that it is regulated and the defendant unregulated. When it went into this business it had full knowledge of the Constitution and laws of this State, and bought out Ferebee and his assigns *cum onere*. In the regulation of its business it is protected by law.

In the regulation of this corporation its property cannot be confiscated. In *Bluefield Waterworks and Improvement Co. v. Public Service Commission*, 262 U. S., p. 679, it is held: "The return on investment which a public utility should be permitted to earn should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise money necessary for the proper discharge of its public duties."

In *Springfield Gas and Electric Co. v. City of Springfield*, 257 U. S., p. 131, it is held: "Leaving free in the matter of charges a municipality

engaged in producing and selling electricity to private consumers, while making the rates of private electric companies subject to the approval of the State Public Utilities Commission, as is done by Illinois Public Utilities Act of 30 June, 1913, and Illinois Municipal Ownership Act of 20 June, 1913, does not deny to the private corporation the equal protection of the laws. A city council has no such interest in a municipally owned electric plant as to make it incompetent to fix the rates."

Plaintiff complains again that it pays tax and the municipally owned utility does not. When it bought the charter from C. M. Ferebee and made its contract with defendant, Elizabeth City, and invested its money, it knew this was the law, and it went into the business with full knowledge. Its contract has expired, and it cannot be heard to complain. We can see nothing in the contention of "acquiescence and estoppel." The allegation is unsupported by the written contract, which, on the record and argument was admitted, expired on 31 May, 1923. The fact that "the subsoil of Elizabeth City is such that the laying of duplicate water mains and pipes will cause great damage and injury to the distributing system," if this is a fact, plaintiff knew it when it made the investment, and cannot be heard to complain. In fact, the legislative act under which the ten-year contract was made has this provision:

"That the corporation of Elizabeth City is hereby authorized and empowered to agree with C. M. Ferebee, or his assigns, that no pipes, tubes or conduits for a water supply or for sewerage shall, under the authority of the said corporation, be placed in, under or across any of the streets, alleys, lanes or highways of said corporation, at any time within ten years from 1 May, 1903, which shall in any way obstruct, interfere with the location of or make necessary the removal or any change in the location of any pipes, tubes or conduits which may be placed by the said C. M. Ferebee, or by his assigns, in, under or across any of the streets, alleys, lanes or highways of the said corporation for the purpose of performing any contract made under the authority of this act: *Provided further,* that the privileges mentioned in this section shall not be granted unless the contract or contracts named in the preceding sections of this act are ratified by a majority of the qualified voters of Elizabeth City in the manner hereinbefore mentioned." Laws 1903, ch. 99 (18 February, 1903), sec. 6.

It appears that the intention was that when this act was voted on by the people, "For contract" or "Against contract," the contract was to be made, which was done—for ten years—although the board of aldermen was given discretion for time not exceeding 30 years.

On 4 March, 1903, the General Assembly, by private act, further empowered the city, upon prescribed conditions, to erect public utilities

of its own. This act of 4 March provided that "No contract or agreement made at any time hereafter by the corporation of Elizabeth City, under the authority contained in the aforesaid act (private act of 18 February, aforesaid), shall, during the period or term for which said contract or agreement shall be made, be in any manner terminated or impaired or by virtue of any power or authority vested in the Board of Aldermen of Elizabeth City by the provisions of this act."

The act (Private Laws 1903, ch. 99, sec. 1) provided: "That the corporation of Elizabeth City is hereby authorized and empowered to contract with C. M. Ferebee, or with his assigns, to furnish to said corporation electric lights, gas, both for illuminating and for fuel, water and sanitary sewerage system, or for any of them, for such time not exceeding thirty years, upon such terms and conditions, and for such consideration in each case, as the board of town aldermen of Elizabeth City may deem just and expedient." It contracted under this power for 10 years and the time has expired.

Plaintiff further alleges that defendant's charter is "A studied and consistent discrimination against plaintiff, amounting to destruction and confiscation and in favor of the municipal water system. The requirements that all property holders pay for the installation and cost of connection with the pipes of the municipal plant and the restriction against the taking up of paving when once laid, are particularly complained against." Sec. 123, Private Laws 1923, ch. 15, allows the city of Elizabeth City to install a system of sewerage and the lot owners to pay for installation, and a series of years given to make payment—20 per cent each year. In some municipalities, sewer tax is required. We see nothing unreasonable in this. In fact, this is customary, and like provisions are made in general and special acts and frequently the individual owner has to pay also for the water meter, sewer, gas and water connections, and, in paving districts, the sewer, gas, water, etc., are all required to be put down before the street is hard-surfaced, and often places are left for connections to be made. This is a sane and sensible police regulation, done in all modern, up-to-date cities, to keep the hard-surfaced pavements, frequently laid at great expense, from being torn up and destroyed. If this was not provided for, it would be hard on abutting owners, who usually pay most of this street improvement, and they may say that not doing this amounts to "destruction and confiscation" to us.

The next complaint is: "With no requirement that the rates charged shall pay all operating expenses, allow for depreciation, and provide for the payment of the principal and interest, violate the rights of the plaintiff," etc. This matter is one largely for, and must of necessity be

left to, the sound discretion of the municipal body, unless otherwise provided in the act. But section 136 of the act (Private Laws 1923, ch. 15, *supra*) seems reasonable and righteous:

"So much of the net revenue derived in any fiscal year from the operation of any of the aforesaid systems of said public utilities after paying all expenses of operating, managing, maintaining, repairing, enlarging and extending such enterprise or any of them, shall be applied, first to the payment of the interest payable in the next succeeding year on bonds issued for such enterprises or any of them, and next to the payment of the amount necessary to be raised by tax in such succeeding year for the payment of the principal of said bonds, and next to the payment of the principal or interest payable in the next succeeding year on any other bonds issued by said city: *Provided, however,* that should there be a loss in any fiscal year from the operation of said systems of public utilities or either or any of them, then said loss shall be paid out of profits derived in a following year or years before said profits shall be applied to the purposes aforesaid: *Provided further,* that nothing herein contained shall in any way conflict with or supercede the Municipal Finance Act of North Carolina."

The plaintiff states that "The only practicable and available source of water supply is Knobb's Creek, which the company from the beginning of its operations, in 1903, as well as did the predecessors of the company the rights of which predecessors the company acquired, have made use of said stream. The company has long had a dam across the creek, and, in 1919, obtained from the Legislature of North Carolina permission to erect a permanent dam. The city has prepared, introduced and caused to be passed a bill repealing the company's right to dam the stream, the act giving the city the right to construct a dam across Knobb's Creek."

It is conceded that Knobb's Creek is one of the boundaries of Elizabeth City and a navigable stream, emptying into the Pasquotank River, which empties in turn into Albemarle Sound and then into the Atlantic Ocean. Some years ago, the company constructed a pile and timber dam with sluice gate across Knobb's Creek, near the plaintiff company's intake. This was done to prevent the backing up of the brackish water from the river and to stop inflow of refuse and rubbish from sawmills and to provide necessary storage and settlement. Under chapter 10, Private Laws 1919, plaintiff was authorized to build a permanent dam across said creek under conditions prescribed by said act. This was not done. The Legislature, at its session in 1923 (5 February, 1923) Private Laws, ch. 243, some four years after, repealed this act. There is no suggestion in any official act alleged in the bill that the city intends to use Knobb's Creek as its source of water supply, except the legislative act giving it

the right. There is nothing in writing to show plaintiff's right to this "navigable stream." There is no legislative right given by the State or United States. It is public property. No condemnation by plaintiff is alleged, if under the charter it had the power. From the entire record, the plaintiff has used the water from a navigable stream, belonging to the sovereign, and sold it to the defendant city and its inhabitants and others, without any right in law so far as the record shows. Plaintiff seems to be a "squatter" on sovereign property, and the "take" is not exclusive, nor adverse, but permitted with no complaint by proper authorities. It used the public navigable stream and sold the public water without paying for it, now it complains that the Legislative branch of the Government had repealed, in 1923, the act of 1919, giving it a right to dam the stream, which plaintiff never did. To what extent the Legislature could give away a sovereign right, we are not now called upon to pass on. We do say that plaintiff should have no cause to complain in obtaining free public water all these years, transporting and selling it.

It was said in *Geer v. Water Co.*, 127 N. C., 353 (applying to non-navigable streams): "This Court has repeatedly held that it requires the continuous and adverse use of an easement for 20 years to raise the presumption of a grant, and that even then the presumption extends only to the 'state and extent' of such user during said period." *Pugh v. Wheeler*, 19 N. C., 54.

It seems to be well settled that "There can be no prescriptive right to maintain or continue a material obstruction in a navigable stream." 29 Cyc., 310.

C. S., 7540, is as follows: "All vacant and unappropriated lands belonging to the State shall be subject to entry by any citizen thereof, in the manner hereinafter provided, *except*, (1) Lands covered by navigable waters," etc. *Bell v. Smith*, 171 N. C., p. 116.

In *S. v. Twiford*, 136 N. C., p. 608, it is said: "The whole matter is thus summed up by *Shaw, C. J.*, in *Attorney-General v. Woods*, 108 Mass., 436, 11 Am. Rep., 380: 'If water is navigable for pleasure-boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.' It would be a serious detriment to the public if water, capable of such usefulness as here, can be made private property by buying up the adjacent land. The control of such water belongs to the public and is not appurtenant to the ownership of the shore. It is not a case 'where the tail goes with the hide.' . . . Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public and are reserved

for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet."

The case of *Cuyahoga River Power Co. v. City of Akron*, 240 U. S., p. 462, cited by plaintiff, is a different state of facts from the instant case. In that case *Mr. Justice Holmes*, writing the opinion, speaking of the allegations of the bill, says: "It alleges that the city does not intend to institute any proceedings against the plaintiff but intends to take its property and rights without compensation; that it is building a dam and has taken steps that will destroy the plaintiff's rights; that it is insolvent; that the purpose of the ordinance and certain statutes referred to is to appropriate and destroy those rights without compensation; that the defendant purports to be acting under the ordinance, and that in so acting it violates Article I, section 10, and the Fourteenth Amendment of the Constitution of the United States.

The plaintiff complains that "the bond ordinance is invalid in that the purpose is not in fact a public purpose, and that the city did provide in accordance with the requirements of the Municipal Finance Act, but did acts prohibited by the State and Federal Constitution," and "It is charged that the issuance of the bonds without a vote of the people is in violation of the State Constitution as construed by the highest State Court at the time of the organization of plaintiff and the issuance of its securities." It relies on Const. of N. C., Art. VII, sec. 7, which is as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

The contention of plaintiff is that in *Mayo v. Washington*, 122 N. C., p. 5 (1898—Electric Light Plant) and *Thrift v. Elizabeth City*, 122 N. C., p. 31 (1898—Waterworks), were held not a "necessary expense" and a vote of the people was necessary. In *Fawcett v. Mount Airy*, 134 N. C., 125 (19 December, 1903), these cases were overruled, and water and light were held to be a necessary expense. The *Fawcett case* has been followed time and time again, and it is well settled by the decisions of this State that water and lights are a "necessary expense." There has never been any question about sewerage not being a "necessary expense." On the record it appears that the defendant, in conformity with the Municipal Finance Act passed by the General Assembly of North Carolina in 1917 (ch. 138, Public Laws 1917) and amendments thereto (Public Laws 1919, chs. 49, 178, 285, 291, and Spec. Ses. 1921, ch. 106), passed ordinances providing for the issue of $800,000 bonds for the city to construct water, sewer and electric light system. Plaintiff

conceded that the doctrine of these cases was reversed on 19 December, 1903, by the decision in *Fawcett v. Mount Airy, supra,* but contends that such reversal of judicial decision cannot affect the law as it has been declared in the former decisions and which they contend became a part of their contract of 1 June, 1903. Plaintiff's contentions cannot prevail, its contract relied on expired on 31 May, 1913, and has not been renewed. It has been continued at will.

Speaking on this question, *Judge Woods,* Circuit Judge, in a clear and concise opinion, in the case of *Hill v. Elizabeth City,* 298 Fed., 67, *supra,* says: "The continuation of the service of the Light and Water Company and the acceptance of it by the city after the expiration of the express contract implied a contract of indefinite duration, terminable upon reasonable notice either by the city or by the company at such time and under such circumstances as may be consistent with the duty both owe to the inhabitants of the city. *Denver v. Denver Union Water Co.,* 246 U. S., 178, 190. A long time must pass before the municipal system will be in operation; and there is nothing before us warranting a conclusion that the municipality will not give due notice to the public-service corporations that their service is no longer desired."

Constitution United States, Art. I, sec. 10, in part, is as follows: "No state shall . . . pass any bill of attainder, *ex post facto* law, *or law impairing the obligation of contracts.*"

The Fourteenth Amendment to the Constitution of the United States, in part, is as follows: "Sec. 1, . . . 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."

Constitution of North Carolina, Art. I, sec. 17, is as follows: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of life, liberty or *property but by the law of the land.* Const. 1868; Const. 1776; Decl. Rights, sec. 12; *Magna Carta* (1215), ch. 39 (1225), ch. 29."

Black's Constitutional Law (3 ed.), p. 596, says: "Vested rights are to be secured and protected by the law and a statute which divests or destroys such rights, unless it be due process of law, is unconstitutional and void."

These provisions are fundamental and should be carefully and jealously guarded.

We have treated only the main contentions of plaintiff, as set forth in its brief. We have gone carefully over the complaint, record and

statutes, and can find no infringement of these great constitutional provisions that it has invoked in this case. Under our government, municipalities have the right to own and operate water, sewerage and electric light systems. Defendant has a right to build these utilities under legislative authority, so far as it does no act prohibited by the Constitution or the law of the land. Municipal corporations have the same rights as individuals and private corporations, to battle for justice and equality of opportunity as they view it, in their sphere of uplift and endeavor, and equal rights should be given to all under the law.

For the reasons given, the judgment below is

Affirmed.

W. T. WHITTEN, S. R. WHITTEN, J. W. WHITTEN, J. O. B. PALMER AND WIFE, MINNIE W. PALMER, SUING IN BEHALF OF THEMSELVES AND ALL OTHERS, HEIRS OF SALLIE S. WHITTEN, DECEASED, WHO SHALL JOIN HEREIN AS PARTIES PLAINTIFFS, v. S. T. PEACE, INDIVIDUALLY AND AS SURVIVING EXECUTOR OF SAMUEL S. WHITTEN, DECEASED.

(Filed 1 October, 1924.)

1. Wills — Executors and Administrators — Nonresidents — Witnesses— Statutes.

Where a nonresident testator has left a will disposing of certain lands in this State, including his wife as a beneficiary, with two witnesses required by C. S., 4131, an affidavit he has attached thereto as a part thereof, stating that none of his wife's money had been used in his acquisition of the lands disposed of, signed without witnesses, cannot alone be construed as showing an *animo testandi*, or as having the effect of passing thereunder any of the testator's lands here situated under the will to which it was attached: *Semble*, a will properly attested and otherwise sufficient under the laws of another State would operate to pass title to lands situated here. C. S., 4152.

2. Trusts — Husband and Wife — Deeds and Conveyances — Purchase Money—Resulting Trusts.

A resulting trust in favor of the wife is not created in the husband's favor solely by his paying the purchase price for lands with his own money and taking the deed to his wife, the presumption of a gift arising from the relationship.

3. Deeds and Conveyances — Husband and Wife — Probate—Statutes— Void Deeds—Color.

A deed of her own lands from the wife to her husband, not certified to by the probate officer that it was "not unreasonable or injurious to her" (C. S., 2515), is void as a conveyance, though it may be regarded as color of title, and ripen the title in seven years under sufficient adverse possession for that period of time.

4. Same — Title — Adverse Possession—Husband and Wife—Tenant by the Curtesy.

Possession, to ripen title to land under color of title, must be adverse, and it is insufficient where a husband has the right of possession as tenant by the curtesy, and has accordingly entered therein, and he and his executor have been in possession for the required period, without claiming under another an adverse right.

5. Wills—Devise—Election of Remedies—Heirs at Law.

Where a testator has devised his lands, excluding those his wife attempted to convey to him under a void deed, the acceptance of benefits under the will does not put her heirs at law to their election to take the lands described in her void deed as her heirs at law.

APPEAL by defendant from *Lyon, J.*, at May Special Term, 1924, of VANCE.

By consent, the judge presiding heard and determined the issues of fact and law arising upon the pleadings in this action. The facts found by the judge, material to the exceptions upon which assignments of error are based, are as follows:

(1) That Sallie S. Whitten became the owner in fee and entered into possession of the lot of land situate in the city of Henderson, described in the complaint, by virtue of a deed executed by M. S. Alley and others, dated 15 May, 1893, and duly recorded in Vance County, conveying the same to her.

(2) That a paper-writing, dated 17 November, 1897, executed by Sallie S. Whitten, and sufficient in form to convey the said lot of land to Samuel S. Whitten, her husband, was recorded in the office of the register of deeds of Vance County on 15 September, 1914; that the execution of the said paper-writing was acknowledged by Sallie S. Whitten on 17 November, 1897, before a notary public, whose certificate did not comply with C. S., 2515, in that said certificate does not state that the notary public found and concluded that the execution of the said paper-writing by Sallie S. Whitten was "not unreasonable or injurious to her."

(3) That Sallie S. Whitten died, 29 July, 1912, intestate, leaving surviving her husband, Samuel S. Whitten, and their seven children, including the plaintiffs herein, as her heirs at law.

(4) That Samuel S. Whitten was in possession of the said lot of land from his wife's death, on 29 July, 1912, until his death, on 7 September, 1919, and that the defendant, executor and trustee under his will, has been in possession of the same since the death of the said Samuel S. Whitten, receiving the rents and profits therefrom.

(5) That the last will and testament of Samuel S. Whitten, with codicils thereto, was duly probated in Virginia, and thereafter certified

and recorded in Vance County; that by said will and codicils Samuel S. Whitten devised and bequeathed property to each of his children by Sallie S. Whitten, his wife, including the plaintiffs herein, but made no specific devise of, or reference to, the lot of land described in the complaint; that the will contains a general residuary clause, by which the testator devised the residue of his estate to his executor upon certain trusts therein set out; that a paper-writing was duly probated in Virginia and certified and recorded in Vance County, North Carolina, as a codicil to the said will, in words as follows:

STATE OF VIRGINIA—City of Roanoke.

To wit, I, Samuel S. Whitten, of the city of Roanoke, Va., do hereby make oath and say that in the year 1884 I voluntarily changed my name from Samuel L. Whitten to Samuel S. Whitten. This change was made on my own volition and without any particular reason.

I also further make oath and say that my wife, Sallie S. Whitten, never had any of her money in any property that I own or ever did own. It is my desire that this affidavit be made part of my last will and testament.

Given under my hand, this 13 May, 1919.

(Signed) SAMUEL S. WHITTEN.

Subscribed and sworn to before me, notary public for the city and State aforesaid, this 13 May, 1919.

(Signed) W. P. BOWLING,
Notary Public. (Seal)

My commission expires 1 August, 1920.

Upon the facts found by the court, which are fully set out in the judgment, it is ordered and adjudged that the children of Sallie S. Whitten, as her heirs at law, are the owners in fee and entitled to the possession of the land described in the complaint, and that they recover of the defendant possession of the said land, together with the rents and profits therefrom since the death of Samuel S. Whitten.

It is ordered that such of the children and heirs at law of Sallie S. Whitten as have not been formally named as parties hereto shall not receive their portion of the recovery adjudged herein until admitted as formal parties, which may be done by the clerk, and shall contribute their proportion of the expenses of the action.

It is ordered that a reference be had to ascertain the amount which plaintiffs are entitled to recover of the defendant on account of rents and profits from the said land since the death of Samuel S. Whitten.

To this judgment the defendant excepted, and appealed to this Court, assigning as error:

(1) The failure of the judge to consider and give full effect to the paper-writing dated 13 May, 1919, probated and recorded as a codicil to the will of Samuel S. Whitten.

(2) The failure of the judge to consider and give full effect to the deed dated 17 November, 1897, and recorded 15 September, 1914, from Sallie S. Whitten to Samuel S. Whitten, her husband.

(3) The failure of the judge to hold that, by reason of the possession of the said land by Samuel S. Whitten under the deed from Sallie S. Whitten, dated 17 November, 1897, from the date of its registration, on 15 September, 1914 to his death, and by defendant as his executor and trustee under his will since his death, the plaintiffs are not the owners and entitled to possession of the said land.

(4) The failure of the judge to hold that plaintiffs could not recover the land because, as legatees and devisees under the will of Samuel S. Whitten, by which this lot of land was devised under the residuary clause to the defendant, the plaintiffs were estopped to claim the same against the will.

These are the only assignments of error discussed in the defendant's brief, and relied upon by him in his contention that the judgment should be reversed and a new trial ordered.

T. M. Pittman and Brawley & Gantt for plaintiffs, appellees.
J. P. Zollicoffer and Hicks & Sons for defendant, appellant.

CONNOR, J. The first assignment of error is based upon the contention of defendant that the judge failed to give full force and effect to the paper-writing dated 13 May, 1919.

The will and all codicils thereto, except this paper-writing, were executed and attested in accordance with the laws of North Carolina, the same having been signed by Samuel S. Whitten and subscribed by two witnesses, as required by C. S., 4131. This paper-writing was signed by Samuel S. Whitten, who refers to it as an affidavit, not as a codicil to his will. It is not subscribed by two witnesses, nor does it appear to have been executed *animo testandi*. It is true that he expresses a desire "that this affidavit be made a part of my last will and testament," but it does not affect or purport to affect the disposition of his property made in his will and codicils, which are valid under the laws of North Carolina.

It may be that, having been probated in Virginia and certified and recorded in Vance County, in accordance with the provisions of C. S., 4152, as a codicil, it cannot now be attacked collaterally (*Spencer v.*

Spencer, 163 N. C., 83), but by the express provisions of C. S., 4152, when any will made by a citizen of any other State has been duly proven and allowed according to the laws of such State, and a certified copy thereof has been duly recorded in any county of this State in which is situate property owned by testator, and such will contains any devise or disposition of real estate in said county, such devise or disposition shall not have any validity or operation unless the will is executed according to the laws of North Carolina. *McEwan v. Brown,* 176 N. C., 249.

This paper-writing, therefore, whether it is valid as a codicil, for any purpose or not, has "no validity or operation" with respect to the lot of land described in the complaint and situate in Vance County.

Even if the inference sought to be drawn by the defendant is permissible, and the statement contained therein, that "my wife, Sallie S. Whitten, never had any of her money in any property that I own or ever did own," is evidence that he paid the purchase money for the lot conveyed to his wife by M. S. Alley and others, this fact did not affect her title to the said land. Where a husband pays the purchase money for land conveyed to his wife, no resulting trust to him arises from this fact, for the law presumes, from the relationship, that it is a gift. *Nelson v. Nelson,* 176 N. C., 191; *Anderson v. Anderson,* 177 N. C., 401.

Defendant's first assignment of error is therefore not sustained. The second assignment of error is that the judge failed to consider and give full force and effect to the deed of Sallie S. Whitten to Samuel S. Whitten, dated 17 November, 1897, and recorded in Vance County on 15 September, 1914.

The certificate of the notary public who took the acknowledgment of Sallie S. Whitten that she signed the said deed does not state that it appeared to his satisfaction and that he found that the execution of the same by her was "not unreasonable or injurious to her." The deed is therefore void. C. S., 2515. *Davis v. Bass, ante,* 200; *Smith v. Beaver,* 183 N. C., 497; *Butler v. Butler,* 169 N. C., 584. The second assignment of error is therefore not sustained.

In his third assignment of error the defendant contends, however, that conceding that the deed, for the reason stated, has no effect or validity as a deed of conveyance, it is color of title, and that possession of the land described therein by the defendant and Samuel S. Whitten, his testator, claiming under this deed, for seven years, is a perpetual bar against the plaintiffs, heirs at law of Sallie S. Whitten, and ripens into a perfect title in the defendant. C. S., 428.

This Court has held, in *Norwood v. Totten,* 166 N. C., 649, that a deed executed by a wife conveying land to her husband, void for failure

of the probate officer to comply with C. S., 2515, is, nevertheless, color of title, and that adverse possession by the husband under such deed for seven years will ripen into a perfect title. See, also, *Clendenin v. Clendenin,* 181 N. C., 465; *Elmore v. Byrd,* 180 N. C., 120; *Adderholt v. Lowman,* 179 N. C., 547; *Shermer v. Dobbins,* 176 N. C., 547; *King v. McRackan,* 168 N. C., 621.

The third assignment of error, therefore, presents the question whether or not defendant and his testator have had such possession of the land described in the complaint, under the deed of Sallie S. Whitten, as bars the claim of her heirs at law and ripens into a perfect title to the land in the defendant.

Upon the death of Sallie S. Whitten, in 1912, intestate, her husband, Samuel S. Whitten, issue of their marriage, having been born alive, became and was entitled to an estate as tenant by the curtesy, during his life, in the said lot of land, the wife having been seized in fee of the same during the coverture. C. S., 2519.

Samuel S. Whitten was, therefore, entitled, as against the heirs at law of Sallie S. Whitten, to the possession of the said lot of land as tenant by the curtesy, during his life. The judge finds as a fact that Samuel S. Whitten was in possession of the lot of land from the death of his wife until his own death, and that defendant, as his executor, has continued in possession since his death. No facts are found by the judge, and none appear from the evidence, that the entry of Samuel S. Whitten into possession at the death of his wife was adverse to her heirs at law. The law presumes that he entered and was in possession rightfully, and therefore presumes that he entered into possession as tenant by the curtesy for his life. *Vanderbilt v. Chapman,* 175 N. C., 11.

The possession of Samuel S. Whitten, and of defendant claiming under him, has been continuous for more than seven years. Such possession, although under color of title, does not ripen into a perfect title in the defendant unless it was adverse. In *Vanderbilt v. Chapman, supra, Justice Allen* says: "Possession which will ripen an imperfect into a perfect title must not only be actual, visible, exclusive and continued for the necessary period of time, but it must be under a claim of title. It is the occupation with an intent to claim against the true owners which renders the entry and possession adverse." He cites *Parker v. Banks,* 79 N. C., 485, and *Snowden v. Bell,* 159 N. C., 500.

Chief Justice Ruffin, in *Green v. Harman,* 15 N. C., 158, often cited and approved by this Court, says: "The operation of the statute of limitations depends upon two things. The one is possession, continued for seven years, and the other is the character of that possession—that it should be adverse."

The fact, therefore, found by the judge, that Samuel S. Whitten was in possession from the death of his wife until his own death, and that defendant, his executor and trustee, has been in possession since his death—more than seven years—is not sufficient, for Samuel S. Whitten entered into possession rightfully and not adversely to the plaintiffs, heirs at law of his wife.

In 1914 a deed executed by his wife conveying the land to him was recorded in Vance County, which, although void as a deed of conveyance, was good as color of title. There is no fact found or evidence in the record which shows that the character of his possession was changed after the registration of this deed. At no time prior to his death could plaintiffs have maintained an action against him for the possession of the land, for he was entitled to possession as tenant by the curtesy for his life, and their right of action for possession did not accrue until the falling-in of his life estate at his death, in 1919. "The possession of real property cannot be considered as adverse to one who during its continuation did not have a right of entry, as, for instance, a remainderman or reversioner." 1 R. C. L., 758; *Hauser v. Craft,* 134 N. C., 319; *Maynard v. Sears,* 157 N. C., 1. We approve as the law applicable to the facts of this case the statement in the note to be found in 9 L. R. A. (N. S.), p. 750, as follows:

"It may be said to be a well-settled rule, with but few exceptions, that a tenant for life cannot acquire an outstanding paramount title as against the remainderman and gain any rights by claiming thereafter to hold by adverse possession, unless, at least, it appears that he has clearly renounced all claim as tenant, to the knowledge of the remainderman." The mere registration of a void deed, although good as color of title, by the life tenant in possession is not evidence of such a renunciation of his right of possession as tenant for life, and of his claim under the color of title, as to put the heirs at law upon notice that thereafter he is claiming adversely to them.

The third assignment of error is not sustained.

The fourth assignment of error is that the judge failed to hold that plaintiffs, as devisees and legatees under the will, by which the testator devised the lot of land to the defendant, are estopped to set up title to the lot of land against the will.

The principle invoked to sustain this assignment of error is well established and has been uniformly recognized and enforced by this Court. It has no application, however, to the facts of this case, for the judge has found that the will made no specific devise of, or reference to, this lot of land. This finding is fully sustained by an inspection of the will. Defendant admits in his answer that he claims title to the lot of

land under the will of his testator. This claim is under item 11 of the will, which is as follows:

"It is my will and desire, and I so direct, that all the rest and residue of my estate and property shall be held intact until the death of my wife, Mamie Whitten, by my executors." This lot of land, not being included within the description, "all of the rest and residue of my estate and property," was not devised in the will, and the plaintiffs were not put to an election with respect to it. There is no finding and no evidence tending to show that plaintiffs have accepted benefits under the will, or claim adversely to the will; but this is immaterial, for in no event, upon the facts as they appear in the record, does the doctrine of election apply in this case.

The judgment, upon this aspect of the case, is fully sustained by the learned and exhaustive opinion of *Justice Walker* in *Elmore v. Byrd,* 180 N. C., 122.

The fourth assignment of error is not sustained.

The fifth assignment of error is to the judgment, and is based upon a formal exception, which is overruled. There is no error in the record, and the judgment is

Affirmed.

JOHN E. WATERS AND WIFE v. GEORGE E. GARRIS.

(Filed 1 October, 1924.)

1. Injunction—Mortgages—Foreclosure—Equity.

Equity is now administered in the same courts as matters of law, but the distinction between equitable and legal principles have not been abolished. Constitution, Art. IV, sec. 1.

2. Same—Actions at Law—Usury.

Where the plaintiff seeks by injunction relief from the foreclosure of a mortgage on his lands on the ground of usury, his remedy being by an action at law (C. S., 2306), he must, under the rules of equity, offer to repay the principal sum due and the legal rate of interest thereon, under the equitable principle that he who asks equity must do equity, and he may not resist the foreclosure of the mortgage on the sole ground that he has been charged a usurious rate of interest, contrary to the provisions of the statute on the subject.

APPEAL by plaintiffs and defendant from *Horton, J.,* at June Term, 1924, of LENOIR.

Civil action to restrain the foreclosure of two mortgages and to have the debts secured thereby credited with a foreclosure of the entire interest charged and twice the amount of usurious interest paid thereon.

The facts established by the verdict or not disputed are as follows:

1. The defendant, being the holder of two notes executed by the plaintiffs, one for $1,000 and the other for $4,000, each being secured by real estate mortgage on the same property, and default having been made, was, at the time of the institution of this action, proceeding to advertise and sell the same under powers contained in said mortgages. The plaintiffs instituted this action to restrain the sale of the property under the powers of the mortgages and for the relief set forth in the complaint.

2. A restraining order was issued prohibiting the sale, and the sale of the lands did not take place because of the restraining order and the lands have not been sold.

3. The defendant admitted collecting interest on the $1,000 note, the smaller indebtedness, for five years at $80 a year, that is, $400; and on the $4,000 note, the larger indebtedness, the interest for one year, of $320. Upon issues submitted the jury found that the defendant had retained $80 at the time of making the $1,000 loan, and $320 at the time of making the $4,000 loan.

4. It is admitted that only one interest payment, that is the last $80 payment of interest on the smaller note, was made within two years prior to the institution of this action.

5. In his answer the defendant expressed his willingness to credit the indebtedness with the interest admitted by him to have been paid by the plaintiffs, and with any further payments of interest, if any had been made thereon, and offered to accept from the plaintiffs the money actually loaned, with legal interest.

6. The defendant did not and does not ask any relief in this action from the court, the prayer of the defendant being that the restraining order issued be dissolved and he go without day.

7. Upon the coming in of the verdict, establishing the facts as above set out, the defendant again reannounced his willingness as expressed in his answer and reiterated at the trial, to remit all usurious interest and accept in payment and settlement the principal moneys with interest at 6%, again stating that he was not asking any affirmative relief of the plaintiffs.

8. Plaintiffs refused to tender the principal moneys with legal interest and declined to make any tender at all, and moved for judgment upon the verdict.

9. Motion of plaintiffs for judgment granted, and the court held that the plaintiffs were entitled to have the principal of the indebtedness credited, with the interest paid by the plaintiffs, together with the additional amounts found by the jury to have been retained by the defend-

ant at the time of executing the notes, and the further amount of $80, representing the penalty prescribed by statute for interest payments made within two years prior to the institution of the action, and entered judgment for $3,800 on the two notes, with legal interest after, but not before, judgment.

Upon exceptions duly entered both sides appeal, assigning errors.

Shaw & Jones for plaintiffs.
Rouse & Rouse for defendant.

PLAINTIFFS' APPEAL.

STACY, J. The principal question presented by plaintiffs' appeal relates to the statute of limitations. The trial court held that plaintiffs were entitled to have their notes credited with the forfeiture of the entire interest charged, and twice the amount of usurious interest paid within two years next immediately preceding the commencement of the action, but not for any sums paid more than two years prior to that time. C. S., 442. After making these deductions, judgment of foreclosure was entered over objection by the defendant. In the view which we take of the case, as will more fully appear from what is said under defendant's appeal, the question as to the statute of limitations becomes an academic one and we need not determine it on the present record.

The plaintiffs are not entitled in this action to have their notes credited with the penalties allowed by statute for charging and receiving usurious interest and to injunctive relief. Having come into a court of equity, they must do equity before they can ask its aid; and what constitutes doing equity in a case where usurious interest has been reserved, or paid in advance, is payment of the principal debt less the usurious excess of interest paid. *Purnell v. Vaughan,* 82 N. C., 134; *Beard v. Bingham,* 76 N. C., 285. If the contract for usurious interest be executory, the sum equitably due is the principal debt with legal interest thereon. *Churchill v. Turnage,* 122 N. C., 426; *Burwell v. Burgwyn,* 100 N. C., 389.

All the exceptions presented by plaintiffs' appeal must be overruled.

No error.

DEFENDANT'S APPEAL.

STACY, J. The defendant, having offered to remit all usurious interest and to accept the principal moneys actually borrowed with legal interest in full settlement of his claims, was entitled to have the action dismissed or judgment entered accordingly, as he is not asking for any affirmative relief.

It is the established law of this jurisdiction that when a debtor, who has given a mortgage to secure the payment of a loan, comes into equity, seeking to restrain a threatened foreclosure under the power of sale in his mortgage, as a deliverance from the exaction of usury, he will be granted relief and allowed to have the usurious charges eliminated from his debt only upon paying or tendering the principal sum with interest at the legal rate, the only forfeiture which he may thus enforce being the excess of the legal rate of interest. *Corey v. Hooker,* 171 N. C., 229; *Owens v. Wright,* 161 N. C., 127. This ruling which has been established by an unbroken line of precedents, beginning with *Taylor v. Smith,* 9 N. C., 465, and running through a multitude of cases down to our latest decision in *Adams v. Bank,* 187 N. C., 343, is based upon the principle that he who seeks equity must do equity. It is a well recognized rule of equity jurisprudence that one who seeks the aid of a court of equity to be relieved from usury, must do equity by paying or offering to pay the principal sum borrowed, with lawful interest thereon, as a condition precedent to the granting of the relief sought. 39 Cyc., 1010.

The following clear and succinct statement of the doctrine is taken from 27 R. C. L., 264: "It is well settled, in the absence of statutes to the contrary, that one seeking relief in a court of equity from a usurious contract must, as a condition of relief, do everything that equity requires, and if a borrower goes into a court of equity, in respect to a security given in connection with usurious contracts, or to avoid extortion or oppression, the court will compel him to pay principal and legal interest if the contract is executory, because there is moral obligation resting on him to do so, and it is equitable that he should be compelled to do it. The rule of course rests on the equitable maxim that 'he who seeks equity must do equity.'"

To like effect are the decisions of the United States Supreme Court: *Brown v. Swann,* 10 Pet., 497; *Hubbard v. Tod,* 171 U. S., 474; *Trust Co. v. Krumseig,* 172 U. S., 351; *Holden Land, etc., Co. v. Interstate Trading Co.,* 233 U. S., 536.

The gist of *Mr. Justice Wayne's* opinion in *Stanley v. Gadsby,* 10 Pet., 521, 9 L. Ed., 518, may be stated as follows:

Appellant filed a bill in the Circuit Court for an injunction to prevent the sale of property by a trustee, to whom it had been conveyed to secure the payment of a sum of money borrowed by him at usurious interest; the money borrowed had not been repaid, and the bill sought no discovery of the usury from the defendant, but averred that the complainant would be able to prove it by competent testimony; the Circuit Court dismissed the bill: *Held,* that the decree of the Circuit Court was correct. This is substantially an application for relief from

usury; and the consequence of granting the injunction would be relief upon terms at variance with the rule of equity, that he who seeks the aid of equity to be delivered from usury, must do equity, by paying the principal and legal interest upon the money borrowed. The complainant does not offer to do so in this bill; this is essential to every such application in a court of equity: first, to give the court jurisdiction; and to enable the chancellor, if he thinks proper to do so, to require the payment of principal and interest before the hearing of the cause. The relief sought in such cases is an exemption from the illegal usury; the whole inquiry on the hearing is to establish that fact and to give relief to that extent; whenever a complainant does not comply with the rule, by averring in his bill his readiness or willingness to pay principal and interest, he can have no standing in a court of equity. See, also, *Fowler v. Trust Co.*, 141 U. S., 384.

Under these decisions, and the principle they establish, the defendant was clearly entitled to have the present action dismissed or judgment entered according to his offer, as plaintiffs were not entitled to more and defendant asked for no affirmative relief.

But if the exaction of usury, knowingly made, under our statute, destroys the interest-bearing quality of a note or other evidence of debt affected with usury and authorizes the debtor to recover a penalty of twice the amount of interest paid. How are these penalties to be enforced? The answer is to be found in the statute itself. C. S., 2306, provides in part as follows: "The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid may recover back twice the amount of interest paid, in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest."

From an examination of the above section it will be seen that two remedies are provided for the enforcement of the penalties authorized by the statute:

First. Where a greater rate of interest than six per centum per annum has been paid, the person or his legal representatives or the corporation by whom it has been paid, may recover back twice the

amount of interest paid, in an action at law in the nature of an action for debt. *Bank v. Wysong & Miles Co.*, 177 N. C., 380.

Second. In any action brought by the creditor to recover upon any usurious note or other evidence of debt affected with usury, it is lawful for the party against whom the action is brought to plead as a counterclaim or set off, the penalties provided by the statute, to wit, twice the amount of interest paid, and also the forfeiture of the entire interest charged. But see *Miller v. Dunn, post,* 397.

These penalties, it will be observed, are given by statute. Hence, they are legal rights to be administered in legal actions or as legal defenses, but not as affirmative equitable rights where the debtor, as actor, voluntarily comes into court and asks for equitable relief. When he does this he is met with another principle as he enters the door of the court: "He who seeks equity must do equity." The true meaning of this maxim is that, to entitle the plaintiff to the aid of a court of equity, he must secure to the defendant the rights which are his according to the settled doctrines and principles of equity jurisprudence. The debtor, in equity and good conscience, owes the principal sum borrowed with interest thereon at the legal rate, and he may not ask a court of equity to restrain the defendant from exercising his legal right of foreclosure without offering to do the fair and equitable thing, to wit, to pay what he justly owes. But when he has been oppressed by the creditor and required to pay more than a legal rate of interest, the statute provides that he may recover back twice the amount of interest paid, in an action at law in the nature of an action for debt. And it is further provided that when the creditor undertakes to recover on any usurious note or other evidence of debt affected with usury, it is lawful for the party against whom the action is brought to plead as a counterclaim or set off the penalties provided by the statute, to wit, twice the amount of interest paid, and also the forfeiture of the entire interest charged.

The section of the Constitution, Art. IV, sec. 1, adopted in 1868, which provides, "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished," does not imply that the distinctions between law and equity are abolished in this State. The principles of law and the doctrines of equity remain the same and are practically unaffected by this provision, the only change wrought being in the method of administering them, and, in some degree, the extent of their application. *Matthews v. McPherson,* 65 N. C., 189; *Lumber Co. v. Wallace,* 93 N. C., 22; *Rudisill v. Whitener,* 146 N. C., 403; Connor & Cheshire on the Constitution, 147.

The judgment as entered was erroneous, and on defendant's appeal a new trial must be awarded. It is so ordered.

New trial.

JOHN C. BELL v. COUNTY BOARD OF ELECTIONS OF BERTIE COUNTY.

(Filed 1 October, 1924.)

1. Elections—Primaries—Statutes.

In primary elections the return for county officers must be certified as the statute requires to the county board of elections, which shall publish the result (C. S., 6032, 6336), the distinction between elections of this character and general elections being that in the former there is no right to an election to public office which may be put in issue and determined by *quo warranto*, and no provision for a board of canvassers with power judicially to determine the precinct return.

2. Same—Ministerial Duties—Mistakes—Corrections.

In primary elections for county officers the registrar and judges of election are authorized not only to pass upon the qualification of voters therein, but to determine whether a ballot found in the wrong box was placed there by mistake, and, if satisfied of the mistake, to count the ballots for the one for whom they had been cast, in making their returns to the county board.

3. Same — County Board of Elections — Continuing Judicial Duties—Functus Officio.

In a primary for county officers the registrar and judges of election have the sole power, acting in their ministerial capacity, to determine whether votes cast in the wrong ballot box should be counted; and they may correct their tabulation of the results thereof to the county board of elections before the latter has judicially determined the results; the duties of the latter board being continuous, under the provisions of the statute, and such powers not being *functus officio* until they have finally determined the results of the election. C. S., 5924, *et seq.*

4. Same—Mandamus.

Where the powers of the county board of elections are not *functus officio*, they may be compelled by mandamus to act upon the correction of a mistake made by the registrar and judges of election, and its certificate correcting it, in allowing a candidate votes cast for him, but in the wrong ballot box.

APPEAL by defendant from *Midyette, J.* From BERTIE.

In the Democratic primary held in Bertie County on Saturday, 7 June, 1924, the plaintiff and Roscoe V. Peele were candidates for nomination for the office of county treasurer. After the polls had been closed the registrar and judges of election in Colerain Precinct No. 1 in counting the ballots found two which had been cast for the plaintiff and deposited in the box provided for State officers instead of the box provided for county officers. The registrar and judges of election threw out these two ballots because they concluded as a matter of law that they had no right to count them. They afterwards discovered their mistake, and signified their readiness to count the two omitted ballots

and to amend their returns. The county board of elections refused to receive such amended returns, and the plaintiff thereupon applied for a writ of mandamus to require the board to reassemble and accept the amendment.

Judge Midyette found the facts to be as follows:

1. That the plaintiff, John C. Bell, and Roscoe V. Peele duly qualified as the only two candidates in the primary election held in Bertie County on Saturday, 7 June, 1924, for the Democratic nomination for the office of county treasurer of said county.

2. That in Colerain Precinct No. 1, in said county, when the polls had been closed, and the registrar and judges of election came to count the ballots deposited in the various boxes, there were found two ballots cast for plaintiff, John C. Bell, but deposited in a box other than that provided for ballots for county officers, to wit, in the box provided for ballots for State officers; that the said registrar and judges of election, under the impression that, as a matter of law, the said ballots could not be counted because found in the wrong box, threw out the ballots and did not count them, and in making their returns did not include the said ballots in the number of votes returned as cast for the plaintiff, John C. Bell, the returns as made to the proper board and official showing 96 votes for John C. Bell and 47 votes for Roscoe V. Peele, whereas had said two votes been counted the returns would have shown 98 votes cast for said John C. Bell, instead of 96 as returned.

3. That on 9 June, 1924, the county board of elections, composed of H. G. Harrington, chairman, C. W. Mitchell, Jr., and J. C. Davidson, assembled to tabulate the returns from the various precincts of Bertie County, and this matter was called to the attention of the said chairman, H. G. Harrington, after the board adjourned, whereupon the said chairman agreed that plaintiff might have time to present affidavits showing the facts as stated, and on 13 June, before the tabulation of the votes had been signed the registrar and judges of election of said Colerain Precinct No. 1, in said county, formally and in writing made affidavit to the facts hereinbefore recited, and requested that they be permitted to amend their return so as to count the said two ballots for John C. Bell, and include same in their returns, because satisfied that they were placed in the wrong box by mistake.

4. That on 13 June, 1924, and within five days of the tabulation of said returns, and before any notice of said results had been given formally to the plaintiff, the said plaintiff made formal demand in writing that he be declared the nominee for the office of county treasurer upon the ground that a correct count of ballots which should have been counted would show that he had received a majority; and also demanding that a second primary be held upon the ground that his opponent had not received a majority of the votes legally cast and counted.

5. That notwithstanding the requests of the registrar and judges of election of Colerain Precinct No. 1, and of plaintiff, the defendant chairman of the county board of elections has refused and failed to call a meeting of the said county board of elections, and has failed and refused to afford the registrar and judges of election of Colerain Precinct No. 1 the opportunity to amend their returns as requested, and has failed and refused to take any action or steps whatsoever in the premises.

6. That in Roxobel Township Precinct six ballots cast had printed thereon, in addition to the matter prescribed legally for such ballots, the words "Aulander Advance Print"; that four of these ballots were cast for Roscoe Peele and two thereof for John C. Bell; that when these ballots were found they were taken out and placed in an envelope, not counted, but brought with the returns to the county board of elections on 9 June, 1924, the said returns not including the said six ballots; that the said registrar and judges of election left it with the said county board of elections to determine whether these six ballots with the words "Aulander Advance Print" were official ballots; that thereupon the said registrar and judges of election of Roxobel Township Precinct changed the returns so as to include the said six ballots, and on 9 June, 1924, the registrar and one of the judges of election, in the absence of the other and not in any regular meeting, changed the returns of this precinct, and including these six ballots, and without such change the election in the county would have been at least a tie; and later on 10 June, 1924, after the meeting of board of county elections, the other judge, Owen G. Auston, signed said returns, and on the bottom of these six ballots and on the same side names of candidates were printed, it is admitted, were printed the words "Aulander Advance Print"; that these ballots on which appeared the words "Aulander Advance Print" contained the name of the Democratic candidate for the legislature and the various county officers, including that of treasurer. These six ballots the court finds were distributed with large number of similar ballots by county board of elections. Ballots not containing this language were distributed in other precincts; that the original returns of the registrar and judges of election of Roxobel Township Precinct were filed with the clerk of the Superior Court on 9 June, 1924, by C. L. L. Cobb, registrar, and B. E. Burkett, judge of election; and later, on the same day, the said Cobb and Burkett, in the presence of H. G. Harrington, withdrew the said returns from said clerk's office to make some change, and a day or two later another original return of said Roxobel Township Precinct was received by said clerk through the mail.

8. That the abstract of votes for county officers cast in said primary on 7 June was filed in the office of the clerk of the Superior Court of Bertie County on 14 June, 1924, and such abstract showed 1,133 votes

for Roscoe V. Peele and 1,131 votes for John C. Bell, which tabulation and count excluded the two votes in Colerain Precinct No. 1 cast for John C. Bell, but not counted because found in the wrong box as aforesaid, and also included the six votes cast in Roxobel Township Precinct with the words "Aulander Advance Print" thereon, four for Roscoe V. Peele and two for John C. Bell.

9. That the returns made to the board of elections by the registrar and judges of elections of the various townships were regular upon their face and showed none of the alleged irregularities set out in the complaint.

10. That the petition from the registrar and judges of election from Colerain Precinct No. 1 to be permitted to amend their returns as heretofore recited, and exceptions to the counting of six votes from Roxobel Precinct, were both made before the results of the primary election had been published.

Upon these facts the following judgment was rendered:

In this cause considered upon application for writ of mandamus, and upon facts found at request of defendants, it is ordered, adjudged and commanded that the defendant county board of election shall forthwith reassemble, permit said registrar and judges of election of Colerain Precinct No. 1 to amend their returns as requested, should said registrar and judges of election so elect, and if no aspirant for the nomination for county treasurer of Bertie County shall have received a majority of the votes, then to call a second primary for such nomination as prescribed by law. The court, upon application of Roscoe V. Peele, makes him a party hereto.

It is further ordered that certified copies of this order to be made by the clerk of the Superior Court of Bertie County shall be served by the sheriff of said county upon the county board of election of said county and each member thereof forthwith. And also the clerk will copy and certify the findings of fact, and they shall also be served on said board by sheriff.

The defendants excepted and appealed.

George C. Green for appellants.
Stephen C. Bragaw for appellee.

ADAMS, J. In primary elections the returns for county officers must be certified as provided to the county board of elections, who shall declare and publish the result. C. S., 6032, 6036. On the day the returns from Colerain Precinct No. 1 were certified, the chairman of the board of elections, after the board had adjourned, but before the abstract had been signed, consented that the plaintiff should have an opportunity to present affidavits in reference to the two contested votes.

Four days afterwards the registrar and judges of election offered such proof, but it was not accepted or considered by the board.

The county board of elections filed the abstract of votes for county officers in the clerk's office on 14 June, and the defendants contend that after the discharge of this duty the board was *functus officio.* It is true that a ministerial agency which has served the purpose of its creation is generally treated as devoid of further force or virtue; but the question is whether the board had fulfilled its function at the time the registrar and judges of election requested the privilege of correcting the error in their returns. Such request was made before the result was declared, and before the abstract was filed with the clerk or even signed by the board.

In considering the question we may avoid confusion by noting the duties required of election officers and the distinction between general elections and primary elections. In the primary there is no election to public office, the right to which may be put in issue and determined by *quo warranto,* and no provision for a board of canvassers clothed with power judicially to determine the precinct returns. C. S., 5984 *et seq.;* 6018 *et seq.; Britt v. Board of Canvassers,* 172 N. C., 797. The officers chiefly concerned with the primary are the election boards, the registrars, and the judges of election, whose several duties are prescribed by statute. The registrar and judges of election are authorized, not only to pass upon the qualification of the voter, but finally to determine whether a ballot found in the wrong box was placed there by mistake and, if satisfied of the mistake, to count the ballot in making their returns to the county board; for in section 6020 it is provided that primary elections shall be conducted as nearly as may be in accordance with the general election law, and between section 5983 and section 6020 we find no fatal conflict or inconsistency. And the determination of these matters involves the exercise of judicial functions. *Rowland v. Board of Elections,* 184 N. C., 78; *Brown v. Costen,* 176 N. C., 63. But in these cases it is likewise held that the powers vested in the county board of elections are not judicial, but ministerial. While the board acts in an administrative capacity, its office is not discharged by merely tabulating the returns and declaring the result. Its organization is not dissolved in this manner, for it is not the creature of a day. It is composed of three persons, whose term of office continues for two years from the time of their appointment and until their successors are appointed and qualified, and it is organized by the election of designated officers. C. S., 5924 *et seq.*

In our opinion the cases relied on by the defendant are not in conflict with this position, for the reason that the facts therein stated and the statutes therein construed were not similar to those in the case at bar.

In *O'Hara v. Powell,* 80 N. C., 104, the decision turned upon the act of 1876, which required the board of county commissioners to meet on the second day after the election, to canvass the returns, and to make abstracts of the votes; and the Court held that the board "dissolved its organization" by adjourning after the completion of its work. And in *Swain v. McRae,* 80 N. C., 111, the plaintiff's action, brought to compel the county commissioners to reassemble and recount the vote, presented the anomalous case of an incumbent who held over after the expiration of his office and sought to prevent the induction of the successful candidate until the vote should be recounted under the direction of the court. Neither case sustains the position that the county board of elections was *functus officio* at the time the present action was instituted.

Citing *Britt v. Board of Canvassers, supra,* the defendants say, in the next place, that mandamus can be issued to enforce the performance only of such ministerial duty as presently exists and that the writ, if granted in this case, will compel the board of elections "to set aside a decision already made." In *Britt's case* it was said that as the board of canvassers was vested with power judicially to pass upon all matters relating to the election its discretion could not be supervised by the courts, but that the performance of a ministerial duty could be enforced by mandamus. The county board of elections in tabulating the returns acted in a ministerial capacity, and did not render a judicial decision. As we have said, it is the action of the registrar and judges of election, when taken in the respects pointed out, that is not subject to judicial control. These officials were the sole judges of the questions whether the ballots were put in the wrong box and whether they were cast for the plaintiff, and having resolved both questions in favor of the plaintiff they should be granted the privilege, not to change the vote of any elector, but to correct an error which, if uncorrected, will deprive a candidate of ballots to which he is justly entitled.

We find no error, and the judgment is

Affirmed.

F. T. WIGGINS v. E. G. LANDIS AND LANDIS MOTOR COMPANY.

(Filed 1 October, 1924.)

1. Pleadings — Amendments — Courts — Discretion — Vendor and Purchaser—Warranty—Statutes.

Where the plaintiff seeks to recover damages upon the allegation that defendant falsely and knowingly induced him to purchase an automobile upon false representations, it is within the sound discretion of the trial judge to permit an amendment alleging a warranty, in addition to the

allegations in the original complaint; and where the statute of limitations has not run as to the latter, the amendment cannot be construed to have a different result. C. S., 547.

2. Same—Contracts—Warranty—Immaterial Allegations.

Where the original complaint has alleged facts sufficient to constitute a warranty by defendant of an automobile which the latter had sold and delivered to him, the specific allegation of warranty becomes immaterial, and it is within the sound discretion of the trial judge to allow the complaint to be amended so as to allege a warranty. C. S., 537, 547.

3. Same—Election of Remedies.

Where the complaint sufficiently alleges that the plaintiff was induced to purchase an automobile by the false representation of the owner as to its condition, he may recover upon a warranty without the use of the particular word, and objection that he had been put to an election of remedies cannot be sustained.

APPEAL by E. G. Landis from *Lyon, J.*, and a jury, at May Special Term, 1924, of VANCE.

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

CLARKSON, J. The following issues were submitted to the jury, and the answers thereto:

1. Did the defendant warrant the automobile to be a new automobile of 1920 model when he sold the same to the plaintiff? Ans. Yes.

2. Was said car a new car of the 1920 model? Ans. No.

3. Is the cause of action barred by the statute of limitations? Ans. No.

4. What damages, if any, is the plaintiff entitled to recover. Ans. $1,000 without interest.

The defendant's counsel earnestly contended in the argument that the action was originally brought for rescission of the contract of the sale of a Hudson car, made by E. G. Landis to plaintiff, and this was so alleged in the complaint, and plaintiff was allowed to amend the complaint and allege breach of warranty, and "Defendant insisted that the nature of the action could not be thus changed from one to rescind a sale and recover the price, to one for damages for breach of a warranty that the car when sold was new"; that the new cause of action in the amended complaint was barred by the three-year statute of limitation.

It is necessary to refer to the allegations of the complaint, which are as follows:

That on 10 December, 1919, the defendant, E. G. Landis, sold the plaintiff an automobile for the sum of $2,450.

To induce the plaintiff to purchase said automobile the defendant, E. G. Landis, represented to the plaintiff that the automobile was a brand new Hudson car, 1920 model.

That the said automobile is not a new automobile as represented, but was a second-hand or third-hand automobile which had been run many years, and rebuilt and repainted so as to cover the defects and deceive the purchaser.

That the said automobile has given the plaintiff practically no service; has cost him more than $300 in repairs, and that he is informed and believes that it is a stolen car, and that the numbers have been filed off and painted over, to avoid detection.

That as soon as the plaintiff found that it was a stolen car, he ceased to use same, and tendered it back to the defendant E. G. Landis, demanding the money he had paid, or a new car as he had bargained for.

That the plaintiff stands ready now to return to the defendant the car he got, and has been damaged by this transaction in the sum of $2,450.

Wherefore, the plaintiff prays judgment against the defendants in the sum of $2,450, and interest on same from 10 December, 1919, and for the cost of this action, and for such other and further relief as to the court seems just and proper.

When the cause was called for trial defendant moved the court to dismiss the same because the complaint does not state facts sufficient to constitute a cause of action, in that it does not allege a warranty by defendant, or any fraud or deceit, and because plaintiff waited nearly three years after the purchase of the car before bringing his action to rescind.

The court below in its sound discretion has a right to allow amendments.

C. S., 547, is as follows: "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or 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 a 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."

The amendment allowed is as follows: "To induce the plaintiff to purchase the said automobile the defendant, E. G. Landis, represented and warranted to plaintiff that the automobile was a new 1920 model Hudson automobile, when in truth and in fact it was not a new car, nor a 1920 model Hudson, but an old second-hand Hudson automobile of about 1916 or 1917 model."

In the original complaint the plaintiff alleged "That the defendant, E. G. Landis, *represented* to the plaintiff," and the amendment alleges that the defendant "*represented* and *warranted* to the plaintiff."

We think that the amendment was not necessary, but was allowable in the sound discretion of the court below. We think that the allegation "represented" and the other facts alleged sufficient, without the amendment inserting the word "warranted."

In *Foy v. Stephens*, 168 N. C., 439, it has been well said by *Brown, J.*: "We have held that a demurrer will not be sustained to the extent of dismissing the action, unless it entirely fails to state a cause of action. If in any portion of it it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for contrary to common-law rule, a very reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. *Brewer v. Wynne*, 154 N. C., 472. This case is affirmed and cited with approval in the recent case of *Hoke v. Glenn*, 167 N. C., 594. Where it is manifest that the complaint defectively states a good cause of action, and the defect can be cured by amendment, the courts will allow the amendment rather than dismiss the action. This is in the interest of justice and the speedy trial of actions." *Currie v. Malloy*, 185 N. C., 209.

After the complaint was filed the defendant has a right, even after the answer was filed, in the sound discretion of the court below, to request that the complaint be made definite and certain.

C. S., 537, in part is as follows: "When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

The better practice and procedure is to make the request before answer or demurrer. *Power Co. v. Elizabeth City, ante*, 278.

A liberal construction of the complaint and the prayer for judgment clearly showed that the action was for "breach of warranty." The complaint does allege that the car was tendered back to the defendant. This the defendant denied in his answer. It further alleges that the plaintiff stands ready now to "return to the defendant the car he got," but the prayer for judgment does not ask "to rescind the trade," but for damages.

If the defendant was uncertain as to the precise nature of the action, he could have asked that the complaint be made more "definite and

certain." We think the complaint, although not using the word "warranted," but the word "represented," and the facts alleged, were sufficient to charge a breach of warranty.

"To constitute a warranty in the sale of goods, it is not necessary that the vendor should use the word 'warrant' or 'warranty.' If the language actually used at the time of the sale by a fair construction amounts to, or is equivalent to, an undertaking on the part of the owner that the property is what it is represented to be, it is sufficient to create a warranty. A description of a printing press, in a bill of sale thereof, as being 'in good working order, with all parts intact,' is warranty. *Udell v. Sarafian*, 43 N. Y. Supp., 1092, 1094, 19 Misc. Rep., 542"; 8 Words and Phrases, 7404.

"To constitute an express warranty the term 'warrant' need not be used; no technical set of words are required, and it may be inferred from the affirmation of a fact which induces the purchase and on which the buyer relies and on which the seller intended that he should so do, but it has been said that the words used must be tantamount to a warranty, and not dubious or equivocal." 24 R. C. L., sec. 437.

In *Swift v. Meekins*, 179 N. C., 174, it is said: "It is not necessary that the language should be intentionally false, or that there should have been any purpose to deceive. The positive representation by a vendor that the article sold possesses a certain value and certain qualities, amounts to a warranty, and by counterclaim the defendant may set up the breach of the warranty and reduce the sum claimed by the difference between the contract price and the actual value, although there was no deceit in the sale. *McKinnon v. McIntosh*, 98 N. C., 89. This case is very much on all fours with the one under consideration. In *Reiger v. Worth*, 130 N. C., 268, it was held that representations that rice is excellent seed rice amounts to a warranty. In that case the Court held also that his Honor correctly instructed the jury as a matter of law that the defendant's representations amounted to a warranty, and that they should answer that issue 'Yes.' See, also, *Love v. Miller*, 104 N. C., 582; *Lewis v. Rountree*, 78 N. C., 323."

From the view we take of this case we do not think the subject of "election of remedies" has any application. If it did we think the reasonable and sensible rule is laid down by *Judge Cothran*, in *McMahan v. McMahan* (S. C., 1922), 26 A. L. R., 1299, as follows: "When a certain state of facts under the law entitled a party to alternative remedies, both founded upon the identical state of facts, these remedies are not considered inconsistent remedies, though they may not be able to 'stand together' the enforcement of the one remedy being a satisfaction of the party's claim. In such case the invocation of the one remedy is

not an election which will bar the other, unless the suit upon the remedy first invoked shall reach the stage of final adjudication, or, unless, by the invocation of the remedy first sought to be enforced, the plaintiff shall have gained an advantage thereby, or caused detriment or change of situation to the other."

The learned judge who tried this case below, we think in clear and concise language stated correctly the reasons why the cause should not have been dismissed: "While the complaint may be defective, still it is the policy of the law to determine all matters in the controversy as speedily as possible and on the merits; and whatever defects there may be in the pleadings, they can be cured by amendment. I do not think the evidence tends to show any fraud or deceit, and I do not understand the plaintiff is relying on fraud or deceit. If they did I would hold there was no evidence of that. I understand the plaintiff is now contending there was a warranty; that the car was a new car of the 1920 model, and that there was a breach of that warranty by reason of the fact that it was not a new car of the 1920 model. The motion to dismiss is denied."

On this theory the case was tried. The questions of fact were left to the jury. From a careful reading of the contentions and charge by the court below, we think the case was fairly and impartially left to the jury. We can find

No error.

N. E. GARRIS v. EMMA GARRIS.

(Filed 1 October, 1924.)

1. Divorce—Limitation of Actions—Statutes.

The common-law rule that there is no statute of limitations barring an action for divorce obtains in this jurisdiction, applying the rule that the proceedings, as a matter for the court, should have been commenced without unreasonable delay, except in so far as it may have been modified by C. S., 445, barring all actions not otherwise provided for in ten years.

2. Same—Alimony—Pendente Lite.

In proceedings for alimony under the provisions of C. S., 1667, the right of a wife for *alimony pendente lite* arises to her, in the application of the statute of limitations, when the action is commenced, and not from the time of the separation from her husband.

CIVIL ACTION and cross-action for divorce, heard on motion for alimony by *feme* defendant, before *Daniels, J.*, at March Term, 1924, of PITT.

The positions of the parties as set forth in the pleadings, and the facts appertaining to the motion are embodied in his Honor's judgment allowing alimony to the wife, which is as follows:

"This cause coming on to be heard before Hon. F. A. Daniels, judge presiding, at the March Term, 1924, of Pitt Superior Court, on motion of defendant for alimony *pendente lite*, or an allowance to be made by the court to be paid by the plaintiff for the use of the defendant for necessary maintenance, support and expenses of defendant, pending the determination of this action, and for attorney's fees, and the matter being heard on the pleadings, affidavits and oral testimony, both parties, plaintiff and defendant, being present in court and represented by counsel, and the court finding the following facts:

"1. That summons was regularly issued and served on the defendant on ... January, 1924, and complaint filed on 16 January, 1924, in which the cause of action based only on the separation of the plaintiff and defendant on 1 January, 1919, and the living separate and apart from each other since said date; that extension of time for filing answer was granted defendant by the clerk of Superior Court, and that answer, further answer and cross-action of defendant was filed on 10 March, 1924, in which defendant admitted the marriage on 15 June, 1905, and separation on 1 January, 1919, and the living separate and apart from plaintiff since said date, but alleged that said separation was not through any fault or wrongdoing of defendant or of her own accord, but was brought about and forced upon her by the cruel, inhuman and unjust treatment of the plaintiff; that defendant's further answer and cross-action alleged that she was the party injured by reason of the plaintiff's conduct and the separation, and prayed for dismissal of the plaintiff's action for divorce *a vinculo matrimonii*, and that defendant be granted divorce *a mensa et thoro* and alimony, and also alimony *pendente lite*, and attorney's fees; that plaintiff on 20 March, 1924, filed replication denying the allegations contained in the defendant's further answer and cross-action, and plead the three-year statute of limitations in bar of the defendant's recovery.

"2. That the statutory notice of the hearing, together with affidavit of complaint to obtain alimony *pendente lite* was duly and regularly served on the plaintiff on ... March, 1924, and the plaintiff was present at the hearing, represented by counsel, and the cause fully heard on the pleadings, affidavits and oral testimony.

"3. That the plaintiff is not the party injured within the contemplation of the statute, and that the separation complained of by plaintiff and set up as his cause of action for divorce, was caused by the cruel, inhuman and unjust treatment accorded defendant by plaintiff, and that defendant after living with plaintiff from 15 June, 1905, to

1 January, 1919, and during said time bearing him seven children, was, through the brutality, foul and slanderous accusations and disgraceful and inhuman conduct of plaintiff forced to seek the protection of her father's home, and that it was the plaintiff's conduct toward the defendant, making her life burdensome and her existence intolerable that was the direct cause of the separation, which was brought about through no fault or wrongdoing of the defendant; that plaintiff did not properly provide attention for defendant during sickness and childbirth, and that the plaintiff on one occasion slapped defendant and threatened her bodily harm, and on other occasions would come in late at night and kick and batter down doors to the home, without warning or making known his identity, and that plaintiff foully and injuriously accused defendant of infidelity.

"4. That there are four children born to plaintiff and defendant now living, two of whom are living with plaintiff, and the other two with defendant, and that defendant's individual estate, from which her total income does not exceed $400 per annum, is insufficient to support herself and her two said children, and therefore defendant is without adequate means for her maintenance and support during the pendency of this action, and is without means with which to pay attorney's fees and other expenses with which to properly prepare and maintain her defense and cross-action; that plaintiff owns an estate consisting of valuable farm lands, team, farming implements, etc., valued at from fifty to one hundred thousand dollars, and is amply able to pay the defendant alimony during the pendency of the action, and the allegations of the facts in answer found to be true of this action. The foregoing facts are found from the evidence for the purpose of the motion for alimony, and is not to prejudice plaintiff upon the trial upon the merits.

"5. That defendant is justly and properly entitled to alimony *pendente lite* and attorney's fees, and that a fair and just allowance for plaintiff to pay to defendant for her maintenance and support during the pendency of this action $50 per month and $200 additional for attorneys' fees.

"6. That plaintiff's plea of the three-year statute of limitation, as set out in paragraph 10 of his replication or reply is not a bar to defendant's right of recovery of alimony *pendente lite* and expenses, including attorneys' fees. It is now, on motion of D. M. Clark and M. B. Prescott, attorneys for defendant, ordered, adjudged and decreed that the plaintiff, N. E. Garris, on 1 April, 1924, and on the first day of each month thereafter, during the pendency of this action, pay into the office of the clerk of the Superior Court of Pitt County the sum of $50

as a monthly allowance to be paid by the clerk of said court to the defendant, Emma Garris, for the purpose of providing her with maintenance and support.

"It is further ordered that the plaintiff, N. E. Garris, immediately pay into the office of the clerk of the Superior Court of Pitt County the sum of $200, to be paid by the clerk of said court to the defendant's attorneys of record in this case as a partial compensation for preparing defendant's cause of action and defense for trial, and this cause is retained for further orders.

"This 28 March, 1924. F. A. DANIELS, *Judge Presiding.*"

Defendant excepted and appealed, assigning for error that the court held as a matter of law that defendant's cross-action for alimony and counsel fees was not barred by statute of limitations.

A. B. Corey and L. W. Gaylord for plaintiff.
M. B. Prescott and David M. Clark for defendant.

HOKE, C. J. At common law there was in strictness no statute of limitations barring a divorce proceedings, though a court having jurisdiction would at times refuse relief where there had been unreasonable delay in making the application, a principle which has been embodied in the English Divorce Act, referring the question to the sound legal discretion of the trial court. Buswell on Limitations, sec. 191, note; 2 Bishop on Marriage and Divorce, sec. 108. Under our statute of limitations there is no provision which in express terms bars a divorce, and if such an action is barred with us it would be by C. S., 445, barring all actions not otherwise provided for in ten years. In *O'Connor v. O'Connor,* 109 N. C., 139, it seems to have been held that in proper instances the section referred to is applicable to actions for divorce.

As to the demand for alimony, while our legislation on the subject now provides for its award by separate and independent suit, C. S., 1667, it was formerly only allowable as ancillary to suits for other relief, usually in actions for divorce. Growing out of the obligation of a married man to support a deserving wife, it was a continuing liability, enforceable whenever the necessity for it should arise unless barred by some specific statute applicable. In the present case the application is for alimony *pendente lite*—for her support during the separation—and to enable her to properly present and maintain her suit, a right to which she is clearly entitled under our decisions and on the present aspect of the record. *Medlin v. Medlin,* 175 N. C., 529; *Webber v. Webber,* 79 N. C., 572; *Barker v. Barker,* 136 N. C., 316.

It is insisted for plaintiff, appellant, that this right to alimony arose when the separation took place in 1919, and being a liability then

created by statute, is barred in three years by the express provision of the law. C. S., 441, subsec. 2. It might be answered that in the very section on which appellant chiefly relies, C. S., 1667, the right accrues to the wife as incident to the suit for independent alimony, and not necessarily at the time the separation took place, but the final answer to plaintiff's position is that defendant's application here is under Rev., 1666, for alimony *pendente lite,* arising to her when the action is commenced and not before. The times designated in all these sections of the statute, section 441 and others, begins to run from the accrual of the right—here, at the beginning of her suit and as incident to it, and in no aspect of the case is her application barred.

There is no error, and the judgment of the court below is

Affirmed.

IN RE LAST WILL AND TESTAMENT OF EMMA SOUTHERLAND.

(Filed 8 October, 1924.)

1. Appeal and Error — Evidence — Competent in Part—Objections and Exceptions.

Where evidence is competent for some purposes, the party objecting should request that it be confined to that purpose, and his general exception to its admission will not be sustained on appeal.

2. Wills—Holograph Wills—Evidence—Ambiguity—Intent—Appeal and Error.

Upon the trial of a caveat to a holograph will, when an inquiry in the issue is to the intent of the testatrix to make the will, or the *animus testandi* wherein the caveator's interest as an heir at law was practically omitted, evidence as to the relationship or regard the testatrix had for the caveator is admissible upon the question of the intent of the testatrix to make a will, though it be of such a character that might influence the sympathy of the jury in the caveator's favor.

3. Appeal and Error—Evidence—Harmless Error.

Where the evidence itself and when taken in connection with the verdict cannot have been to the prejudice of appellant, reversible error will not be held by the Supreme Court on appeal.

4. Wills—Evidence—Intent—Burden of Proof—Instructions.

Where the *animus testandi* does not appear by construction of the instrument itself offered as a last will and testament, but is left uncertain, it is competent to show it or disprove it by parol or extrinsic evidence for the jury to decide; and an instruction on this phase of the case does not affect the burden of proof to the propounder's prejudice after the execution of the paper-writing has been prima facie proven by him.

5. Wills—Signature—"Mother."

The signature of the word "Mother" to a paper-writing offered as a holograph will is sufficient if it is shown that the maker adopted it as her own for the purpose of executing the instrument.

APPEAL from *Horton, J.*, at March Term, 1924, of DUPLIN.

In March, 1923, the following paper was offered for probate as the last will and testament of Mrs. Emma Southerland:

MT. VERNON SPRINGS, N. C.,
FRIDAY, September 1st.

This is what I want done with a fiew of my things $200.00 for Bariam Orphanage My diamond ring to Elbert for his first little girl Black silk taffata for Lucy or Nora Coat suit for Mary Lawrence $5.00 to the dear little twins $2.50 to Bettie's baby Jesse—My wedding ring to lucy Cameo to Lucy if she wants it.

Give Susie Burdett something I cant think of anything suitable now. Elbert have his Papa's knife.

Pay my church dues to the end of year.

Pay my Auxiliary dues for this year, and 5.00 gift to budget all left to go to Elbert & Lucy. MOTHER.

Before the paper was admitted to probate, a caveat was filed.

The cause was thereupon transferred to the civil-issue docket, and at the trial the following verdict was returned:

1. Did Mrs. Emma Southerland write all of the paper-writing propounded with intent that it should be operative as her last will and testament, and was it found after her death among valuable papers and effects? Answer: No.

2. If said Mrs. Emma Southerland wrote said paper-writing propounded, did she at the time have sufficient mental capacity to make and execute a last will and testament? Answer: .....

3. Was the said execution of said paper-writing, if written by Mrs. Emma Southerland, procured by undue influence exerted over her, as alleged by the caveators? Answer: .....

4. Is said paper-writing the valid last will and testament of said Mrs. Emma Southerland? Answer: No.

R. D. Johnson and Stevens, Beasley & Stevens for propounders.
George R. Ward and E. K. Bryan for caveator.

ADAMS, J. The only heirs at law of the alleged testatrix are her two children, E. F. Southerland and Lucy Jolly, the propounders, and her

grandchild, Susie Lee, the caveator. Susie's mother, who was a sister of the propounders, intermarried with T. W. Lee on 14 October, 1914, and died on 10 October, 1918. Two days before her mother's death, Susie Lee, when about nine months of age, while critically ill, was committed by her father to the friendly keeping of H. D. Williams and his wife.

The cause came on for hearing, and the propounders, after offering evidence tending to establish the paper-writing as Mrs. Southerland's holograph will, rested their case; whereupon, H. D. Williams, a witness for the caveator, was permitted to rehearse the circumstances under which the child had been received into his home. His testimony included reference to her illness, to that of her mother and Mr. Southerland, and to the difficulty experienced in procuring the services of a nurse. To this evidence the propounders excepted, chiefly on the ground that it was prejudicial to them and threw no light on the mental condition of the alleged testatrix or the question of undue influence.

The issues relating to mental capacity and undue influence were not answered; and if it be granted that the evidence objected to was calculated to excite in the mind of the jury a sympathetic interest in behalf of the caveator, still it was properly admitted if it was competent for any purpose. The admission of evidence which is competent for some purposes, but not for all, does not constitute reversible error unless at the time it is admitted the appellant request that its purpose be restricted. Rule 21, Supreme Court. It will be noted, the first issue incidentally involved the question whether it was Mrs. Southerland's purpose practically to ignore her grandchild in the disposition of her property. The propounders evidently concluded that such was her purpose, for upon no other theory can the writing be upheld as her will. In controverting this theory it was competent for the caveator to show the relation that existed between her and her grandmother; and as tending to show such relation, evidence of certain circumstances to which the witness testified was both relevant and material. It matters not that a part of the evidence may have been incompetent, for a general exception will not be considered unless all the evidence objected to is incompetent. *Dellinger v. Building Co.*, 187 N. C., 845, 848; *Rollins v. Wicker*, 154 N. C., 559.

Nor can the exception to Mrs. Williams' testimony be sustained. What she said was at most merely the recital of a question asked her by Mrs. Jolly, and does not constitute reversible error, particularly in view of the verdict, which omits an answer to the second and third issues. Technical error, unless prejudicial, is generally held insufficient ground for a new trial. *Plyler v. R. R.*, 185 N. C., 357; *Penland v. Barnard*, 146 N. C., 379.

The propounders excepted to certain instructions relating to the first issue, and to the form in which it was submitted, on the ground that the trial judge imposed upon them the burden of establishing the testamentary intent, as well as the formal execution of the paper.

It is not denied that the burden was on the propounders to establish the formal execution of the writing (*In re Chisman*, 175 N. C., 420), but it is insisted that, upon proof of such execution, the *animus testandi* was to be inferred. This principle obtains where the testamentary character of the instrument appears on its face and only a question of construction is presented (*Outlaw v. Hurdle*, 46 N. C., 150); for when the *animus testandi* is established, the character of the instrument is fixed; but when the instrument on its face is equivocal and it is doubtful whether it is intended to operate as a will, a deed, or a gift, parol evidence may be considered. *Robertson v. Dunn*, 6 N. C., 133; *Clayton v. Liverman*, 29 N. C., 92; *Davis v. King*, 89 N. C., 441; *Egerton v. Carr*, 94 N. C., 648; note to *Ferris v. Neville*, 89 A. S. R., 488; note to *Smith v. Smith*, 33 L. R. A., 1018; note to *Shaull v. Shaull*, 11 A. L. R., 49. See, also, *Phifer v. Mullis*, 167 N. C., 405; *In re Seymour*, 184 N. C., 418. In *Heaston v. Krieg*, 119 A. S. R. (Ind.), 475, it is said: "The *animus testandi* does not depend upon the maker's realization that the instrument he is executing is a will, but upon his intention to create a revocable disposition of his property, to take effect after his death."

The paper offered for probate is equivocal. The maker designates several beneficiaries, but names no executor or other person to deliver the gifts. It may fairly be said that there is some indication of disposition *inter vivos* and of testamentary intent; and under these circumstances his Honor properly submitted to the jury the determination of the maker's purpose. The burden of showing such intent was, of course, upon the propounders.

The signature, "Mother," is sufficient if the maker adopted it as her own for the purpose of executing the instrument. *Wise v. Short*, 181 N. C., 320.

We find

No error.

W. C. HIGHT v. DAVID HARRIS.

(Filed 8 October, 1924.)

1. Infants—Contracts—Void Contracts.

Excepting necessaries or contracts authorized by statute, an infant may avoid his contracts concerning personalty on account of his infancy, either during his minority or promptly upon coming of age, and recover the consideration he has paid thereon either in money or property, upon his

restoring the consideration he has received, if he then has it, or the value thereof in property in which he has invested it, which is still under his control and ownership.

2. Actions—Inconsistent Defenses.

Inconsistent defenses may be set up in the same action, and a plea of infancy may be interposed to avoid a contract together with a counterclaim for breach of warranty therein.

3. Justice's Courts—Appeal—Trial De Novo—Superior Courts—Pendency of Action.

Appeals from a justice's court are tried *de novo* in the Superior Court; and where an appeal has thus been taken and consolidated with another action brought originally in the Superior Court, in both of which infancy is pleaded to avoid a contract for goods sold and delivered, and damages as a counterclaim for the breach of warranty in the sale of a mule, by not submitting an issue as to the damages for the breach of warranty set up before the justice of the peace, the counterclaim in that action is deemed to have been abandoned, and the right of the party plaintiff in the former action and the defendant in the latter is taken as waived when objection has not been aptly taken in time.

4. Actions—Pendency of Actions—Waiver.

Held, upon the facts of this case, the place of the pendency of another action was waived by the party.

CIVIL ACTION, tried before *Lyon, J.*, at May Special Term, 1924, of VANCE.

From a perusal of the record and case on appeal, it appeared that in February, 1923, plaintiff, a merchant, sued the defendant, a minor, in a justice's court, on account for goods sold, amounting to $83.68 and interest. Defendant did not deny the account, but set up a counterclaim for $175.00 damages for breach of contract of warranty on sale of a mule by plaintiff to defendant in 1920. On the trial the justice entered judgment for the account, as claimed, and against defendant on the counterclaim, and defendant appealed to the Superior Court, where the cause was duly docketed.

Defendant, having become twenty-one, instituted against plaintiff an action in Superior Court to set aside sale of mule on account of infancy and on allegations of fraud and deceit, and to recover of plaintiff the purchase price of mule, $375.00, tendering the mule to plaintiff. This cause being also for trial on the docket of the Superior Court, on motion it was consolidated with the cause appealed from the justice's court, and defendant, appellant from the justice's court judgment, not denying the account, and renewing and maintaining his tender of the mule, the cause as consolidated was submitted and verdict rendered on the following issues:

Was the plaintiff, David Harris, a minor, under the age of twenty-one, at the time of the purchase of the mule for $375 from the defendant, W. C. Hight? Answer: Yes.

Is the defendant, David Harris, indebted to the plaintiff, W. C. Hight, in the sum of $83.68, with interest from 1 September, 1920? Answer: Yes.

When did the plaintiff, David Harris, arrive at the age of twenty-one years? Answer: 22 August, 1923.

On the verdict, judgment was rendered as follows:

This cause coming on to be heard at this special term of the Superior Court, held, beginning 5 May, 1924, and being heard before his Honor, C. C. Lyon, judge presiding, and a jury, and the jury having answered the issues as appears of record:

Now, therefore, on motion of Kittrell & Kittrell and Jasper B. Hicks, attorneys for plaintiff, David Harris, it is ordered, adjudged and decreed that the contract of purchase and sale of a mule between W. C. Hight and David Harris is declared and adjudged to be null and void, and the plaintiff, David Harris, is ordered to return the mule to W. C. Hight when this judgment has been paid him; and the defendant, W. C. Hight, is liable to David Harris for the $375, being the price paid for said mule, less the sum of $83.68, with interest from 1 September, 1920, amounting to $18.40, which leaves the amount due by W. C. Hight to David Harris $272.92; and it is ordered that the plaintiff, David Harris, therefore recover of the defendant, W. C. Hight, the sum of $272.92, with interest from this date, and the costs of this action.

This 13 May, 1924. C. C. LYON, *Judge Presiding.*

From which judgment plaintiff, W. C. Hight, appealed.

T. T. Hicks & Son for plaintiff, appellant.
Kittrell & Kittrell for defendant, appellee.

HOKE, C. J. It is recognized in this jurisdiction that, except in case of necessaries or contracts authorized by statute, an infant may avoid his contracts concerning personalty on account of his infancy; and, either during his minority or on coming of age, if he acts promptly in the matter and on such avoidance, he may recover the consideration paid by him, either in money or property, with the limitation that he must restore the consideration received if he still has the same in hand, or return or account for the value of property in which it has been invested and which is still under his control and ownership. *Morris Plan Co. v. Palmer,* 185 N. C., p. 108; *Chandler v. Jones,* 172 N. C., p. 569; *Skinner v. Maxwell,* 66 N. C., p. 45; *Ex parte McFerrin,* 184 Ala., p. 223; *Gullis v. Goodwin,* 180 Mass., p. 140; 14 R. C. L., title Infancy, secs. 20, 21, 22, 23.

In the well-considered case of *Bank v. Palmer, supra, Associate Justice Adams* states the principle as it prevails with us, as follows: "Omitting reference to contracts for necessaries, and to such contracts as a minor is authorized by statute to make, the Court has held that an infant may, during his minority, avoid his contract relating to personal property, and that such avoidance, when effected, is irrevocable and renders the contract null and void *ab initio.*" And again: "This doctrine is established. It is approved and maintained with practical unanimity; and while the infant's right to disaffirm his contract may sometimes be exercised to the injury of the other party, the right, nevertheless, exists for the protection of the infant against his own improvidence, and may be exercised entirely in his discretion. 1 Elliott on Contracts, sec. 302; 3 Page on Contracts, sec. 1593; *Dibble v. Jones,* 58 N. C., p. 389."

The cause below seems to have been tried and determined in accord with these positions, and we find no valid reason for disturbing the result.

It is chiefly urged for the appellant that the appellee should not have been allowed to insist on an avoidance of the contract for the purchase of the mule, as claimed in his action instituted in the Superior Court while there was a counterclaim presented by him on his appeal from the justice's court for a breach of warranty in the sale. To this objection it might well be answered that, under our system of procedure, a party is allowed to submit inconsistent pleas, and that in these actions, consolidated by order of court, the defendant Harris might well be allowed to plead that he was an infant at the time of sale, and, failing in that, that there was a breach of warranty in the sale. C. S., 522, citing *Upton v. R. R.,* 128 N. C., p. 173; *McLamb v. McPhail,* 126 N. C., p. 218; *Higson v. Ins. Co.,* 152 N. C., p. 206; *Ten Broeck v. Orchard,* 79 N. C., p. 518. See, also, *Johnson v. Lumber Co.,* 147 N. C., pp. 249-252. On the facts of this record, however, the complete answer to this objection is that, on appeal from the justice's court, the matters there determined were, under our procedure, to be tried *de novo;* and in tendering and submitting only the issues presented by defendant's action to set aside the contract by reason of infancy, the counterclaim for breach of warranty set up in the justice's court should be treated as abandoned or withdrawn by appellee. Under our decisions, it was open to appellee to do this at any time before the final hearing. *Barnett v. Mills,* 167 N. C., pp. 576-584; *Cook v. Cook,* 159 N. C., pp. 47-50.

Speaking to the question in *Cook's case, supra,* the Court said: "As a general rule, this right to plead the pendency of another action between the same parties before judgment had is regarded to a large

extent as a rule of convenience, resting on the principle embodied in the maxim, *'Nemo debet bis vexari.'* The defect is one that can be waived, and it may also be cured by dismissing the prior action at any time before the hearing." Citing *Grubbs v. Ferguson,* 136 N. C., p. 60; 1st Cyc., p. 25.

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

No error.

TOWN OF MOUNT OLIVE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 8 October, 1924.)

Municipal Corporations — Streets — Improvements—Assessments—Intersecting Streets—Statutes.

Where railroad property in a city lies along an unimproved street, but abuts upon an improved street that runs through the unimproved one, the owner is ordinarily liable to an assessment of one-half of the cost of the improvement on the abutting and improved street, and the exception in the statute as to street intersections is inapplicable. C. S., 2710 (1), 2703.

APPEAL by plaintiff from *Lyon, J.,* at February Special Term, 1924, of WAYNE.

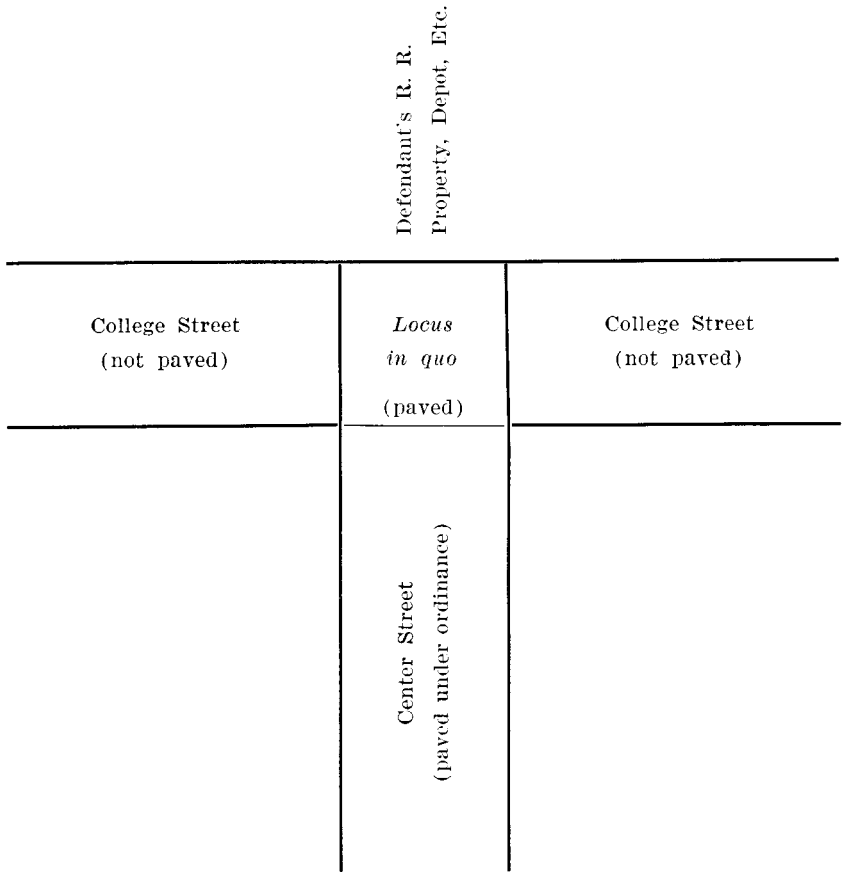
Langston, Allen & Taylor for plaintiff.
Dickinson & Freeman and O. H. Guion for defendant.

CLARKSON, J. This is an action brought by the town of Mount Olive against the Atlantic Coast Line Railroad Company for the recovery of assessments (under the ordinance regularly passed) against the defendant's property for certain paving on West Center Street, in the town of Mount Olive, up to the depot of the defendant company.

The paving so made under this ordinance was on West Center Street, up to and including the entire width of College Street, where College Street runs into it on the east and west side of Center Street. West Center Street was paved up to a point upon which is located the depot of the Atlantic Coast Line Railroad Company, immediately adjoining the space paved on Center Street, and at a point where College Street extended across Center Street would cover.

College Street lies to the west and east of Center, Street, and no part of College Street is paved but the space on Center Street. The entire width of College Street and the width of Center Street is covered by

the paving under this ordinance. This paving is placed on Center Street its entire width, and covers a space made by the junction of East and West College Street with Center Street. The location of defendant's property and its relation to the street paving is shown on the map.



From the record, no part of College Street has been paved, except the *locus in quo,* on which defendant's land abuts, and is an extension of Center Street to the depot of defendant. The question presented is: Whose duty is it to pay for this street pavement? To answer this we must refer to the statutes on the subject.

C. S., 2710, sec. 1, is as follows:

"*One-half on abutting property.* One-half of the total cost of a street or sidewalk improvement made by a municipality, exclusive of so much

of the cost as is incurred at street intersections and the share of railroads or street railways, shall be specially assessed upon the lots and parcels of land abutting directly on the improvements, according to the extent of their respective frontage thereon, by an equal rate per foot of such frontage, unless the petition of such street or sidewalk improvement shall request that a larger proportion of such cost, specified in the petition, be so assessed, in which case such larger portion shall be so assessed, and the remainder of such cost shall be borne by the municipality at large; but no assessment for streets and sidewalks shall be made against abutting property on any such street or sidewalk until said street or sidewalk has been definitely laid out and the boundaries of the same definitely fixed."

The above section is taken from Laws 1915, ch. 56, sec. 8, with the exception that the Consolidated Statutes has added "*one-half on abutting property,*" and the latter part of the section commencing with "but no," etc.

The clear interpretation of the act, we think, means what its language says—that one-half of the total cost of the street improvement shall be assessed upon the parcel of land abutting directly on the improvement, according to the extent of the respective frontage thereon.

Section 2703 defines what "frontage" means:

" 'Frontage,' when used in reference to a lot or parcel of land abutting directly on a local improvement, means that side or limit of the lot or parcel of land which abuts directly on the improvement."

Defendant's land abuts on one-half of the *locus in quo* paved, and, we think, under the statute, the defendant is liable for this much of the cost of the street improvement.

The position taken by counsel of both plaintiff and defendant, that the question was whether plaintiff or defendant was liable, depended on the following in the statute: "Exclusive of so much of the cost as is incurred at street intersections." The discussion in the briefs is on the proposition whether the *locus in quo* was a street intersection.

Construing a criminal statute passed for the protection of human life and the safety of motorists and pedestrians, in *Manly v. Abernathy*, 167 N. C., p. 220, it was held that the *locus in quo* was an intersection. The street-improvement statute must be construed according to its language and intent.

We do not think the *Manly case, supra,* has any application to land abutting on improvements. The language of the statute now under consideration, we think, clearly fixes the liability of defendant, and rightly so. The owner of the frontage of land abutting on the street improvement must pay one-half the cost of the width of the street. The defend-

ant's land abuts on the improvement made, and it must pay one-half of the amount assessed for the improvement made, as shown on the *locus in quo*. The other half must be paid by the city. Any other construction would discriminate, and the position here taken makes all pay alike.

From the view we take of the law, the judgment below is

Reversed.

PEANUT GROWERS EXCHANGE v. A. E. BOBBITT.

(Filed 8 October, 1924.)

1. Jurors—Challenges.

The statutory conditions upon which a juror may be challenged and stood aside for cause are cumulative to that of the common-law disqualification as to the juror's interest in the result of the action; and thereunder a juror who is a member of a growers association, a party to the action, may be challenged for cause therein.

2. Same—Waiver.

A party to an action is entitled to set aside a juror therein for cause shown, and in so doing, he cannot be held to have waived this right by having previously refused the offer of the adversary party to agree that he should not act as a juror.

APPEAL by defendant from *Sinclair, J.*, at January Term, 1924, of HALIFAX.

Civil action, to recover damages for an alleged breach of contract.

Upon denial of liability, and issues joined, there was a verdict and judgment for the plaintiff, from which defendant appeals, assigning errors.

C. E. Peters, Daniel & Daniel, Dunn & Johnson, and George C. Green for plaintiff.

Travis & Travis and R. H. Parker for defendant.

STACY, J. The first exception appearing on the record is as follows: "The defendant challenged the juror, Cherry, on the ground that he was a member of the plaintiff Peanut Growers Association. The defendant had already exhausted his peremptory challenges. The court examined the juror, Cherry, and, being of the opinion that he was an impartial juror, in its discretion refused to stand him aside. The plaintiff's attorney, while the jury was with the plaintiff, announced to the defendant that Cherry was a member of the Peanut Association and proposed to excuse him. The defendant refused to accept the

plaintiff's offer to excuse the juror and objected that his being a member of the association was not a ground of challenge open to the plaintiff, which objection was sustained by the court. At the time the defendant asked the juror, if notwithstanding his being a member of the association, could he, after hearing the evidence, give a fair and impartial trial, to which he replied that he could. Exception by defendant."

The incompetency of the juror Cherry must be conceded; and the exception is properly presented. *S. v. Levy,* 187 N. C., p. 587. The juror was a member of the plaintiff association and necessarily interested in the litigation. Speaking to a similar question in *Bank v. Oil Mills,* 150 N. C., 683, *Walker, J.,* said:

"The defendants, having exhausted their peremptory challenges, objected to a juror, Samuel Bear who admitted that he is a stockholder in the plaintiff bank. The court, upon evidence, found that, notwithstanding the fact of his being a stockholder, he was 'a fair and unbiased juror,' and overruled the challenge. In this ruling, we think, there was error. It is very true, the cause of challenge is not one of those specified in the statute, but they are merely cumulative, and it was not the intention of the Legislature to repeal the fundamental principle of the common law forbidding a person to sit in judgment when his own interests are involved. Whether there are any circumstances which will justify a departure from this elementary rule by reason of the necessity of the case, we need not consider, as no such necessity arose in the trial of the present action. The only question presented is, was the juror competent to sit in the case? He was a stockholder of the plaintiff bank, and therefore had a direct pecuniary interest in the result of the trial. This cannot well be questioned. He was therefore made a judge in his own cause without any sufficient reason in law to sustain the ruling of the court. Whether he was actually biased or not is immaterial. Suppose a plaintiff in a case is called as a juror, could we hesitate to declare his incompetency? The difference between such a case and the one before us, where the juror is the holder of stock in the plaintiff bank, is one that relates, not to the fact, but to the degree of interest."

In *Oliphant v. R. R.,* 171 N. C., 303, a new trial was ordered because an employee of the defendant, a clerk in its legal department, was allowed to sit on the jury over plaintiff's objection and exception properly entered.

It was the rule at common law, and still obtains with us, that if a juror be of the same society or corporation with either party, when such society or corporation is interested in the litigation, he may be challenged upon this ground. *S. v. Levy,* 187 N. C., p. 586, and cases there cited.

In the case at bar, it is contended on behalf of appellee that the defendant waived his right to challenge the juror Cherry when he declined to allow the plaintiff to stand him aside without using one of his peremptory challenges and that in any event the exception is without merit. It must be remembered that the trial court ruled with the defendant when this objection was made and held that the plaintiff might not challenge the juror for the cause assigned. The defendant, therefore, when he sought to force the plaintiff to exhaust one of his peremptory challenges in standing this juror aside, if not satisfactory to him, did no more than exercise his rights under the law as it was then being administered. A waiver is a voluntary relinquishment of some known right. *Alexander v. Savings Bank,* 155 N. C., 124. A party should not be held to have waived his rights when he is proceeding according to law.

But assuming the real ground of the alleged waiver or estoppel to be that plaintiff was erroneously deprived of its right to stand the juror aside, because of an untenable objection by the defendant, it nowhere appears that the plaintiff was prejudiced by such action. The plaintiff had four peremptory challenges and he allowed Cherry to remain on the jury. The plaintiff won its case and is not appealing. The defendant alone has been prejudiced. Furthermore, the ruling was made by the court and not by the defendant. We cannot hold that an error against the plaintiff, induced by defendant's objection, if error it were, offsets an error against the defendant. It would be stretching the doctrine of harmless error to an unwholesome degree to say that it includes the principle of comparative errors.

If the right of trial by jury be fundamental, and we have uniformly held that it is, then the right to a fair and impartial jury, as allowed by law, is equally fundamental.

The cause will be remanded for another hearing.

New trial.

J. L. PARKER v. B. R. HARRELL.

(Filed 8 October, 1924.)

Vendor and Purchaser—Crops—Liens—Contracts—Waiver.

Where one having a lien on a crop for advancements is informed by his lien debtor that he has sold a part of the crops to another, and the conditions of the sale, and the lien creditor accepts a part of the money thus obtained by his debtor, it is a ratification of the transaction, and he cannot recover the balance from the purchaser or assert his lien on the crops against him.

APPEAL from *Brown, J.,* at April Term, 1924, of BERTIE.

The issues submitted to the jury, with the answers thereto, are as follows:

1. What sum of money did the defendant pay to J. T. Holly for the peas? Answer: $182.00.

2. Is the defendant indebted to the plaintiff, and if so, in what sum? Answer: Nothing.

The assignments of error relied upon by the plaintiff, who appealed from the judgment rendered, are set out in the opinion.

Winston & Matthews for plaintiff, appellant.
Gilliam & Davenport and R. C. Bridger for defendant, appellee.

CONNOR, J. The plaintiff testified as a witness in his own behalf, that he had a lien upon the crops made by J. T. Holly during the year 1921 to secure an account for advancements. The balance due on the account was about $350.00; that Holly had sold a portion of said crop to the defendant for $182.00 and that the defendant had paid Holly $108.00 on the purchase price for said crops, leaving a balance due of $74.00.

Plaintiff further testified that Holly paid to him out of the cash payment made by defendant, to be credited on his account secured by the said lien, $75.00 and informed plaintiff at the time of making such payment of all the circumstances relative to the sale of the said crops; that plaintiff with this information, received from Holly the $75.00 and applied it as a credit on his account.

Plaintiff thereafter brought a suit before a justice of the peace against the defendant for $182.00 but upon the trial of this action in the Superior Court demanded judgment for only $74.00, the amount due by defendant to Holly for the said crops.

In apt time plaintiff requested the court to instruct the jury that if they believed all the evidence they should answer the second issue $74.00 and interest from 1 December, 1921. To the refusal of the court to so instruct the jury plaintiff excepted and assigned this as error.

The court instructed the jury that if they found the facts to be as testified by plaintiff, the plaintiff ratified the sale by Holly to the defendant Harrell and that they should answer the second issue nothing. To this instruction the plaintiff excepted and assigned same as error.

The law applicable to the facts in this case is stated by *Justice Allen* in *Wilkins v. Welch,* 179 N. C., 266, and fully sustains the instruction given by his Honor and his refusal to give the instruction requested. *Allen, J.,* cites and approves a statement of the law to be found in 9 Cyc., 387.

Plaintiff contends that the fact that Holly did not pay to plaintiff the full amount of the cash payment received from the defendant distinguishes this case from *Wilkins v. Welch, supra,* for that it appears from the facts stated in the report of that case that the mortgagor had paid to the mortgagee the full amount received by him for the sale of the property subject to mortgage. This distinction does not affect the principle involved. The plaintiff having accepted money derived from the sale with full knowledge of the facts relative to the sale, cannot now repudiate the sale. The defendant, by virtue of the said ratification, holds the crops released from plaintiff's lien. The balance due by defendant to Holly is a simple debt for which the defendant is not liable to the plaintiff. The plaintiff, by his act of receiving the money from Holly with knowledge of the facts, has ratified and confirmed the sale. *Norwood v. Lassiter,* 132 N. C., 57.

The exceptions upon which the assignments of error are based are not well taken.

No error.

PINER BROTHERS, INC., v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 8 October, 1924.)

Actions—Carriers—Railroads—Negligence—Damages—Parties—Consignor and Consignee—Title.

While ordinarily the title to a shipment by common carrier by rail, on an open bill of lading, is in the consignee, nothing else appearing thereon, the contrary may be shown by the evidence; and where the consignee refuses the shipment for damages, the consignor is the party aggrieved and may maintain his action against the carrier upon the ground that the latter's actionable negligence caused the damage to the shipment.

APPEAL by defendant from *Daniels, J.,* at June Term, 1924, of CARTERET.

Civil action to recover damages for an alleged negligent injury to a carload of cabbages shipped from Morehead City to Pittsburgh, Pa.

Plaintiff sold to Andrews Brothers Company of Pittsburgh, Pa., for an agreed price per crate, f. o. b. Morehead City, a carload of cabbages, amounting to $479.50. The cabbages were to be transported in a refrigerator car and delivered to the order of the consignee. They were so damaged in transit as to render them unmerchantable, and for this reason the consignee refused to accept them when they arrived at destination. The Railroad Company sold the cabbages for $94.50 and applied the amount on freight charges.

Plaintiff brings this action to recover the value of the shipment, alleging that the damage resulting from an excess quantity of cabbages in the car, loaded under instructions of the defendant's agent, and from a failure to keep the car properly iced.

Upon denial of liability and issues joined, there was a verdict and judgment for plaintiff, from which defendant appeals, assigning errors.

Luther Hamilton for plaintiff.
Moore & Dunn and Julius F. Duncan for defendant.

STACY, J. Defendant's chief exception, as stressed on the argument and in its brief, is the one addressed to the refusal of the court to grant 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, upon the ground that the consignee of said shipment of cabbages, and not the plaintiff, is the real party in interest and alone entitled to maintain an action for its loss or damage.

Speaking to this question in the recent case of *Anderson v. Express Co.*, 187 N. C., p. 173, *Adams, J.*, epitomizing the decisions on the subject in a concurring opinion, said:

"When goods are delivered to a common carrier for transportation on an open bill of lading, the presumption is that the title to the goods passes to the consignee. In such case, if there is no restrictive condition, he, and not the consignor, is the aggrieved party, in whose name a suit for loss or damage must be brought. (Citing authorities.) But it is open to the consignor to show his right to institute and maintain the action. He may sue if title is retained, or if the goods are to be sold for his benefit, or if he has contracted to deliver the goods to the consignee, or if title is to pass only when the goods are received, or if the consignee is to inspect the goods before the purchase price is payable, or if a draft attached to a bill of lading is not paid by the consignee, or if the goods are rejected and thrown back on the consignor"; citing a number of authorities.

To like effect is the language of the present *Chief Justice* in *Buggy Corp. v. R. R.*, 152 N. C., p. 122, quoting with approval from *R. R. v. Guano Co.*, 103 Ga., 590: "Where a consignee of freight refuses to receive goods on account of damages done to them in the hands of the common carrier, and the goods are subsequently thrown back on the hands of the consignor, the latter has a right to bring an action for such damages against the carrier."

It was in evidence, and not denied, such evidence coming from a member of the partnership of Andrews Brothers Company, that the

shipment of cabbages here in question was rejected by the consignee and thrown back on the hands of the consignor, hence the motion to nonsuit, upon the ground stated, was properly overruled. *Anderson v. Express Co., supra.*

The remaining exceptions call for no extended discussion. The case seems to have been tried in substantial conformity to the law bearing on the facts, and we have discovered no ruling or action on the part of the trial court which would warrant a reversal or an order for another hearing. The verdict and judgment will be upheld.

No error.

D. L. NEWMAN v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 8 October, 1924.)

1. Carriers—Railroads—Negligence—Rates—Classification—Bills of Lading—Contracts.

Where a railroad company, with the knowledge of its agent for the purpose, knowingly accepted leaf tobacco arranged on sticks along with a shipment of household goods, and issued a bill of lading therefor as a shipment of household goods at a lower freight rate than the classification on leaf tobacco: *Held*, a bill of lading is not an essential to a valid shipment and the liability of the carrier may attach on a shipment by parol; and the carrier was responsible in damages to the tobacco caused by its reloading and shipment *en route* on a leaky car which caused damage to the tobacco.

2. Same—Waiver—Interstate Commerce Commission.

Where the railroad agent knowingly receives a carload shipment of household goods and leaf tobacco from the consignor, and issues a bill of lading for household goods at a lower classification rate: *Held*, the provision in the bill of lading, approved by the Interstate Commerce Commission, requiring that the tobacco be shipped in a certain manner of packing, was inserted for the benefit of the carrier, which was waived by the carrier's agent, and was properly deducted from the amount of the consignor's damages in his action, caused to the tobacco by its negligence, there being no element of fraud on the plaintiff's part. And the consignor being in no willful default, the only penalty to be enforced will be the difference between the freight rate charged and that fixed by law for the classification, and where this has been properly allowed for in the verdict of the jury, no reversible error will appear on appeal.

CIVIL ACTION, tried before *Lyon, J.*, and a jury, at May Special Term, 1924, of VANCE.

The action is to recover damages to goods and tobacco shipped by plaintiff with defendant as common carrier under contract from Brick-

stone, Ga., to Henderson, N. C., in November, 1920. The evidence of plaintiff pertinent to the questions presented is as follows:

"D. L. Newman, the plaintiff, being duly sworn, testified as follows:

"I live in Henderson now and have lived here since the fall of 1920. I moved here in the fall of 1920 from Brickstone, Ga. There was no agent at Brickstone, Ga., so I went to the agent at Jones, Ga., and told him I wanted to ship to North Carolina my farming implements, potatoes, tobacco, household goods, mules and wagons. I told him that I was trying to sell my mules and wagon in Georgia, but if I could not sell them I would want a car to ship them here. The agent gave me rates both ways, with and without the mules. I sold the mules and wagons, so I loaded household goods, tobacco, potatoes, farming implements and the like in this car. At Brickstone the local train goes down one way one day and comes back the next. I flagged the train but the conductor did not see me, and I could not get him to have me the bill of lading. I went to Jones, Ga., a few miles away, and the agent gave me a bill of lading. He did not ask me what was in the car, but asked me was it loaded, and I told him yes, and that I had put the seal on the car. He wrote the bill of lading for carload of household furnishings, and I thought it was all right until I received the goods. The agent had given me two rates, and he gave me the lowest rate on the car because I had sold the mules and they were not shipped in the car. The agent lived at Jones, Ga.

"I told the agent at Jones Station I was going to put tobacco in the car. I filed a claim for 1,710 pounds of tobacco. I packed the tobacco in the car myself. I filed a claim for furniture amounting to $42.75. The railroad company never has offered to pay my claim for damage to the furniture.

"When my goods arrived in Henderson, it was not in the same car that I had shipped it in. My brother told me the stuff had come, and I told him he was mistaken because the number on the car was not the number called for in my bill of lading. I found that it was my goods, and there was a place broken out of the door of the car about six inches wide. I looked in the car and saw there was some tobacco tumbled in. I came to the agent here and he said it was my stuff. It was in such a mixed up condition I called Mr. Smith before I moved a thing, and he went up and looked at the car, and said to go ahead and unload it. Mr. Smith was a representative of the railroad here in Henderson. I came back and saw Captain Elmore. He looked at the bill of lading, and said it did not call for any tobacco, and said that would have to come through the warehouse and be weighed. I told him I was going to send the tobacco to the High Price Warehouse, and if he said so I would unload it and carry it to the High Price Warehouse.

"There came a rain while the car was on the way, and it blew in the car and wet the tobacco all through. The car I originally loaded the goods in broke down, and they unloaded every bit of my stuff and put it in this car that had the door broken. They did not pack the goods anything like I had it packed.

"The tobacco was not at all in the shape in which I had packed it. I had put some bags under the tobacco, and covered it up good like we do tobacco on the market here. The tobacco was already stripped and hung on sticks like we bring it to market here. When they reloaded the car they put the plows and other things in first and put the tobacco in last, just threw it in.

"I did not weigh the tobacco before it left Georgia. The 1,710 pounds is just what I carried to the High Price Warehouse. I think the tobacco was damaged 12 or 15 cents per pound. I had been raising tobacco ever since I left home. I went to Georgia to raise tobacco. I showed the tobacco to Mr. W. M. Ellis. He had the tobacco graded, and put it on the warehouse floor and tried to sell it for me. I say positively that at the time I went to the agent at Jones, Ga., in regard to this shipment, I told him I was going to load tobacco in the car.

"I say the man I lived with in Georgia shipped his part of this tobacco to Danville, Va., and it brought 18 cents a pound. There was no tobacco market at Brickstone at all. The year before I shipped tobacco to Henderson and sold with Mr. Taylor. I loaded household goods, tobacco, etc., in the car, or had it done. The railroad agent had nothing to do with the loading of the car. I sealed the car. The tobacco lay at the warehouse for nearly a year, and then I sold it to my brother for one cent a pound for manure."

"W. M. Ellis, witness for plaintiff, being duly sworn, testified as follows:

"I remember the tobacco that Mr. Newman shipped to himself here in Henderson sometime in 1920. I examined the tobacco that came in the car. I have had considerable experience with tobacco—have been raising it all my life, and have been in the warehouse business for five or six years. We were unable to sell it for anything. We graded it out and put it on the warehouse floor, and could not get any bid at all. I estimate that it would have averaged from fifteen to twenty cents a pound. The tobacco was graded in different lots like we usually grade it here. This particular tobacco belonging to Mr. Newman had been graded, and tied up nicely, just like we do the tobacco here, and had been hung on sticks like we fix it here for market. As to the condition of the tobacco, it was molded through and through, practically ruined. I cannot undertake to say whether that occurred while with the railroad or in some other way."

I. D. Smith, witness for plaintiff, being duly sworn, testified as follows:

"I am working for the Seaboard Air Line Railway Company. I remember seeing the shipment of goods in question. I saw the goods when they arrived and before they were unloaded. I saw the tobacco—it was not in a pile. The first thing I saw in the car was the tobacco. It was not in a pile or bulk, but scattered over the car. I could not say whether any of the furniture was broken. I remember seeing what was in the car—a lot of farming tools and household goods and the tobacco. It was a general mixture, and about the only thing I noticed was the tobacco that I remember. The tobacco was on sticks, tied in bundles and put on sticks. The tobacco was not packed down in a bulk nor crated when I saw it. I have nothing to do with the classification or tariff. I handle the claims."

Plaintiff also introduced a bill of lading of defendant company of date 18 November, 1920 for one carload of household goods, 12,000 pounds. Relative value 10 per cent. Consigned to plaintiff at Henderson, N. C. Freight prepaid, $177.80.

Defendant offers classification for tobacco and household goods as follows, and it being agreed that it was the classification in force at the time and filed with the Interstate Commerce Commission:

"Consolidated Freight Classification No. 1, page 391, item 21, leaf tobacco must be in bags, bundles or crates less than carload, and bags, bales, bundles or crates and in barrels, boxes or hogsheads in mixed carloads.

"Classification for household goods, page 222, item 14.—Household goods, value declared in writing by the writer; agreed upon in writing as to the released value of the property in accordance with the following: See notes 1, 2 and 3. Note No. 2.—Ratings on household goods apply only on second-hand furniture or furnishings for residences, with not to exceed one piano, but would not apply on articles the acceptance of which is prohibited by Rule 3, nor on any goods shipped for sale or speculation."

At close of plaintiff's evidence and of entire evidence there was motion for judgment of nonsuit. Motion overruled and exception noted. On denial of liability, issues were submitted and verdict rendered, set forth in the judgment which is as follows:

"This cause coming on to be heard before the undersigned Judge Superior Court at the Special May Term for Vance County, North Carolina, the following issues being found as set opposite, to wit:

"Was the plaintiff damaged by the negligence of the defendant? Answer: Yes.

"What damage, if any, was done to the furniture? Answer: $30.00.

"What damage, if any, was done to the tobacco? Answer: $205.00.

"It is therefore, on motion of J. P. Zollicoffer, attorney, ordered, adjudged and decreed that the plaintiff in this action recover from the defendant the sum of two hundred and thirty-five dollars, together with costs of this action, to be taxed by the court.

"C. C. LYON, *Judge Presiding.*"

Defendant appealed, assigning errors.

J. P. Zollicoffer for plaintiff.

J. H. Bridgers and Murray Allen for defendant.

HOKE, C. J. It appears from the evidence that plaintiff's tobacco, shipped with defendant as common carrier, was practically ruined in the course of shipment by negligence of defendant company. Not only is this the permissible inference from the respective conditions of the tobacco when received by the company at the point of shipment and its delivery at the place of destination, but there is direct evidence that same, put in a defective car originally, was transferred by the company in the course of shipment and placed in a car having a hole in the door, by reason of which it was rained upon and thereby so injured as to render it practically valueless. These positions have been established by the verdict and damages assessed and judgment rendered for the injury, less the additional freight for a tobacco shipment, conceded to be $25.00. And on the record we find no valid reason for disturbing the results of the trial.

There is nothing to contradict the plaintiff's statement that the agent who made out the bill of lading was informed that the tobacco was to be included in the shipment, and on the facts of this record, if he chose to describe the entire shipment as household goods, such an act should not be allowed to injuriously affect the plaintiff except to render him liable for the additional freight due for the actual character of the shipment, and this, under his Honor's charge, has been accounted for to defendant.

Even if the term household goods could not be extended to include the tobacco, it is fully recognized that a bill of lading is not an essential to a valid shipment and the liability of a common carrier may attach on a shipment by parol. *Bryan v. R. R.*, 174 N. C., p. 177; *Davis v. R. R.*, 172 N. C., p. 209; *Smith v. R. R.*, 163 N. C., p. 143; *Porter v. R. R.*, 132 N. C., p. 71; *Berry v. R. R.*, 122 N. C., p. 1002.

It is insisted further for defendant that its motion for nonsuit should have been allowed because the shipment is in violation of the classifications introduced in evidence and requiring that leaf tobacco be shipped

in bags, bales, bundles, etc. It is not at all clear that this tobacco when shipped was not in the shape referred to. The witness, I. D. Smith, an employee of the company testified that the tobacco was tied in bundles and put on sticks. But if the contrary be conceded, we do not understand that this classification is inhibitive in its terms or purpose or that it is to be regarded as an essential to a valid shipment. So far as discoverable from this record, it seems to be a provision inserted for the protection of the company and not directly bearing on the administrative regulations established primarily to prevent discrimination among shippers, and this being true, it could be waived by the company and should be considered waived on the facts as presented. And even if otherwise considered, the shipper being in no wilful default the only penalty enforceable would be the collection of the additional freight required by the schedules, and this, as we have seen, has been allowed for in the verdict.

There is nothing in the disposition of the case that in any way conflicts with our decision in *Morris v. Express Co.*, 183 N. C., p. 144, cited for appellant. That was a case to some extent involving the rights of a shipper and carrier in reference to the contents of a closed package, and representations concerning it permitting the inference of fraud. But no such question is presented here where it is not denied that the company and its agent were fully informed of what the shipper intended to place in the car.

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

No error.

D. A. GASTER v. D. J. THOMAS, ADMINISTRATOR OF ELIZABETH ISABELLA THOMAS, DECEASED.

(Filed 8 October, 1924.)

1. Judgments—Motion to Set Aside—Courts—Jurisdiction—Consent.

While ordinarily the judge may not hear a motion to set aside a judgment outside of the county wherein the action was brought, this may be done by him with the consent of the parties.

2. Same—Appeal and Error—Findings of Fact.

On appeal, the findings of fact by the Superior Court judge on a motion to set aside a judgment by default, the findings of the Superior Court judge upon supporting evidence are conclusive.

3. Same—Statutes—Excusable Neglect.

Where it appears upon defendant's motion to set aside a judgment by default, C. S., 600, that the same was regularly calendared for trial, the

defendant had notice thereof and was afforded full opportunity to file his answer, but that his attorney had failed to do so, and that the judgment was accordingly rendered, he has not shown such excusable neglect as will entitle him to have the judgment set aside on his motion under the provisions of the statute.

APPEAL by defendant from *Midyette, J.*, at June Term, 1924, of LEE.

A. A. F. Seawell and Gavin & Jackson for plaintiff.
W. R. Clegg and H. F. Seawell for defendant.

CLARKSON, J. The court below found the following facts:

This cause coming on to be heard upon an appeal from the judgment of the clerk of the Superior Court, upon the motion of the defendant to set aside the judgment by default before the clerk and the verdict and judgment upon the inquiry of damages rendered before his Honor, J. Loyd Horton, judge, and a jury, at the May Term, 1923, of Lee Superior Court, and plaintiff through his counsel, having entered a special appearance and moved to dismiss the said appeal for the reason that the clerk did not have jurisdiction and was without authority to hear a motion to set aside a verdict and judgment rendered in term time, and for the further reason that the said defendant failed to perfect his case on appeal, in that said motion was passed upon and appeal taken on 24 November, 1923, and nothing further done in the premises and no effort made by the appellant to perfect said case, or to have the case made up by the clerk and sent to this Court on appeal, until the same was brought up for hearing at the May Term, 1924, of the Lee Superior Court.

After hearing the said motion, the same was overruled, to which plaintiff excepted, and by consent of the parties, plaintiff was permitted to file affidavits and to argue the case on its merits, without prejudice to his right on his motion to dismiss the appeal.

That the hearing of the said motion was not completed for the reason that the defendant desired to file counter affidavits to the affidavits of E. L. Gavin and D. E. McIver, filed by plaintiff, and this motion was continued, by consent of the parties, for further hearing at Lillington, Harnett County, on 20 May, 1924, and on 20 May, 1924, upon request of counsel for defendant, the same was continued to be heard at Goldsboro, Wayne County, on 30 May, 1924, and at said date said hearing was continued to be heard at Goldsboro, N. C., on Wednesday, 4 June, 1924.

After hearing the evidence of plaintiff and defendant, submitted by affidavits, and the argument of counsel for plaintiff and defendant, the Court finds the following facts from the evidence offered.

1. That summons was issued on 9 August, 1922, and personally served on the defendant on 10 August 1922, and returnable 28 August, 1922.

2. That on 28 August, 1922, plaintiff filed a duly verified complaint.

3. That on the first Monday in November, 1922, the defendant having failed to answer or otherwise plead to the complaint, or to ask for time in which to do so, a judgment by default and inquiry, as appears of record was rendered by the clerk of the Superior Court.

4. That at the May Term, 1923, of Lee County Superior Court, said cause was duly calendared, and the calendar published in the newspapers of Lee County, and the same came on for hearing before the judge and jury upon an inquiry as to the damage, and the jury having answered the issues, a judgment was duly signed thereupon, as appears of record.

5. That on 28 August, 1922, the defendant, who is a resident of Moore County, employed W. R. Clegg, an attorney of Carthage, N. C., and practicing in the courts of Lee County, who claimed that they appeared before the clerk on the return day of said summons, to wit, 28 August, 1922, and at that time, which was in the forenoon, no complaint was then on file.

6. The defendant in this affidavit avers that both he and his counsel, in neglecting to file an answer to the complaint, relied solely upon the promise of the clerk of the Superior Court to notify them when the complaint was filed, and the court finds as a fact that if such promise was made by the said clerk, that they did so rely.

7. That if the clerk had made the promise to the defendant and his counsel, to notify them when the complaint was filed, this did not relieve the defendant of his duty to exercise ordinary care in the defense of said action, and that the defendant or his counsel never, at any time after the 28th day of August, 1922, made any effort or inquiry of the clerk or any one else in his office to ascertain whether the complaint had been filed, although defendant and his counsel were both in the clerk's office several times after the institution of said action and the filing of the complaint therein, and before the default judgment was rendered, and could or should have, with the exercise of ordinary care, ascertained that the complaint had been filed.

8. That long prior to the institution of this action, plaintiff filed with the defendant an itemized account showing in detail the amount claimed by the plaintiff, and the defendant was well aware of the plaintiff's claim and demand.

9. That the defendant and his counsel were in the office of the clerk of Superior Court on the 12th day of September, 1922, on a motion to set aside a sale in a partition proceeding wherein this plaintiff was defendant and this defendant was plaintiff, and defendant and his

counsel were again in the office of the clerk of the said court on 6 October, 1922, at which time defendant's counsel and plaintiff's counsel signed a consent order for a resale of the said land, and on numerous occasions subsequent to said date, the defendant and his counsel were in said clerk's office, and at no time did they make inquiry or any effort whatsoever to ascertain whether or not a complaint had been filed in this cause.

10. That at the hearing of the motion on 6 October, 1922, at which time the consent order was made in the said special proceeding, plaintiff's counsel then and there told defendant and his counsel of this action, and that the complaint had been filed, and warned them that he was going to take judgment unless they filed an answer, and said W. R. Clegg, in the presence of the defendant, then and there stated that he would look after that at the proper time.

11. That from the time of the filing of the complaint on 28 August, 1922, until the time of making the motion to set aside the judgment in this cause, on 6 November, 1923, neither the defendant nor his counsel made any effort to file an answer, nor asked for time in which to do so, nor made any effort whatsoever to defend action. In the meantime, the regular March term of Lee Superior Court was held, beginning on the fourth Monday in March and continuing for two weeks.

12. That the defendant has not exercised such care and diligence as an ordinary man gives to his important business, and his negligence, as well as that of his attorney in this case, is inexcusable.

13. That for the purpose of this motion, the court finds that the defendant has a meritorious defense.

Upon the foregoing findings of fact the court finds and so holds that the judgment entered on 6 November, 1922, and the verdict of the jury and the judgment of the court thereupon, at the May, 1923, term of Lee Superior Court, were not taken against the defendant through his mistake, inadvertence, surprise and excusable neglect, and therefore denies the motion of the defendant to set the same aside.

Done at Goldsboro, 4 June, 1924.

It is well settled in this State that the court below has no jurisdiction to hear and determine a motion to set aside a verdict and judgment of the Superior Court except in the county where the judgment was rendered, unless by consent, *Godwin v. Monds,* 101 N. C., p. 354; *Cahoon v. Brinkley,* 176 N. C., p. 5.

The only serious question presented is to the court below hearing the motion out of the county.

"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." *Clegg v. Clegg,* 186 N. C., p. 34 and cases cited.

There was competent evidence for the court below to find that the case was continued by consent to be heard out of Lee County, and at Lillington, Harnett County, on 20 May, 1924.

From the correspondence in the record it appears that the court below gave defendant's counsel ample notice as to the time of the hearing when it was continued to be heard at Goldsboro, both on 30 May and 4 June, 1924. There is no dispute as to this. Having consented for the motion to be heard out of Lee County, and the defendant's counsel having had abundant notice to be present at the hearing in Goldsboro, we think the hearing by the court below on 4 June, 1924, at Goldsboro, is not prejudicial or reversible error, and defendant's assignment of error cannot be sustained.

The motion in the cause to set aside the verdict and judgment is based on C. S., 600, which is as follows:

"The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

The findings of facts in this case do not show a case of mistake, inadvertence, surprise, or excusable neglect.

This Court has held that "When a man has a case in court, the best thing he can do is to attend it." *Pepper v. Clegg,* 132 N. C., 316. It has also been held that a person having a suit in court "shall give it that amount of attention which a man of ordinary prudence usually gives to his important business." *Sluder v. Rollins,* 76 N. C., p. 272; *Roberts v. Allman,* 106 N. C., 391; *School v. Peirce,* 163 N. C., p. 427; *Cahoon v. Brinkley, supra.*

In *School v. Peirce, supra,* p. 428, it was said: "It early grew into one of the cardinal maxims of the law, that it will assist those who are diligent and not those who sleep on their rights, and the law will not take from him who has been thus diligent, what he has secured thereby, and turn it over to him who has lost by his inaction. Broom's Legal Maxims (6 Am. Ed.), star page 857."

In *McLeod v. Gooch,* 162 N. C., p. 126, it was said: "A party has no right to abandon all active prosecution of his case simply because he has retained counsel to represent him in the court."

In *Pierce v. Eller,* 167 N. C., p. 675, it is said: "It has been held repeatedly by this Court that persons of sound mind who are served

with process must be active and diligent, and that if they fail to give litigation the attention which a man of ordinary prudence usually gives to his important business, they can have no relief under the statute."

From a careful reading of the record, there was competent evidence for the court below to find the facts as stated. We are bound by the findings. The facts are full to show inexcusable neglect and it is needless for us to comment on them. It may not be amiss to say that litigants and attorneys both must be vigilant and diligent and use ordinary prudence to keep up with the orderly course of the court procedure. "And right and justice administered without sale, denial or delay." (Part of Art. I, sec. 35, Const. of N. C.)

The assignment of error cannot be sustained. The judgment of the court below is

Affirmed.

VIRGINIA-CAROLINA POWER COMPANY v. JOB TAYLOR.

(Filed 8 October, 1924.)

Partition — Title — Chain of Title—Evidence—Statutes—Instructions—Appeal and Error.

Where proceedings for partition of lands covered by a nonnavigable stream of water have been made under the provisions of chapter 85, Revised Statutes 1837, before amended, and applicable at the time, it was by the terms of the statute binding upon the parties, and where a party litigant has shown the land to have been embraced under the partition proceedings, it is error for the trial court to hold or instruct the jury that the partition proceedings could not be considered as a link in the chain of claimant's title unless the court had confirmed the report of the commissioners, or the parties to these proceedings had confirmed them by their subsequent conduct that would amount to their ratification.

APPEAL by plaintiff from *Daniels, J.,* at Spring Term, 1924, of NORTHAMPTON.

The plaintiff seeks to recover of the defendant a tract of land situate in Northampton County described in the complaint by metes and bounds upon its allegation that it is the owner and entitled to the possession of the said tract of land; this allegation is denied by the defendant.

The first issue submitted to the jury, with the answer thereto, is as follows: "Is the plaintiff the owner and entitled to the possession of the tract of land described in the complaint? Answer: 'No.'"

Under the instructions of the Court the jury did not answer the other issues submitted. All the exceptions noted during the trial upon which plaintiff bases its assignments of error are to the evidence and instructions applicable to the first issue. Plaintiff contends that the

evidence tends to show that it is the owner of the land described in the complaint by a chain of title connecting it with a grant from the State of North Carolina to William Eaton for a tract of land situate on Roanoke River in Northampton County containing 226 acres described in the said grant by metes and bounds. This grant was recorded in Book 8 at page 248, Northampton Registry on 10 December, 1790.

Plaintiff offered as a link in his chain of title the original petition, order for partition, report of commissioners, and order with respect to the said report, in a partition proceeding between the devisees of W. W. Wilkins and William Miles filed at June Term, 1847 of the Court of Pleas and Quarter Sessions of Northampton County. The petitioners, W. W. Wilkins, Edmund Wilkins, James C. Bruce and wife, William E. Broadnax and Sallie I. Broadnax and William Miles showed to the court that they are tenants in common of certain lands covered by water in Eaton's Falls in Roanoke River described in the petition by metes and bounds containing 226 acres; that William Miles is entitled to one-half of the said lands and that the other petitioners are entitled to the remaining one-half as tenants in common; all of the petitioners pray that William Miles' one-half of the said land be allotted to him in severalty and that the other one-half be allotted to the other petitioners in common. Commissioners were appointed by the court pursuant to said petition and at September Term, 1847, of the said court the said commissioners reported that pursuant to the order of the court they had allotted to William Miles all of that part of the said land lying to the north of a line defined and described in the said report and that they had allotted to the other petitioners as tenants in common, all of the said land lying to the south of said line. Thereupon an order was made in words as follows:

"NORTHAMPTON COUNTY—September Term, 1847.

This division of land was returned in open court by the commissioners who made it and ordered that the same, together with the plat annexed, be certified and registered. JOHN B. ODOM, *Teste.*

Registered 6 September, 1847.

SAMUEL CALVERT, *Register.*"

This partition proceeding is recorded in Book 32 at page 248, Northampton County Registry. The plaintiff herein claims under the Wilkins devisees, and contends that the land allotted to them is the same land as that described in the complaint.

The defendant objected to the introduction of the said partition proceedings on the ground that the report of the commissioners was not

confirmed. The proceedings, however, was admitted by his Honor who reserved his ruling upon the defendant's objection. Evidence was subsequently offered which the plaintiff contended established ratification of the said proceeding by William Miles and those under whom he claimed, including the defendant. The defendant, however, contended that upon all the evidence the jury should find that there was no ratification of the said partition.

In his charge to the jury his Honor instructed them as follows: "I want to say to you, however, gentlemen of the jury, that the report of the commissioners in the division of the Wilkins lands between the Wilkins heirs and William Miles, has never been confirmed so far as the record discloses and therefore it would not be a link in the chain of title of plaintiff unless the evidence should satisfy you by its greater weight, that it was acquiesced in by William Miles and his successors in title."

To this instruction plaintiff excepted and this is plaintiff's exception No. 51.

There were other and further instructions to the jury based upon his Honor's holding that the report of the commissioners had not been confirmed and that the said partition proceeding should be disregarded by the jury unless they should find by the greater weight of the evidence that William Miles and those who claimed under him had ratified the same by acquiescence. To each and all of these instructions the plaintiff excepted and assigned same as errors.

In view of the disposition of this appeal it becomes unnecessary to set out the other exceptions and assignments of error made by the plaintiff.

George C. Green for plaintiff, appellant.

Travis & Travis, Daniel & Daniel and Burgwyn & Norfleet for defendant, appellee.

CONNOR, J. The controversy between the parties to this action involves the title to a parcel or tract of land in Northampton County over which the Roanoke River, a nonnavigable stream, flows, the said land lying and being in the bed of said river.

The plaintiff offered evidence which he contends established a connected chain of title beginning with a grant by the State of North Carolina in 1790 and continued to the deed of its grantor. As one of the links in such chain of title he offered the record of a special proceeding for partition in the Court of Pleas and Quarter Sessions of Northampton County begun at the June Term, 1847 and concluded at the September Term, 1847, of said court. His Honor was of the opinion

and so instructed the jury, that the said proceeding was not valid as a link in the chain of title for the reason that the report of the commissioners had not been confirmed.

This proceeding was conducted in accordance with the provisions of chapter 85 of the Revised Statutes of North Carolina 1837. Section 1 of said chapter, after providing for the appointment of the commissioners to make the partition in accordance with the prayer of the petition, provides further: "The said commissioners, or a majority of them, are required as soon as they can to make a return of their proceeding and appropriations under their hands and seals, ascertaining with precision the different tracts or parcels of land, lots or houses with actual surveys of the same when necessary, to the court by which they were appointed, which return and appropriation shall be certified by the clerk and enrolled in his office and registered in the office of the county where such lands, lots or houses respectively lie; and such return and appropriation shall be binding and valid among and between the claimants, their heirs and assigns forever."

This statute which was applicable to the proceeding had in 1847, was not called to the attention of his Honor; we are of the opinion that his Honor was in error in holding that the said proceeding was not valid for the reason that there was no formal order or decree confirming the report of the commissioners.

An inspection of the proceeding shows that the report of the commissioners appointed in this proceeding was returned into open court, and that the said return, together with the plat annexed, was certified by the clerk and enrolled in accordance with the provisions of the statute then in force. By virtue of such statute, such return and appropriation when so certified and registered, became "binding and valid among and between the petitioners, their heirs and assigns forever."

It is interesting to note that this section 1 of chapter 85, as the same appears in the Revised Code of North Carolina 1854, was amended by requiring that the report of the commissioners should be *confirmed* and then enrolled and certified in accordance with the provisions of the foregoing section. See C. S., 3230, 1.

The plaintiff's assignment of error for that his Honor held that the report of the commissioners had not been confirmed and that therefore the proceeding was not valid as a link in plaintiff's chain of title, is sustained and therefore there must be a

New trial.

W. P. ROSE v. L. F. DAVIS AND WIFE, CLYDE N. DAVIS.

(Filed 8 October, 1924.)

1. Liens—Statutes—Subcontractors—Material—Prepayment by Owner to Contractor.

The liens given the furnisher of material on the building of the owner to the contractor, etc., are strictly statutory; and no lien can be acquired therefor unless notice has been given, as the statute requires, while the owner still owes the contractor a balance upon the contract to be prorated among those who have a like claim; nor is it contemplated or provided by the statute that this will be altered by reason of the owner paying the contractor by agreement in advance of his work. C. S., 2438.

2. Same—Married Women—Husband and Wife.

The liens given to those furnishing material to the contractor and used in the construction of houses against the owner, are now applicable to married women.

APPEAL by plaintiff from *Horton, J.*, at February Term, 1924, of LENOIR.

Civil action for debt against L. F. Davis and to enforce a lien upon his wife's property for materials furnished and used in the erection of a building thereon.

Judgment was entered against L. F. Davis and this is not questioned, but no lien was allowed upon his wife's property, and from this part of the judgment, plaintiff appeals.

Rouse & Rouse and Kenneth C. Royall for plaintiff.
Sutton & Greene for defendant, Clyde N. Davis.

STACY, J. The pertinent facts, established by the verdict or not disputed, are as follows:

1. During the year 1920, the *feme* defendant, Mrs. Clyde N. Davis, and one Samuel Abbott were the owners and tenants in common of a lot of land in the town of LaGrange, N. C.

2. As owners they entered into a contract with L. F. Davis, husband of the *feme* defendant, and a contractor by trade, to erect a theatre building on said lot at and for the agreed price of $15,000.00, paying for the same in advance.

3. Some of the materials used in the construction of this building were purchased from the plaintiff by the defendant, L. F. Davis.

4. Upon the completion of the theatre, Samuel Abbott sold his interest in the building and lot to Mrs. Clyde N. Davis.

5. Shortly thereafter, the building was destroyed by fire, and the plaintiff attempted to file a lien against the lot and attached the

insurance money paid as a result of the loss, alleging a balance of $3,255.83 due him for materials furnished and used by the said L. F. Davis in the erection of the building.

6. These materials were sold to L. F. Davis on open account and not to the owners of the property. The plaintiff himself testified: "I sold these materials to Mr. Davis on open account, and never sold any of them to Mrs. Davis."

7. No notice was given to Mrs. Clyde N. Davis of plaintiff's claim until after the building was destroyed by fire. The contractor had been paid in full before the building was erected.

The appeal presents the question as to whether, under the facts stated, plaintiff is entitled to enforce a lien against the property for materials furnished by him and used by the contractor in the building of said theatre. We think not. Such was the direct holding in *Payne v. Flack*, 152 N. C., 600.

This conclusion rests, not upon the fact that the property in question is owned by a married woman, for liens may now be acquired against the property of married women (C. S., 2434), but it is bottomed on the circumstance of no notice to the owner before settlement with the contractor. C. S., 2438. Plaintiff seeks to meet this position by saying that, as the contractor was paid in advance, he had no opportunity of giving any notice to the owner prior to settlement with the contractor, and hence it should be held that none was necessary. In answer to this, it is sufficient to say that liens are statutory, and the statute gives no lien to a subcontractor or laborer in such a case. *Building Supplies Co. v. Hospital Co.*, 176 N. C., 87.

C. S., 2437, in terms provides that all subcontractors and laborers who are employed to furnish, or who do furnish, labor or material for the building, repairing or altering of any house or other improvement on real estate, shall have a lien on said house and real estate for the amount of such labor done or material furnished, when notice thereof shall be given as required by law; "but the sum total of all the liens due subcontractors and materialmen shall not exceed the amount due the original contractor at the time of notice given." *Supply Co. v. Eastern Star Co.*, 163 N. C., 513.

The policy of the law is to protect subcontractors and laborers against loss for labor done and material furnished in building, repairing or altering any house or other improvement on real estate, to the extent of the balance due the original contractor at the time of notice to the owner of claims therefor, but it is not provided that the owner shall be liable in excess of the contract price, unless he continue to pay after notice of claim from the subcontractor or laborer, and then only to the extent of such payments after notice. "After such notice is given, no

payment to the contractor shall be a credit on or discharge of the lien herein provided." C. S., 2438.

Where the original contractor has been paid in advance, or when the owner has settled with him in full prior to notice of any claim from a laborer or materialman for work done or material furnished and not paid for, there is no provision in the statute whereby a subcontractor may acquire a lien against the property, or sue the owner for the value of such claim. And while this may work an apparent hardship in some cases, it would doubtless prove more hurtful in general if the law were otherwise. *Hardware Co. v. Graded Schools,* 150 N. C., 680. Objections readily suggest themselves. Suppose, for example, a contractor wanted to pay a debt by building a house for his creditor. Would the law deny him this privilege? Liens are given to subcontractors and those who furnish labor, materials and supplies, to the end that they may force collection from their debtor, the original contractor, and not for the purpose of rendering the owner primarily liable for such claims, except where proper notice has been given before settlement with the contractor. *Mfg. Co. v. Andrews,* 165 N. C., 285.

The general principles underlying the statutes on the subject, and the reasons for their embodiment into legislative enactments, are discussed at length by *Allen, J.,* in *Ingold v. Hickory,* 178 N. C., 614, and *Foundry Co. v. Aluminum Co.,* 172 N. C., 704. We are content to rest our decision upon the law as stated in these cases. It would only be a work of supererogation to repeat in substance here what has been so recently said in these decisions.

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.

STATE v. W. A. HARTSFIELD.

(Filed 8 October, 1924.)

1. Appeal and Error — New Trials — Motions — Newly Discovered Evidence—Procedure.

The Supreme Court, on appeal in criminal cases, will not entertain a motion for a new trial for newly discovered evidence, though it may be entertained in the Superior Court at least during the term at which the case was tried, and allowed, or not, in the discretion of the judge presiding there.

2. Same—Facts Found by the Trial Judge.

The facts found upon the evidence by the trial judge upon a motion for a new trial for newly discovered evidence, are not subject to review on appeal.

3. Same—Criminal Law.

As a matter of right the State cannot introduce depositions as evidence against the prisoner, the constitutional right of the prisoner to confront his accusers including his right of cross-examination in the presence of the jury impaneled to try him.

4. Same—Waiver—Objections and Exceptions.

The prisoner upon his trial for a crime less than a capital offense waives his right to have a State's witness present before the jury impaneled to try his case, by not objecting to the State's introducing depositions of the witness, and this may be done by the prisoner's attorney in the presence of the prisoner during the trial. The distinction between this case and the waiver of the right to a trial by jury drawn by STACY, J.

APPEAL by defendant from *Grady, J.*, at May Criminal Term, 1924, of WAKE.

Criminal prosecution tried upon an indictment charging the defendant (1) with selling or disposing of, for gain, certain spirituous, vinous or malt liquors (C. S., 3367 and 3373), and (2) with having or keeping in his possession, for the purpose of sale, certain spirituous, vinous or malt liquors (C. S., 3379,) contrary to the statutes in such cases made and provided, etc.

From an adverse verdict and sentence of 18 months on the roads, the defendant appeals, assigning errors.

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

Douglass & Douglass and J. R. Hood for defendant.

STACY, J. The defendant, *in limine*, lodged a motion for a new trial upon the ground of newly discovered evidence. It is alleged that the information which the defendant considers vital and important to his defense, came to his attention after the adjournment of the term of court at which the case was tried, and after the appeal was docketed here. *Allen v. Gooding*, 174 N. C., 271. It is the settled rule of practice with us, established by a long and uniform line of decisions, that new trials will not be awarded by this Court in criminal prosecutions for newly discovered evidence. *S. v. Williams*, 185 N. C., p. 664; *S. v. Jenkins*, 182 N. C., 818; *S. v. Lilliston*, 141 N. C., 857, and cases there cited. Such motion may be entertained in the Superior Court, at least during the term at which the case was tried, and allowed or not in the discretion of the judge presiding. *S. v. Trull*, 169 N. C., p. 370; *S. v. Starnes*, 97 N. C., 423. And ordinarily, the action of the trial court and his findings of fact on such motion are not subject to review on appeal. *S. v. Degraff*, 113 N. C., p. 694.

Following the established precedents, defendant's motion for a new trial, based on the ground of newly discovered evidence, must be denied in this Court, as a matter of procedure without passing upon its merits. *S. v. Turner,* 143 N. C., 641; *S. v. Starnes, supra.*

We then come to a consideration of the record.

The defendant's chief assignment of error, emphasized most strongly on the argument and stressed in his brief, is the one addressed to the action of the court in permitting the solicitor to offer in evidence the deposition or affidavit of one of the State's absent witnesses. When the case was called for trial at the September Term, 1923, the defendant moved for a continuance. This was resisted by the solicitor on the ground that George McKeithan, a witness for the State, would be absent from the jurisdiction of the court at the next term; whereupon it was "agreed that his statement might be taken and sworn to before *Calvert, J.,* or the clerk of the court: W. F. Evans, solicitor, representing the State, and W. H. Sawyer representing the defendant."

Defendant calls attention to the fact that while, on the record, this statement seems to have been taken with his consent, or at least with the consent of his counsel, it nowhere appears to have been prepared in pursuance of an agreement on his part that it might be used in evidence against him. But even if such were the agreement, and omitted by inadvertence from the record, defendant further says the agreement, on its face, did not extend beyond the next succeeding term and, therefore, it could not lawfully be used against him several terms thereafter.

There is no statute in North Carolina authorizing the taking of depositions to be used as evidence by the State in criminal prosecutions. This privilege is extended to the defendant in certain cases (C. S., 1812,) but it may not be exercised by the State as a matter of right. With respect to the witnesses offered by the prosecution, the defendant has the right to demand their presence in the courtroom, to confront them with other witnesses, and to subject them to the test of a competent cross-examination where their bearing and demeanor may be observed by the jury. *S. v. Mitchell,* 119 N. C., 784. The defendant may not be required, against his will, to examine the State's witnesses in the absence of the jury. "He is entitled to have the testimony offered against him given under the sanction of an oath, to require the witnesses to speak of their own knowledge, and to be subjected to the test of a competent cross-examination." *S. v. Dixon,* 185 N. C., 727.

Speaking to a similar question in *S. v. Hightower,* 187 N. C., p. 310, it was said: "In all criminal prosecutions the defendant is clothed with a constitutional right of confrontation, and this may not be taken away any more by denying him the right to cross-examine the State's wit-

nesses than by refusing him the right to confront his accusers and witnesses with other testimony. Constitution, Art. I, sec. 11. 'We take it that the word *confront* does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmance of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face'—*Pearson, C. J.*, in *S. v. Thomas*, 64 N. C., 74. And this, of course, includes the right of cross-examination. It is fundamental with us, and expressly vouchsafed in the bill of rights, that no man shall be 'deprived of his life, liberty, or property but by the law of the land.' Const., Art. I, sec. 17."

This rule is as old as the common law itself. It was a fixed custom among the Romans, observed and practiced by them certainly as early as the time of Augustus Caesar. Festus, answering the chief priests and elders of the Jews, when they desired to have judgment against the Apostle Paul, said: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." Acts, 25:16.

But the present defendant is not in position to take advantage of the law which he invokes. Pretermitting the question as to whether the deposition or sworn statement of the witness George McKeithan was taken under a valid agreement with the defendant, whereby it became competent as evidence against him, the fact remains that when it was offered on the trial the defendant interposed no objection to its introduction in evidence before the jury. This was a waiver of his right to have it excluded, and rendered the alleged want of original consent immaterial. 6 R. C. L., 93. It is the general rule, subject to certain exceptions, that a defendant may waive the benefit of a constitutional as well as a statutory provision. Sedgwick Stat. and Const. Law, p. 111. And this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *S. v. Mitchell, supra.*

In this jurisdiction, the more important privilege of being present in person, so as to confront one's accusers on trial for a criminal offense, may, in felonies other than capital, be waived by the defendant himself, but not by his counsel, while in misdemeanors such waiver may be made through counsel with the consent of the court. *S. v. Dry*, 152 N. C., p. 814. "In capital trials, this *right* cannot be waived by the prisoner, but it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial"—*Ruffin, J.*, in *S. v. Jenkins*, 84 N. C., 813. Of course, the prisoner is not required to

be present during the argument of a motion for a new trial and similar motions, for they are not properly matters occurring during the trial. 1 Whart. Cr. Pl. & Pr. (9 ed.), sec. 548; *S. v. Kelly,* 97 N. C., 404. "This Court has repeatedly held that nothing should be done prejudicial to the rights of a person on his trial for a capital felony unless he is actually present; while, on trial for misdemeanors, it is sufficient if the defendant assents through counsel when any order is made or any step taken affecting his rights"—*Avery, J.,* in *S. v. Jacobs,* 107 N. C., 772, citing a number of authorities for the position. For like reason, one who is actually or constructively present at the trial of an indictment against him for an offense of the lower grade, must be deemed to have waived the right when he does not in express terms insist upon the bodily presence in the courtroom of witnesses for the prosecution. *S. v. Mitchell, supra; S. v. Freeze,* 170 N. C., 710.

True it has been held in several criminal cases that where a defendant enters a plea of "not guilty" in the Superior Court, he may not thereafter, without being permitted to change his plea, waive his constitutional right of trial by jury. *S. v. Rogers,* 162 N. C., 656. And this applies to misdemeanors as well as to the more serious offenses. *S. v. Pulliam,* 184 N. C., 681. The reason for such holding is to be found in the language of the Constitution: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal." Const., Art. I, sec. 13.

But these decisions, relating to the defendant's right of trial by jury in criminal prosecutions, are not in conflict with our present holding that the defendant has waived his right to object to the introduction of the evidence offered on the hearing. The distinction is not difficult to perceive. The parties, even by consent, may not change the policy of our law and substitute a new method of trial in criminal prosecutions for that of trial by jury as provided by the organic law; but a right arising during the progress of an orderly proceeding may be waived by express consent, or by failure to insist upon it in apt time. *S. v. Paylor,* 89 N. C., 539.

The remaining exceptions are without special merit. We have found no legal or reversible error in law. The verdict and judgment must be upheld.

No error.

TOWNSHIP ROAD COMMISSION OF GOLD MINE TOWNSHIP v. THE BOARD OF COMMISSIONERS OF FRANKLIN COUNTY.

(Filed 15 October, 1924.)

1. Roads and Highways—Public Roads—Taxation—Statutes—Local Laws.

It was the intent and purpose of C. S., 3718, 3719, 3720 and 3721, that the public roads of a township formed under the provisions of a special statute, with a road commission having charge of its public roads (ch. 84, Public-Local Laws 1919), to provide for the continued maintenance of the roads, and for the payment of interest on bonds issued for their construction, and *held*, under the statute applicable in this case the county commissioners can levy a special tax sufficient for such purposes, the local and the general act on the subject being consistent and their terms not repugnant to each other.

2. Same—Elections—Necessaries—Constitutional Law.

The maintenance of township roads under a board of commissioners duly constituted, and the provision for the payment of interest on bonds issued for the purpose with provision for their retirement at maturity, are necessary expenses not requiring, when permitted by statute, and in the absence of statutory requirement to the contrary, an authorization by the approving vote of the electors of the district.

3. Same—Mandamus.

Where the county commissioners have wrongfully refused to levy a road tax, authorized by statute upon the request of township road commissioners, it is a refusal to perform a ministerial duty, and the remedy by mandamus will lie.

APPLICATION for mandamus, instituted by summons, etc., to compel a tax levy for maintenance of public roads in Gold Mine Township, heard before *Horton, J.*, at August Term, 1924, of FRANKLIN.

There was judgment directing the tax levy as prayed for, and defendant commissioners appealed.

W. H. Ruffin and T. W. Ruffin for plaintiff.

S. A. Newell and James S. Massenburg for defendant.

HOKE, C. J. The county of Franklin seems to have very generally established a township system for the construction and maintenance of its public roads, and in chapter 84, Public-Local Laws 1919, a road commission is appointed for Gold Mine Township, in said county, who are commissioned to take charge of laying out, opening, maintaining or discontinuing the public roads of the township, and to that end are clothed with all the rights and powers now vested in the board of county commissioners or other commission or board for the general supervision of such roads and the construction and repair thereof.

Under the statute, and an amendment thereto, at Special Term, 1920, said township board of commissioners, on approval of the voters, are authorized to issue bonds to the amount of $80,000, which are to constitute a liability of the township, and the county commissioners are directed to levy an annual tax of not less than 25 cents nor more than 75 cents on $100 value on the property of the township, and also a poll tax, for the purpose of providing for the principal and interest on said bonds, and for the construction, improvement and maintenance of the township roads, which said bonds, approved at an election as required, have been issued and sold, and now constitute a municipal liability of the township, as stated.

It further appeared at the hearing that owing to a horizontal reduction of values to the amount of 40 per cent, ordered by the county commissioners under statutory authority, the amount of taxes to be realized by a tax levy of the 75 cents, the maximum allowed by the local statute referred to, will scarcely suffice to pay the interest on the bonds and to provide a sinking fund to pay same at maturity, a duty held to be incumbent on the authorities in *Spitzer v. Comrs., ante,* 30.

Under these conditions the road commissioners for the township applied to the commissioners of the county to levy on the taxable property of the township an additional tax for maintenance of the township roads, under the provisions of an act of the General Assembly, passed in 1919 (chapter 190), appearing in Consolidated Statutes (chapter 70, Article 6). The county board professed a readiness to make the levy if it had the power, but declined the request of the road commission, on the ground that the local law was exclusive in the matter and the board was thereby restricted to a maximum tax levy of 75 cents on the hundred dollars, as heretofore stated.

Upon these the facts chiefly pertinent this Court fully approves the judgment of the lower court directing a tax levy, as follows:

"It is ordered, considered, and adjudged that the defendant board of commissioners levy on all taxable property within said township taxes as follows:

"(1) A tax of 75 cents on the $100 worth of property, to provide annual interest and a sinking fund on the bonds issued for the year 1924, under the provisions of said special act (chapter 84 of the Public-Local Laws of 1919).

"(2) A tax in a sum sufficient to provide a maintenance fund in accordance with the provisions of the road maintenance law (chapter 190, Public Laws 1919, as brought forward in chapter 70 of the Consolidated Statutes), to wit, a sum amounting to $4,000, by a tax-rate levy of 76 cents on the $100 worth of property for the year 1924.

"(3) And that each year thereafter they shall levy and lay in said Gold Mine Township a special tax in a sum sufficient to provide for the payment of interest on $80,000 of road bonds and provide a sinking fund, which at maturity will be adequate to pay off the sum; said levy to be based upon the property valuation from year to year as the same may be ascertained, and the rate of such taxation to be determined by the limits of the special act providing for the issuance of said bonds, or any amendment thereto.

"(4) That they shall each year thereafter at the same time levy in said Gold Mine Township, under the provisions of the said road maintenance act, a tax in a sum sufficient to provide for the maintenance of roads in accordance with the provisions of Article 6 of the Consolidated Statutes and especially sections 3718, 3719 and 3720 thereof."

This county road maintenance tax upon which the judgment is principally based was enacted by the General Assembly of 1919, chapter 190, on matters here pertinent, and appears in chapter 70, Article 6, as follows:

"3718. Where the board of county commissioners of any county in the State has heretofore issued and sold, or may hereafter issue and sell, bonds for the construction or reconstruction of the roads in the county or in any township or road district therein, such board of commissioners is directed to levy annually during the life of the bonds a special tax on all taxable property, both real and personal, sufficient to raise an amount equal to at least three per cent, and not more than five per cent, of the total amount of bonds issued by the county, except as hereinafter specified, for the construction or reconstruction of the public roads, as may be necessary to maintain said roads in a satisfactory manner.

"3719. The money raised by the special tax authorized by the preceding section shall be used for the maintenance of the roads in said county, township or road district in which the tax is collected, and which were or will be built by the revenue derived from the sale of bonds; and shall not be used for any other purpose except as herein provided.

"3720. Taxes for the maintenance of the roads built from the revenue derived from said bonds shall be levied upon the following scale: Where the roads have cost one thousand dollars per mile or less, a tax sufficient to raise not less than fifty dollars per mile per year shall be levied. Where the roads have cost more than one thousand and not more than two thousand dollars per mile, a tax of five per cent shall be levied. When the roads have cost more than two thousand dollars per mile and not more than three thousand dollars per mile, a tax of four per cent shall be levied. When the roads have cost more than three thousand dollars per mile, a tax of three per cent shall be levied.

"3721. When in any county, township or road district the fund raised under this article is thought to be more than sufficient to maintain the roads in proper condition the board of county commissioners are authorized to apply to the State Highway Commission for an investigation to determine the amount needed for the proper maintenance of the roads to be maintained by the county, and upon certification by said State Highway Commission, showing that funds are more than sufficient, a reduction may be made in the levies as above provided, so that only such levies as will provide the amount needed may be made."

A proper persual of these sections, in our opinion, will disclose that not only is there no necessary inconsistency between the general and special acts relating to this subject, but the former is clearly designed to supplement the latter and to provide for the very conditions that are here presented. It would indeed be an improvident course to expend $80,000 of township money to construct a road system and then allow them to run down and practically disappear for lack of an adequate maintenance fund, "and the Legislature, recognizing that such conditions might occur, has wisely provided for dealing with them and thus conserve the roads and save to the residents of the township and others the benefit of their principal investment." Being for a necessary expense, no further vote of the people is required for this maintenance tax. *Hargrave v. Comrs.*, 168 N. C., p. 626; *Trustees v. Webb*, 155 N. C., p. 379. And the amount authorized by the special local legislation being all required for paying the interest on the bonds and providing an adequate sinking fund, our decisions applicable are in full approval of the judgment entered by the Court commanding the additional levy. *Blair v. Comrs.*, 187 N. C., p. 488; *Kinston v. R. R.*, 183 N. C., pp. 14, 20, 21; *Burgin v. Smith*, 151 N. C., p. 561.

The decision in *Bramham's case*, 171 N. C., p. 196, cited and relied upon by appellant, does not conflict with the disposition made of the present appeal. That was a case involving the power of the city of Durham to make a bond issue without a vote of the people of the city. Speaking to the case, in *Kinston v. R. R., supra*, the Court said: "That was a case involving the validity of a bond issue, and it appeared that the public act passed in 1915 authorized a bond issue without the approval of a popular vote. At the same session, 1915, the Legislature passed a special act by which the city of Durham was authorized, if the measure was approved by popular vote, to make a bond issue of $300,000 to construct, pave, and improve the streets and sidewalks of the city of Durham. The city authorities undertook to issue bonds for the purpose indicated without approval of the voters as the private act required, and the proposed measure was enjoined. It will be noted that

both acts were in force and effect, and it was clear that the bond issue permitted to Durham only after a vote was intended to provide for the entire work then contemplated, that it contained a clause repealing any and all laws inconsistent with its provisions, and the Court held that the private act, being still in force and requiring a popular vote, was inconsistent with the proposed issue without such vote and by correct construction it had the effect of exempting the city of Durham from the public statute, assuredly so while the private act was in force and intended to cover, for the present at least, the entire subject." But not so here, where, as shown, the local act authorized a bond issue on approval of the voters, and the proceeds proving insufficient to meet the primary purposes of the local act, a current maintenance tax under the general act is directed to be laid to preserve and maintain the roads.

Referring again to the County Road Act, it appears that when the additional tax is required the commissioners are directed to lay it, and for a definite amount, as indicated in section 3720, to be reduced only after an investigation and finding by the State Highway Commission that the fund to be realized by the required levy is more than sufficient for the purpose. This being a clearly defined ministerial duty imposed upon the commissioners by the statute, mandamus is available to plaintiffs and has been properly allowed. *Spitzer v. Comrs., ante,* p. 30; *Tyrrell v. Holloway,* 182 N. C., p. 64; *Jones v. Comrs.,* 137 N. C., p. 579.

There is no error, and the judgment of the Superior Court is

Affirmed.

STELLA RIGGS v. NORFOLK-SOUTHERN RAILROAD COMPANY.

(Filed 15 October, 1924.)

1. Evidence—Expert Witnesses—Opinion.

The opinion of a physician, testifying in a personal injury case, as to the effect upon the plaintiff of an injury caused by the negligence of defendant, *is held,* upon the evidence in this case to have been properly received upon the trial.

2. Carriers — Railroads — Negligence—Evidence—Questions for Jury—Trials.

While a passenger upon a mixed train is required to use the proper degree of care attending upon travel of this character, it is also the duty of the carrier to exercise that degree of reasonable care incident to the increased risk to the passenger; and upon evidence tending to show that the conductor while helping a female passenger on such train with a baby at a regular station and assisting her to get to her seat on the car,

signalled the engineer to go ahead before the passenger could reach the seat, thereby causing her to be thrown againt the arm of a seat and injured, the question of the carrier's actionable negligence therein is one for the jury.

APPEAL by defendant from judgment rendered by *Daniels, J.*, at May Term, 1924, of PAMLICO.

The jury, upon proper issues, found that plaintiff was injured by the negligence of defendant, as alleged in the complaint; that she did not contribute to her injury by her own negligence, and that she is entitled to recover from defendant as damages the sum of $1,500.

From judgment rendered, defendant appealed. Errors assigned are based upon exceptions noted during the trial to evidence, and instructions of the court.

D. L. Ward and F. C. Brinson for plaintiff, appellee.
Moore & Dunn for defendant, appellant.

CONNOR, J. There is evidence in the case on appeal tending to show that plaintiff was injured while a passenger on defendant's train, after she had passed through the smoking car into the car provided for ladies; that before she was able to get into a seat she was thrown by a sudden and violent jerk of the train against the iron frame of a seat, and thus injured on her knee and foot. Her ankle and knee were swollen and enlarged a few days thereafter when she was examined by Dr. McCotter. The doctor, introduced by the plaintiff as a witness, had testified that he could not determine from his examination whether there was a fracture of a bone or not; that he suspected a fracture, and advised that an X-ray picture be taken.

Exceptions 1, 2, 3, and 4 are to the overruling by the court of defendant's objections to two questions addressed to this witness by the plaintiff, and the refusal of the court to strike out the witness' testimony following such questions. The doctor was asked, if the jury should find certain facts as stated in the questions, would he be able to form an opinion upon these facts satisfactory to himself as to whether or not there was a fracture, and, if not, whether he would be able to form an opinion as to the extent of the injury. He replied in the negative, and then proceeded to explain why he could not form such an opinion.

There was evidence from which the jury could find the facts to be as stated in the questions, and objections to these questions were properly overruled. *Parrish v. R. R.*, 146 N. C., 125. The witness having testified that he could not upon such facts form an opinion satisfactory to himself, explained to the court and jury why he could not do so. There was no error in the refusal of defendant's motion to strike out this testimony.

The fifth and sixth exceptions are to refusal of the court to enter judgment as of nonsuit at the close of the plaintiff's evidence and again at the close of all the evidence. The seventh exception was to refusal of the court to charge the jury as requested by the defendant that "if they believe all the evidence they will answer the first issue 'No.'"

There was evidence from which the jury could find that on 3 July, 1922, the plaintiff with two small children, one six months old and the other two years, went upon the defendant's train at West Alliance in Pamlico County; that the conductor assisted her in getting upon the train and knew that she had to pass through the smoking car in order to get into the passenger car in which seats were provided for ladies; that before she reached a seat in said car the train moved forward with a sudden and violent jerk, snatching her from her feet, and causing her to fall against the iron frame of the seat, thus injuring her knee and foot; and that soon after the injury the conductor came into the car and was informed by the plaintiff of the occurrence, and of her injury. The train was not in motion when she got on at the station. It started off quickly, after the conductor had signalled the engineer to go ahead. He followed plaintiff into the car, bringing her suit-case for her.

The conductor, the engineer and two male passengers testified that there was nothing unusual in the starting of the train—nothing more than usual in starting a mixed train. Both passengers, one a witness for the plaintiff, and the other for defendant, testified that plaintiff was thrown down and injured when the train started, before she had taken a seat in the car. The conductor also testified that when he went into the car the plaintiff told him that she was hurt, and that when the train arrived at her destination he assisted her to her sister's house and sent a physician to see her.

There was evidence that plaintiff was confined to her bed for fourteen days, and to her room for four weeks, and that at the time of the trial—nearly two years after she was injured—she suffered pains from her hip to her foot.

There was no error in the refusal of the court to nonsuit the plaintiff or in the refusal to give the instruction requested.

The plaintiff notified the conductor that she wished to get upon the train as a passenger. She had at this time in her arms a six months old baby and was leading by the hand a child of two years of age. The conductor took her suit-case and helped her to get upon the platform leading into the smoking car. He knew that she must pass through the smoking car into the passenger car in which seats were provided for ladies, and that she had two small children with her. The engineer testified that he stayed at the station until the conductor gave orders to go. It was clearly the duty of the conductor to give the passenger a reason-

able time within which to find a seat for herself and children and not to cause the train to be moved until she had such reasonable time. There was evidence from which the jury could find that there was a breach of duty in this respect and that her injury was caused by the failure of the conductor to give her reasonable time to get to a seat in the car. The case was properly submitted to the jury.

This case is easily distinguished from *Usery v. Watkins*, 152 N. C., 760, cited by defendant's counsel. In that case the plaintiff was a passenger, and was thrown down by the starting of the train. He was standing up in the car, near the door when the train stopped at a water tank, and continued standing until the train started. In this case plaintiff had gone upon the train at a regular station of the defendant, and was thrown against the arm of a seat by the sudden starting of the train, before she had taken a seat. The conductor knew that she had preceded him into the car with two small children. Whether or not he gave her a reasonable time to get into a seat before signalling engineer to start train was a question for the jury. There was evidence from which the jury could find, as they did under the instruction of the court, that he failed to give her such reasonable time.

While it is the duty of a passenger, on a mixed train—that is, one made up of both passenger and freight cars—with a full knowledge of the increased risks incidental thereto, to be correspondingly careful in guarding against injury by reason of the risks incidental to traveling upon such a train, it is no less the duty of the company carrying passengers on such a train to exercise every reasonable care and take every reasonable precaution against injury or danger to the life of such passengers, which the appliances for that mode of transportation will admit of. An act may be negligent or not, according to attendant circumstances. *Mitchell v. R. R.*, 176 N. C., 645.

We have examined defendant's exceptions Nos. 8, 9, 10, 11, and 12, and find no error in the instructions given or in the refusal to give instruction requested by defendant.

No error.

W. R. GRACE & COMPANY v. J. H. STRICKLAND.

(Filed 15 October, 1924.)

1. Bills and Notes—Negotiable Instruments—Renewal.

A renewal note taken by a bank is not necessarily an extinguishment of the note it is given to renew, and nothing else appearing, the bank takes with notice of the infirmity, when it has purchased the original one after maturity and the maker may set up the infirmity existing between himself and the payee named therein, who has negotiated it to the bank.

2. Same—Holder—Infirmity of Instrument—Notice.

While ordinarily one who has acquired a negotiable instrument is prima facie presumed to be a holder in due course (C. S., 3033), yet when the title is shown to be defective the burden is on him to show that he or some person under whom he claims acquired the title as a holder in due course.

3. Same—Prima Facie Case—Fraud.

The principle upon which an unlettered person may not disclaim liability on a note signed by his cross-mark without requiring that it first be read to him, does not apply as to those taking with notice of the fraud, when the one who induced its execution by his acts of fraud, misrepresentations or deceit, had fraudulently lulled him into a feeling of security and induced him to execute the instrument.

4. Same—Evidence.

Evidence that an illiterate maker of a note was lulled into security in signing a negotiable instrument which had been fraudulently misrepresented to him, is sufficient as to those taking with notice of the fraud, without positive or direct assertions, when the fraud may be inferred from circumstances surrounding the transaction.

5. Same—Instructions.

Upon the evidence in this case: *Held*, a requested prayer for instruction was properly refused that denied the defense of fraud in the procurement of defendant's note.

6. Bills and Notes—Negotiable Instruments—Renewal—Principal and Agent.

The payee of a note acts as the agent of the holder when with the latter's consent he obtains a renewal note from the maker thereof.

7. Bills and Notes—Negotiable Instruments—Corporations—Shares of Stock—Blue-Sky Law.

Where a note has been given for shares of stock solicited in violation of the Blue-Sky Law, and the holder has acquired it with notice of its illegality, he may not maintain his action thereon.

APPEAL by plaintiffs from *Midyette, J.*, at April Term, 1924, of WAYNE.

The defendant executed the following note:

$164.58. DUNN, N. C., 23 June, 1921.

November 1, 1922, after date, I, we, or either of us promise to pay to the order of Seminole Phosphate Company, at the First National Bank, Dunn, N. C., one hundred sixty-four and 58-100 dollars, for value received, negotiable and payable without defalcation or discount, with interest, after maturity. Each of the makers hereof, and the endorsers hereon, waive demand, notice and protest on this note, and guarantee the payment of this note at maturity or any time thereafter. Int. after maturity.

Also the following paper:

STOCK PURCHASE BLANK.
Mines: Croom, Fla.

THE SEMINOLE PHOSPHATE CO.,
Goldsboro, N. C.

I hereby purchase from the Seminole Phosphate Company three shares of the capital stock of said company, at one hundred dollars per share (par value, $100.00); total, three hundred dollars. Payment for above stock to be as follows: Note due..... You are authorized to attach the above stock certificate to my note or notes given on account of this purchase as collateral security, if you so desire. No conditions or agreements, other than those printed herein, shall be binding, either upon the purchaser or said Seminole Phosphate Company; and I certify that I have read this contract and understand the same.

Witness my hand and seal, this 8 September, 1921.

J. H. (his × mark) STRICKLAND. (Seal)

The payee endorsed the note in blank and delivered it to the plaintiffs as collateral security. It was taken in renewal of a former note given by the defendant to the Seminole Company and transferred by endorsement to the plaintiffs after maturity. The plaintiffs' cashier testified that the original note had been placed with the National Bank of Goldsboro and had been withdrawn by the Seminole Company, which had arranged the renewal; that the Seminole Company had authority to collect the note, but not to renew it, but that the plaintiffs had accepted the note in suit, knowing that its renewal had been procured by said company. It was admitted that the original note had been given for the purchase of stock in the Seminole Company; that the plaintiffs had bought it for value, after maturity, and that the note sued on had been given in renewal and had gone into the hands of the plaintiffs before maturity.

The defendant alleged that the original note had been obtained by fraud and transferred to the plaintiffs after maturity, and contended that in this suit he could set up against the plaintiffs the same defenses he could have set up in a suit on the original note.

The following verdict was returned:

1. Was the defendant induced by fraud to execute the original note given for the stock? Answer: Yes.

2. If so, did the defendant waive said fraud? Answer: No.

3. Did the plaintiffs take the renewal note in suit without a knowledge of any defect? Answer: Yes.

Judgment for the defendant. Appeal by the plaintiffs.

Kenneth C. Royall and D. C. Boney for plaintiffs.
Young, Best & Young for defendant.

ADAMS, J. It is admitted that the plaintiffs took the note in suit before it was overdue, for good faith and value, and without knowledge of any infirmity. It is therefore contended that the plaintiffs are holders in due course and entitled to judgment. C. S., 3033. Every person is deemed prima facie to be a holder in due course; but when it is shown the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. C. S., 3040. The plaintiffs admit they purchased the original note after maturity, and the verdict shows that its execution was fraudulently procured. Consequently, the plaintiffs held the first note subject to the defendant's equity. *Wilkins-Ricks Co. v. Welch,* 179 N. C., 266. The question is whether such equity may be pleaded against the plaintiffs in their suit on the second note.

The parties admit that the note in controversy was given in renewal of the original. As applied to negotiable instruments, the word "renewal," or "renewed," signifies more than the substitution of one obligation for another. It means the substitution in place of one engagement of a new obligation on the same terms and conditions—that is, the reëstablishment of a particular contract for another period of time. *Kedy v. Petty,* 54 N. E. (Ind.), 798; *National Bank v. Fickett,* 50 S. E. (Ga.), 396; *Griffin v. Long,* 131 S. W. (Ark.), 672; *Hyman v. Devereux,* 63 N. C., 624; *Kidder v. McIlhenny,* 81 N. C., 123; *Bank v. Hall,* 174 N. C., 477. In 8 C. J., 443 (656), it is said: "Where a note is given merely in renewal of another note, and not in payment, the renewal does not extinguish the original debt nor in any way change the debt, except by postponing the time of payment." *Bank v. Bridgers,* 98 N. C., 67. If the second note be given and accepted in payment of the debt, and not in renewal of the obligation, a different principle will apply. *Wilkes v. Miller,* 156 N. C., 428; *Collins v. Davis,* 132 N. C., 106; *Smith v. Bynum,* 92 N. C., 108. The first note was surrendered, it is true; but the plaintiffs' admission that the note sued on was accepted in renewal is inconsistent with any suggestion that the original debt was thereby extinguished.

The Seminole Company, no doubt with the plaintiffs' consent, withdrew the former note from the National Bank of Goldsboro for the purpose of having it renewed, and the plaintiffs accepted the renewal note with full knowledge of the facts. It is apparent that in renewing the note the Seminole Company acted as the plaintiffs' agent, and that, with respect to the defense pleaded, the plaintiffs are in no better situation

than they occupied when they became the holders of the original note. They did not become holders, in due course, of either paper; and the renewal note, in like manner with the original, was open to the defense of fraud. That is, as between the defendant and the Seminole Company, and as against the plaintiffs, who were not holders in due course, the second note was subject to the defense which might have been made against the first. *Tyler v. Anderson,* 6 N. E. (Ind.), 600; *Hunt v. Rumsey,* 9 L. R. A. (Mich.), 674; *Adams v. Ashman,* 53 Atl. (Penn.), 375. The principle is recognized by *Bigelow, C. J.,* in *Sawyer v. Wiswell,* 9 Allen (Mass.), 39. It will be observed that the paper in suit is not a second note, unrelated to the first, and executed to the plaintiffs as endorsees, for value and without notice, as in *Calvert v. Williams,* 64 N. C., 168.

The plaintiffs took other exceptions, which refer to the charge on the issue of fraud. It is insisted that the alleged representation was harmless, that it was not relied on, and that the element of fraud was not disclosed by the evidence.

The defendant testified that he could neither read nor write, and that the agent who had sold the stock told him that the paper which he then delivered was a certificate of stock. "He told me that the paper he left with me was stock." The conduct of the agent cannot be justified or its effect neutralized by proof that the certificate was attached to the note when the retention of the certificate was a material factor in the consummation of the fraud.

The plaintiffs requested this instruction: "If the defendant signed his name to the stock-purchase contract introduced in evidence without asking the same to be read to him, he is bound by the terms thereof; and since the contract is not evidence of fraud, you should answer the second [first] issue 'No.'" The instruction was substantially given, and then modified by the words, "unless something was done or said by the agent of the company to lull him into security or throw him off his guard." As argued by the plaintiffs, it is the duty of an illiterate person, before signing a paper, to have it read to him, and as a general rule his failure to do so is treated as negligence, for which the law affords no redress; but this principle does not apply in case of fraud or false representation, by which the person signing the instrument is lulled into security or thrown off his guard and deceived. *Griffin v. Lumber Co.,* 140 N. C., 514; *Leonard v. Power Co.,* 155 N. C., 10; *Pittman v. Tobacco Growers Assn.,* 187 N. C., 340. The plaintiffs admit that the modified instruction is correct as an abstract proposition, but contend it is not supported by the evidence. An instruction which is not based on sufficient evidence is erroneous (*Williams v. Harris,* 137 N. C., 460), but we think there is evidence tending to show the defendant was thrown

off his guard. Positive or direct assertion to this effect is not required; proof of circumstances from which the jury may reasonably infer the fact is sufficient.

The jury were instructed to answer the second issue "No," if they believed the evidence, and the plaintiffs excepted on the ground that the defendant, knowing the paper he held was not a certificate of stock, retained it for more than a year without complaint. The defendant did not discover the fraud until after he had executed the renewal note (*Gilpin v. Machine Co.*, 29 L. R. A. (N. S.), 477), and did not treat with the plaintiffs after such discovery. *McDowell v. Simms*, 41 N. C., 278; *Alexander v. Utley*, 42 N. C., 242; *Knight v. Houghtalling*, 85 N. C., 17, 31. He has not brought suit for rescission, but asserts his right to an equitable defense in the plaintiffs' action at law. Besides, the plaintiffs cannot escape responsibility for the fraud on the ground that the defendant was negligent, because the evidence shows, and the verdict has established the fact, that the agent resorted to means calculated to induce the defendant to forego inquiring into the fraud. *Miller v. Mateer*, 172 N. C., 401, 406.

We have considered all the plaintiffs' exceptions, and find them untenable; but there is another ground on which the judgment should be upheld. The contract of subscription did not comply with the provisions of section 6367 of the Consolidated Statutes. The note, therefore, was not enforceable against the defendant by the Seminole Company, and likewise is not enforceable in this action, for the reason that the plaintiffs, as we have said, are not holders in due course. *Bank v. Felton, post*, 384; *Miller v. Howell*, 184 N. C., 119; *Glenn v. Bank*, 70 N. C., 191.

We find

No error.

COMMERCIAL NATIONAL BANK v. A. B. WESTER.

(Filed 15 October, 1924.)

Bills and Notes—Negotiable Instruments — Infirmity — Holder—Prima Facie Case—Evidence.

While a holder of a negotiable instrument regular on its face is prima facie presumed to be one in due course, he is required to show that he has not obtained it with notice of a prior infirmity therein when evidence of the infirmity of the instrument is introduced on the trial, and under such conditions the question of such notice is one for the jury. For the effect upon the negotiable instrument given for shares of stock in a corporation solicited in violation of the Blue-Sky Law, see *Bank and Trust Co. v. Felton, post*, 384.

BANK *v.* WESTER.

APPEAL by defendant from *Grady, J.*, and a jury, March Term, 1924, of WAKE.

C. A. Gosney and J. M. Broughton for plaintiff.
N. Y. Gulley for defendant.

CLARKSON, J. The issues submitted to the jury and their answers thereto are as follows:

"1. Was the execution of the two notes referred to in the pleadings procured by false and fraudulent representations as alleged in the answer of defendant? Answer: Yes.

"2. If so, did the plaintiff acquire said notes in due course for value, and before maturity, without actual notice of said false and fraudulent representations? Answer: Yes.

"3. At the time of execution of said notes did the salesman of the Cumberland Railway and Power Company deliver to the defendant a contract in accordance with section 6367 of Consolidated Statutes? Answer: No.

"4. If not, did the plaintiff have notice of said fact? Answer: No.

"5. In what amount, if any, is defendant indebted to the plaintiff on account of said notes? Answer: $1,000 with interest."

Upon the conclusion of the evidence the court below instructed the jury that if they believed the evidence and found the facts to be as testified to by the witnesses, they would answer the first issue, "Yes," the second issue, "Yes," the third issue, "No," the fourth issue, "No," and the fifth issue, "$1,000 with interest."

To the instructions of the court below, with reference to the second and fifth issues, the defendant excepted and assigned error. We think there was error. From the record there was evidence to be submitted to the jury that the notes sued on were procured by false and fraudulent representations of the agent or salesman of the Cumberland Railway and Power Company. The learned judge who tried the case so thought. If there was evidence, it is well settled in this State that "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." *Bank v. Sherron,* 186 N. C., 299.

This matter is so well stated in *Moon v. Simpson,* 170 N. C., 336-7, by *Allen, J.*, that we reproduce it: "In *Trust Co. v. Bank,* 167 N. C., 261, the Court said: 'Our negotiable instrument law is simply the codification of the common law, and under both the statute and the common law the possession of a negotiable instrument by the endorsee, or by a transferee where indorsement is not necessary, imports prima facie that he is the lawful owner and that he acquired it before maturity, for

value, in the usual course of business and without notice of any circumstances impeaching its validity. Nothing else appearing, this entitles the holder of a negotiable instrument to maintain an action upon it. By presenting the paper, in case duly endorsed, the plaintiff made out a prima facie case, that is, a case sufficient to justify a verdict for him on the first issue.' This prima facie case may be rebutted. The rule is different where it is shown that the title of the person who *negotiated the instrument* is defective [Rev., sec. 2208 (C. S., 3040)], and his title is defective if 'he obtained the instrument or any signature thereto by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiated it in breach of faith or under such circumstances as amount to fraud.' Rev., sec. 2204 (C. S., 3036). In such case, when it is shown that the title of the person who negotiated the instrument is defective, or there is evidence of the fact, 'It is necessary for a recovery by one claiming to be the holder in due course to show by the greater weight of the evidence that he acquired the title (1) before maturity; (2) in good faith for value; (3) without notice of any infirmity or defect in the title of the person negotiating it.' *Mfg. Co. v. Summers,* 143 N. C., 108; *Smathers v. Hotel Co.,* 168 N. C., 69; *Bank v. Fountain,* 148 N. C., 590; *Bank v. Branson,* 165 N. C., 344; *Bank v. Drug Co.,* 166 N. C., 100."

It was said in *Sterling Mills v. Milling Co.,* 184 N. C., 463: "For the error, as indicated, in directing a verdict on evidence from which different inferences may be drawn, we are of opinion that the cause must be submitted to another jury."

The "Blue-Sky Law" defense we have considered in *Planters Bank and Trust Co. v. Felton, post,* 384.

It is of interest to note in the record the testimony of one of the witnesses for defendant, on cross-examination: "I have been a farmer and merchant in Franklin County, accustomed to notes and papers; did business with banks and stores. Have been a director in one bank since its organization. I knew what a note was, and have learned a lot about notes since. I did not think I was going to get something for nothing. It was pictured to us to be pretty, and that man had the gift of gab, and a lot of times a man can overpower you. If the Christian religion had five or six men like that going around preaching the gospel they could soon Christianize the whole world."

"Now the serpent was more subtle than any beast of the field." Genesis, ch. 3, part verse 1.

For reasons given there must be a

New trial.

BANK OF YOUNGSVILLE v. R. P. HUNT.

(Filed 15 October, 1924.)

Bills and Notes—Negotiable Instruments — Statutes — Blue-Sky Law—Illegality—Due Course—Notice.

Where a note is given for shares of stock, sold in violation of the Blue-Sky Law, C. S., 6367, it is voidable only, and a recovery may be had thereon by a purchaser for value in due course, in good faith, without notice of the illegality of the instrument. *Bank & Trust Co. v. Felton, post*, 384.

APPEAL by defendant from *Calvert, J.*, and a jury, November Term, 1923, of FRANKLIN.

B. T. Holden and W. H. Yarborough for plaintiff.
N. Y. Gulley and J. G. Mills for defendant.

CLARKSON, J. The issues submitted to the jury and their answers thereto are as follows:

"1. Was the execution of the note obtained by fraud as alleged in the answer? Answer: No.

"2. Was the contract for the sale of the stock and bonds for which the note was given, in writing and containing the provisions required by section 6367 of the Consolidated Statutes? Answer: No.

"3. Did the Bank of Youngsville become a bona fide holder of said note in due course, for value and without notice of the defects and infirmities existing therein? Answer: Yes.

"4. In what amount, if any, is the defendant indebted to the plaintiff on said note? Answer: $5,000, and interest from 30 March, 1920."

The record shows that the second issue, by the consent of the parties, was answered "No" by the court. Evidence was offered by both plaintiff and defendant tending to establish their respective contentions upon the first, third, and fourth issues, and after argument by counsel and full and proper instruction from the court, the jury answered said issues as follows:

First issue, "No."

Third issue, "Yes."

Fourth issue, "$5,000 with interest from 30 March, 1920."

Upon the answer of the second issue by consent, the defendant moved for judgment. Motion denied. The defendant excepted.

The only material assignment of error was as follows: "That the court erred in overruling defendant's motion for judgment upon the second issue, 'Was the contract for the sale of the stock and bonds for which the note was given in writing and containing the provisions required by section 6367 of the Consolidated Statutes?' being answered 'No.'"

The note sued on being illegal and voidable, not void in not complying with C. S., 6367, and the jury having found that the plaintiff bank was the holder of the note in due course, without notice of the illegality, bona fide for value and before maturity, and the charge of the court below admittedly from the record to be in accordance with law, this case is governed by the principle laid down in *Planters Bank and Trust Co. v. Felton, post,* 384. The illegality is a defense between the original parties, but not in the hands of a purchaser in due course, without notice, bona fide, for value and before maturity.

For the reasons given, there is

No error.

ELROY BAILEY v. J. W. BARNES.

(Filed 15 October, 1924.)

Appeal and Error—Fragmentary Appeals—Judgments.

An appeal from the intimation of the trial judge that upon the evidence the plaintiff could not recover a part of his demand is premature, and will be dismissed in the Supreme Court, the course to be pursued in such instances is to proceed to final judgment and then appeal under plaintiff's exception should the matter still be adverse to him.

APPEAL by plaintiff from *Calvert, J.,* at May Term, 1924, of COLUMBUS.

Civil action to recover the proceeds derived from a sale of a crop of strawberries upon which plaintiff claimed to hold a lien and chattel mortgage.

The agreement in question was made to secure advances amounting to $1,610. Of this amount, $1,275.31 was for back accounts of previous years; $267.75 was advanced under the paper, and only $198 was advanced after or at the time of its execution.

Upon intimation from the court that he would hold the paper-writing to be simply an agricultural lien for advances, and that the plaintiff's recovery would be limited to $198, the plaintiff submitted to a nonsuit and appealed.

Donald McRackan and R. A. Miller for plaintiff.

Tucker & Proctor, and Schulken, Toon & Schulken for defendant.

STACY, J. The appeal must be dismissed on authority of *Chandler v. Mills,* 172 N. C., 366.

Before a plaintiff can resort to a nonsuit and have any proposed ruling of the trial court reviewed on appeal, the intimation of opinion must

go to the whole case and be of such a nature as to defeat a recovery. *Robinson v. Daughtry,* 171 N. C., 200.

"In order to avoid appeals based upon trivial interlocutory decisions, the right thus to proceed (suffer a nonsuit and appeal) has been said to apply ordinarily only to cases where the ruling of the court strikes at the root of the case and precludes a recovery by the plaintiff." *Walker, J.,* in *Hayes v. R. R.,* 140 N. C., 131.

"The adverse intimation should be of such a kind that it is fatal to the case of the party against whom it is made. It must be directed against the right to recover at all, leaving no chance, in law, for him to succeed before the jury." *McKinney v. Patterson,* 174 N. C., 483.

Plaintiff should have noted his exception and proceeded with his case. He submitted to a nonsuit prematurely; and, under the established rule of procedure, we must dismiss his appeal. *Merrick v. Bedford,* 141 N. C., 504.

Appeal dismissed.

R. L. LASSITER ET AL. v. BOARD OF COMMISSIONERS OF WAKE COUNTY.

(Filed 15 October, 1924.)

1. Roads and Highways—State Highway Commission—County Commissioners—Contracts.

The State Highway Commission and the county boards of commissioners are alike agencies of the State for the building and maintenance of public roads, with statutory differences as to national and county highways, etc., and may contract with each other relative thereto in accordance with provisions stated by the statutes on the subject.

2. Same—Necessary Expenses—Contribution of Moneys by Counties.

Where there are two routes by which the State Highway Commission may construct and maintain a national highway from a county seat, and by one of them largely traveled it would relieve the county of great cost in maintenance, and in the straightness of curves relieve the road in certain places of dangerous conditions, and also large expenditure for a bridge, etc., if such route were accepted and constructed and maintained by the State Highway Commission, it is within the discretionary powers conferred by the statute for the county to pay from its general fund, as a necessary county expense, the larger cost of this route over the other upon an agreement made to that effect.

3. Same—Constitutional Law—Statutes—Necessary Expenses.

The building and maintenance of public roads of a county is a necessary county expense, and being authorized by statute the question is not required by the Constitution to be submitted to the voters for approval. Const., Art. VII, sec. 2; C. S., 1297 (18), (19); C. S., 1325.

4. Same—Repealing Acts.

Chapter 189, Laws 1919, brought forward in C. S., 3580-3593, is repealed by the laws of 1921 in so far as the former conflict with the latter act, and under the latter power is conferred on the State Highway Commission to take over county highways as a part of the national highway system of roads upon such terms and agreements with the county commissioners as may be made by them as authorized by the act of 1921.

CIVIL ACTION, heard on return of preliminary restraining order, on 19 June, 1924, before *Grady, J.,* holding the courts of Seventh District.

The action is by certain citizens and taxpayers of Wake County to restrain defendant board from contributing $41,500 towards the construction or renewal and repair of the road leading from Raleigh east through the county of Wake, being known in time past as the old Tarboro Road and designated also locally and in the record as the Milburnie Road. On the hearing the court entered judgment as follows:

This cause coming on to be heard upon complaint, answer and affidavits, and upon plaintiffs' prayer for an injunction until the final hearing enjoining and restraining defendants from contributing $41,500.00 toward the construction of what is described in the pleadings as the Milburnie Road; and the court having given a full hearing, and being of the opinion, upon the admitted facts in the case, that plaintiffs are not entitled to an injunction to the hearing, and not entitled to the relief prayed for in their complaint:

Now, therefore, it is ordered, decreed and adjudged by the court that the preliminary restraining order hereinbefore granted be and the same is hereby dissolved, and that the action be dismissed, the injunctive relief being the basis of this action.

It is further adjudged that defendants recover of the plaintiffs and the surety on their prosecution bond the costs of the action, to be taxed by the clerk of the court.

This is the final judgment in this action.

HENRY A. GRADY, *Judge Presiding.*

Plaintiffs, having duly excepted, appealed.

R. N. Simms for plaintiffs.
P. J. Olive and Pou & Pou for defendants.

HOKE, C. J. In the location of route No. 90 of the State highway system, running from Raleigh through Wake County and into the eastern section of the State, there were two routes suggested and available between Raleigh and the town of Wendell, about 18 miles east—one

known locally as the Milburnie route, and the other the Pool route—both being public highways, for the repair and maintenance of which the county of Wake is responsible. From a perusal of the pleadings and affidavits it reasonably and satisfactorily appears that while the two routes are about the same distance, the upkeep and maintenance of the Milburnie Road is a much greater burden to the county of Wake, and its present condition is such that extensive expenditures are presently desirable, if not necessary, to put said way in a safe and proper condition for travel. Among the changes considered presently desirable and necessary in the near future were the removal of some dangerous curves in the road, the substitution of substantial and adequate bridges over Neuse River and Crabtree Creek, and also the removal of a dangerous grade crossing over the Norfolk Southern Railway; that the adoption of the upper or Milburnie route, and of making the same a part of the State highway system, would relieve the county of the large expenditures required by the above alterations, as well as from the exacting burden of maintaining the road in the future. It further appears, by official survey and estimates, that the cost of the Milburnie route will exceed that of the Pool route by the amount of $41,500.00, but that the new and commodious hard-surface road to be built by the Highway Commission on the former would be of greater service to much the larger number of the citizens of Wake County than on the other. In the presence of these conditions, the State Highway Commission adopted the Milburnie or upper road from Raleigh to Wendell as part of route 90 of the State highway system, on defendant board agreeing to contribute the $41,500.00 as a proper liability and proportion of the cost of construction and repair to be borne by the county of Wake. It is objected for appellants that the commissioners are without power to make the contribution, same not being for a necessary expense of the county, and no vote of the people having been taken thereon; but, in our opinion, the objection cannot be sustained. Unless otherwise directed by express legislation, the supervision and control of county roads and responsibility for their construction and maintenance is placed with the board of commissioners. It is so provided in our Constitution and emphasized by the general legislation on the subject (Constitution, Art. VII, sec. 2; C. S., 1297, subsecs. 18-19); and in C. S., 1325, these boards are "invested with full power to direct the application of all moneys arising by virtue of (this chapter 24) for the purposes therein mentioned, and to any other good and necessary purpose for the use of the county." So all-pervading and insistent is the power of county commissioners on the question of public roads that, although special legislation may disclose a purpose to supervise and control the matter of roads by other boards, as the township

system, unless clearly forbidden by such legislation, the county commissioners could lend proper aid to this effort by appropriating general county moneys for the purpose. *Bunch v. Comrs.*, 159 N. C., p. 335. And it has also been uniformly held that in the exercise of these powers the construction and repair of the public roads are a necessary expense, not requiring the approval of a popular vote. *Woodall v. Highway Commission*, 176 N. C., 377; *Davis v. Lenoir*, 178 N. C., 668; *Hargrave v. Comrs.*, 168 N. C., 626; *Murphy v. Webb*, 156 N. C., 402. It is urged against the exercise of such power in the present instance that when the Milburnie Road is taken over by the Highway Commission, such commission is given full control, and it is then no longer a county road; but, as shown in the evidence, this was a public road, a part of the county system, and for the repair and upkeep of which the county was liable. Unless and until it is taken over by the State Commission, it constitutes a county charge. And we see no reason why, in the exercise of their powers concerning it, the county commissioners may not provide by contract a way for the continued and reliable upkeep by the State Commission, and thus relieve the county of the incidental burdens. True, we would be slow to hold that county commissioners could make an arrangement with some nonofficial board by which they would undertake to absolve themselves from their governmental duties in the matter, but this present arrangement is with a governmental body, also under the control of the State, and which, by the acts of its creation, is given full power to take over roads and stipulate for the terms in which they will do it. Chapter 2, Laws 1921, under which the Highway Commission is operating, and entitled "An act to provide for the construction and maintenance of a State system of hard-surfaced and other dependable roads in the State," etc., shows a purpose throughout to encourage coöperation between the State Commission and the county authorities. In section 18 power is given to make contracts with county commissioners and road-governing bodies for hiring convicts and procuring material and for constructing the highways. In section 14 county authorities are empowered to build hard-surfaced roads under specifications of the highway commissioners, who may contract to reimburse the county for the expense. And in section 10, subsection c, it is authorized to acquire, by gift, purchase or otherwise, *any road* or *highway* that may be necessary for the State system, under a proviso that the State Commission may not pay out anything to counties for existent roads; and in subsection g the commission is empowered "to assume full and exclusive responsibility for the maintenance of all roads, other than streets in towns and cities, forming a part of the State highway."

These municipal boards, as we have uniformly held, are, in matters governmental, mere agencies of the State for the convenience of local

administration in designated portions of the State territory; and in the exercise of their ordinary governmental function they are subject to almost unlimited legislative control, except when restrained by constitutional provisions. Under the Highway Act, it was perfectly competent, therefore, for the Legislature to authorize, as they have done, the acquisition of these roads, and by the same token the county board is allowed to contract with them for its purchase, maintenance and upkeep of the road for which they were then responsible. Granted the power, it is fully established that its discretionary exercise is for the commissioners, and the courts are not permitted to interfere unless their action is so unreasonable as to amount to an oppressive and manifest abuse. *Peters v. Highway Commission,* 184 N. C., p. 30; *Lee v. Waynesville,* 184 N. C., p. 565; *Newton v. School Committee,* 158 N. C., p. 186-188; *Ward v. Comrs.,* 146 N. C., p. 534; *Brodnax v. Groom,* 64 N. C., p. 244. And not only is there no abuse of power disclosed in this record, but by the decided weight of the evidence the commissioners have made an advantageous contract, providing for the county a fine highway and relieving it of the burden and expense of further keeping up the road. We have not been inadvertent to the position of appellee that ample power to make this contract is conferred. C. S., 3580 to 3593, etc. These sections, however, are taken from chapter 189, Laws 1919, the first Highway Act, and are, to a large extent, repealed by the subsequent or fuller Highway Act of 1921, chapter 2. Not only does this appear from the fact that the later act is evidently intended to cover the entire subject dealt with in the Laws of 1919, but the act of 1921, in section 1 and in form, provides that this chapter 189, Public Laws 1919, be amended so as hereafter to "read as follows," and when an amendment is couched in these terms it will work a repeal of all the former act not contained in the second. *Howard v. Hulbert,* 63 Kan., 793; *S. v. Andrews,* 20 Tex., 230; *S. v. Ingersoll,* 17 Wis., 631; *Columbia Wire Co. v. Boyce,* 104 Fed., 172; *Rowan v. Ide,* 107 Fed., 161. As we have endeavored to show, however, there is ample power to make this conferred by chapter 2, Laws 1921, on both the highway commission and the board of county commissioners, and, having the power, there is no evidence that its exercise in the present instance, in any aspect of the testimony, can be regarded as an abuse of discretion. Ordinarily, in hearings of this character the power of his Honor is restricted to a present dissolution of the restraining order, leaving the ultimate determination of the issuable facts for the jury, but, on the admissions and evidence, there being no cause of action stated, we approve the ruling dismissing the suit.

Affirmed.

PLANTERS BANK AND TRUST COMPANY v. M. J. FELTON, NORA FELTON, MARTHA FELTON, T. R. FELTON, AND W. L. FELTON.

(Filed 15 October, 1924.)

1. Actions—Executors and Administrators—Heirs at Law.

After the administrator has duly settled the estate of his intestate, an action may be sustained against his heirs at law upon his unpaid notes, or a debt due by the estate.

2. Bills and Notes—Negotiable Instruments—Fraud—Notice.

Under the provisions of our statute, the procurement by fraud of a negotiable note will avoid it in the hands of those who have previously acquired with notice, which may be shown to rebut the prima facie case made out by a holder after proving the genuineness of the instrument.

3. Same—Illegality—Blue-Sky Law—Banks and Banking.

Where a bank has acquired a negotiable instrument procured by fraud and in violation of a criminal statute, in this case the Blue-Sky Law, evidence that some of the officers of the bank had acted in selling the notes on commission, and others thereof upon the loaning committee had knowledge of the illegality of the corporation in soliciting the sale of the shares of stock for which the notes were given, is sufficient to take the case to the jury in defense of an action upon the notes.

4. Same—Due Course.

Where a negotiable note is given for shares of stock in a corporation, solicited in violation of the Blue-Sky Law, the note is voidable against a holder who has acquired it with notice of the illegality or fraud in the procurement of the instrument.

APPEAL by defendants from *Allen, J.*, and a jury, at April Term, 1924, of WAYNE.

The plaintiff bank brought this action, and, since the suit was instituted, has been placed in the hands of a receiver, the Bank of Fremont. The receiver bank was made a party plaintiff to the action, and the judgment rendered was in favor of the Bank of Fremont, receiver of the Planters Bank and Trust Company.

The suit was to recover on two notes—one for $3,000 and one for $10,000—dated 31 December, 1919, and due at twelve months, with interest from date, made by Thomas Felton. The notes are similar in every respect, except the amount.

It was admitted that the notes were signed by Thomas Felton. The notes were made payable to the order of himself, and it was contended that he endorsed them; the said notes being for the purchase price of stock in the Fisheries Products Company sold by agents of said company, and said notes having been sold by said agents to the plaintiff. After the filing of the final account by the executor, and long after said notes became due, the same having matured during the life of Thomas

Felton, the plaintiff brought suit upon said notes against the defendants as legatees and beneficiaries under the will of the said Thomas Felton. The defendants denied the endorsement of said notes by the said Thomas Felton, and set up as a defense that said notes were illegal, under C. S., Art. 10, ch. 106, known as the "Blue-Sky Law"; that they were obtained by misrepresentation and fraud; and the defendants further contended that in any event the defendants, legatees and beneficiaries under said will, were not liable upon said notes.

The exceptions and assignments of error will not be considered *seriatim,* but the main contentions will be passed on, and the other material facts set forth in the opinion.

Langston, Allen & Taylor, and B. F. Aycock for plaintiff.
S. G. Mewborn and Dickinson & Freeman for defendants.

CLARKSON, J. The contention by the defendants that the plaintiffs should have sued M. J. Felton, executor of Thomas Felton, and not the defendants, legatees and beneficiaries under the will of Thomas Felton, cannot be sustained. The record shows, and it is not disputed, that M. J. Felton was duly appointed and qualified as executor of the last will and testament of Thomas Felton. As executor, he advertised, as required by law, and, after the expiration of the year, filed a final account with the clerk of the Superior Court and settled with the legatees and beneficiaries. The suit is allowable by statute in such cases for the debts of such decedent unpaid and the extent of liability fixed. Consolidated Statutes on the subject are as follows: Sections 45, 59, 60, 76, and 101.

The next contention is one of serious concern. It relates to negotiable instruments. The form of negotiable notes, in accordance with C. S., 2982, is as follows:

"An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to the order of a specified person or to bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

C. S., 3033. "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the facts; (3) that he took it for good faith and

value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

C. S., 3036 defines when title defective: "The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

C. S., 3037 defines what constitutes notice of infirmity or defect: "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., 3040, further defines who is deemed a holder in due course: "Every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

A note payable to a specified person, or his order, is negotiable (C. S., 2989). If payable to order, it is negotiated by the endorsement and completed by delivery (C. S., 3010). Under the above negotiable-instrument law, when Thomas Felton made the negotiable notes sued on "payable to the order of myself," and he endorsed and delivered them, and plaintiff bank became the holder, it "is deemed prima facie to be the holder in due course." By due course is meant that the bank became the holder before maturity; that it took the notes for good faith and value and without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Nothing else appearing, this entitles the holder, the plaintiff bank, to maintain an action on the notes. By presenting the notes, admitted to be signed by Thomas Felton, and proof of his endorsement (which is denied in this case), the plaintiff bank makes out a prima facie case—that is, a case sufficient to justify a verdict; but this prima facie case may be rebutted.

The defendants introduced evidence tending to show that the execution of the notes had been obtained by fraud and tainted with illegality (infirmity in the notes and defect in the title), and thereupon the burden devolved upon the plaintiff to show by the greater weight of the evidence that it acquired the notes before maturity, bona fide, for value,

without notice of any infirmity in the notes or defect in the title (fraud or illegality) of the party negotiating them—the Fisheries Products Company. Such notice on the part of the plaintiff means either actual knowledge of the infirmity or defect, or knowledge of such facts that its action in taking the notes amounted to bad faith. *Holleman v. Trust Co.*, 185 N. C., p. 49.

In construing section 3040, *supra*, in *Bank v. Sherron*, 186 N. C., p. 299, citing many cases, it is said: "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.'"

In *Steel Co. v. Ford*, 173 N. C., p. 196, it was said: "The law presumes that the holder of a note endorsed in blank is its holder in due course; that he took it for value before maturity and without notice of any equity; that he is the owner and has the right to bring suit to enforce collection."

Is there any competent evidence in this case to be submitted to the jury to rebut this presumption, or statutory declaration that the plaintiff bank is deemed prima facie to be a holder in due course?

The evidence was that in the community where the plaintiff bank did business there were men selling stock for the Fisheries Products Company. B. C. Scott was cashier of the plaintiff bank. He testified, on cross-examination: "I don't know how long I had known these stock sales agents, but I had known them for some time, and they had been in the bank before, and talked with me about handling the notes."

"Q. You had made arrangements with them? A. I didn't make any arrangements with them at all to handle a paper like that. It had to be approved by the 'finance committee.' These agents came in there to see if the bank would handle them."

J. L. Hare, a director of the bank and a member of the finance committee of the bank, testified, on cross-examination:

"Q. I will ask you if you didn't know that these particular notes were stock notes, given for stock and offered to the bank as coming from a stock salesman? A. I imagine so.

"Q. Do you know whether those other notes which he paid were also given for Fisheries Products stock? A. The same notes, I thought—the same concern."

The notes given by Thomas Felton, when taken by the plaintiff bank, were not paid for in money, but certificates of deposit given the sales agent, and these certificates of deposit of the bank fell due the same day that Felton's notes fell due—twelve months off, or on 1 January, 1921. Three certificates, amounting to some $25,000, were given the sales agent and included the Felton notes and other notes of the Fisheries

Products Company bought of the sales agent. The sales agent left $4,500 on deposit in the bank at the time he negotiated the notes, and took certificates of deposit. The bank certificates were given without interest. Notes sold the bank bore interest from date. The bank officials knew Felton. Hare testified: "He was very old." Hare knew Felton and investigated his worth, looking towards the bank purchasing the notes. He went to Wilson County—the same county Felton lived in. He knew Felton, but never saw him or informed him about the contemplated purchase. E. G. Deans, who became cashier later of plaintiff bank, testified: "When these certificates became due they were in the possession of the Fisheries Products Company." There was evidence tending to show that plaintiff bank took the notes in due course and had no actual knowledge of any infirmity or defect or knowledge of such facts as its action in taking the notes amounted to bad faith.

We think the defendants' exceptions and assignments of error on this aspect of the case should be sustained. We think, under the facts and circumstances of this case, there was some evidence to have been submitted to the jury.

In *Oil Co. v. Hunt,* 187 N. C., p. 159, it was said: "The presence of fraud, when resorted to by an adroit and crafty person, is at times exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote it. Under such conditions, the inferences legitimately deducible from all the surrounding circumstances furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud has been resorted to and practiced by one or more of the parties. *Grove v. Spike,* 72 Md., 300."

The defendants contend that the notes in the hands of the plaintiff bank, if the jury should find it was not a holder in due course, a bona fide holder for value, before maturity, without notice, are subject to all the equities and defenses that Thomas Felton had against the Fisheries Products Company. The notes fell due 1 January, 1921, and Felton died 6 January, 1921, and the defendants succeeded to his rights and are entitled to set up the equities and defenses:

"(1) That the notes were obtained by misrepresentation and fraud.

"(2) That the notes were illegal, under the 'Blue-Sky Law.'"

From the entire record, there was sufficient competent evidence, circumstantial and otherwise, to go to the jury to show that L. G. Layton, who actually negotiated the notes to the bank, and Abbott & Bradley, were agents of the Fisheries Products Company.

The defendants offered to prove by M. J. Felton, a son of Thomas Felton, and who lived with him at the time of the Fisheries Products Company stock sale to his father, the following: "That on 31 December,

1919, Abbott and Bradley, two stock sales agents, selling stock in the Fisheries Products Company, went to the home of Thomas Felton for the purpose of selling him stock in this company, and that as an inducement to purchase said stock they represented to the said Thomas Felton and promised him that he would never have to pay a cent for said stock, except from dividends from the stock, and that said dividends would fully take care of and pay off said purchase price of the stock." The testimony offered was objected to by plaintiff, and was excluded, and defendants excepted and assigned error. We think the evidence competent and should have been allowed.

In *Des Farges v. Pugh,* 93 N. C., p. 36, it was said: "The intent is always a question for the jury, and to determine whether the intent was fraudulent the jury have necessarily to look to the circumstances connected with the transaction or those immediately preceding or following it." *Whitehurst v. Ins. Co.,* 149 N. C., p. 276; *Bank v. Yelverton,* 185 N. C., p. 314.

The defense sets up the "Blue-Sky Law" as applicable. This has been done in many cases by leading attorneys of much learning over the State, but this Court has not heretofore construed the legislative enactments on the subject in any civil action.

The matter is so vital to the people of the State, we give the material statutes applicable in full:

C. S., 6363, amended by Public Laws 1923, ch. 161, reads as follows: "Before any bond, investment, dividend, guarantee, registry, title guarantee, debenture, or other like company (not strictly an insurance company as defined in this chapter), or any individual, corporation, or partnership who, by agents, offers for sale or sells the stocks, bonds, securities, or obligations of any foreign corporation, whether organized or to be organized or being promoted, may be authorized to do business in this State, such company, individual, or partnership must be licensed by the Insurance Commissioner; and the Commissioner is authorized to issue such license when he is satisfied that such company or corporation is safe and solvent, and has complied with the laws of this State applicable to fidelity companies and governing their admission and supervision by the Insurance Department. The term 'security' or 'securities' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate of interest or participation, certificate of interest in a profit sharing agreement, certificate of interest in an oil, gas, or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits, or any other instrument commonly known as a security. If such company is chartered and organized in this State and has its home office within the State, and is solvent to the extent of at

least fifteen thousand dollars, it may, if a stock company, commence business with a capital stock of twenty-five thousand dollars. The license issued to such companies and their agents shall be issued and paid for as provided for those of insurance companies. This section shall also apply to every corporation, company, copartnership, or association organized or to be organized in this State where such company or organization by its organizers or promoters puts or proposes to put the stock of the company on the market in person or by agents."

C. S., 6367, amended by Public Laws 1923, ch. 180 (second section of this law repealed at Special Session, 1924), is as follows: "No person for the purpose of organizing or promoting any company, or promoting the sale of securities of such company by it after organization, as principal or agent, shall sell or agree or attempt to sell within this State any securities of such company unless the contract of subscription or of sale shall be in writing and contain a provision in the following language: 'No sum shall be used for commission, promotion, and organization expenses on account of any share of stock in this company in excess of twelve and one-half per centum (before the Act of 1923, one per centum allowed, or $1.00 a share, etc.) of the amount actually paid upon separate subscriptions, 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."

The punishment for violation is two-fold; revocation of license and making the officer or agent guilty of a crime.

C. S., 6374. "No company shall fail to comply with any provision of the law or any requirement of the insurance commissioner pursuant to the law, and no officer, agent, or employee of any such company shall make or cause to be made any false statement in any report required by him, or a false entry in any book of such company, or shall make or publish any false statement of its condition or regarding its securities; and upon any violation of this section the insurance commissioner may revoke its license to do business in this State."

C. S. 6375. "Any officer or agent of such company knowingly or wilfully violating any of the provisions of this article shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in jail or worked on the roads for not exceeding two years, or by both such fine and imprisonment."

In *S. v. Agey,* 171 N. C., p. 831, the statutes now under consideration were construed in a criminal action as applying to a foreign corporation.

Agey, an agent of a foreign corporation, organizer and promoter of a "Fig Orchard" scheme, without complying with the statutes of this State and obtaining license, came into the State to do business. He was convicted and on appeal this Court found no error. The Court said: "The intent of the statute is to protect our people, under the police power, from fraud and imposition by irresponsible nonresident parties." The same principle applies to domestic corporations and parties.

The defendants offered to prove that there was no written contract of subscription or of sale, showing compliance with C. S., 6367, *supra*. This was excluded by the court below, to which exception and assignment of error was made. We think this was error, and the evidence competent.

The legislative enactment above referred to prohibits any individual, corporation or partnership, who by agents offers for sale or sells the stocks, bonds, securities or obligations of any foreign corporation, whether organized or to be organized or being promoted, before business can be done in the State license is required. This also applies to every corporation, company, copartnership, or association organized or to be organized in this State where such company or organization by its organizers or promoters puts or proposes to put the stock of the company on the market in person or by agent.

These *organizers and promoters* who sell stock in person or by agents must obtain license. If they do not obtain license, they are guilty of a criminal offense. If they obtain license and sell stock they must put the contract of subscription or sale in writing with the provision in it in the language of the statute. If this is not done, it is made a criminal offense. The purpose and intent of the act is to prohibit organizers and promoters, whether foreign or domestic, who organize and promote the sale of what is commonly known as "blue-sky stock," from doing business without complying with the statutes. The further purpose and intent of the act was to guard and protect an unsuspecting and trusting public from what are commonly known as "wild cat" organizers and promoters and their agents. Now the question arises if these provisions are not complied with, is a note given for stock enforceable in the courts of this State? We think not as between the parties. The courts would not lend their aid to enforce the collection of a note between the parties given without complying with the statute and which makes the officer or agent who violates this provision of the act guilty of a crime. It would be contrary to public policy. The transaction is illegal—voidable, not void.

If, however, the note was negotiated and purchased in due course without notice, bona fide for value and before maturity, it would be enforceable in the hands of an innocent holder. If a statute in clear language declares a note given in violation of its provisions void, it is

not enforceable even if it is a negotiable note transferred in due course without notice to a bona fide purchaser for value, before maturity. It is like a stolen horse, no title passed to any purchaser, however innocent he may be.

We think the position and distinction here taken is borne out by the authorities in this State and elsewhere. *Calvert v. Williams,* 64 N. C., 168; *Glenn v. Bank,* 70 N. C., 191; *Ward v. Sugg,* 113 N. C., 489; *Randolph v. Heath,* 171 N. C., 383; *Bank v. Grafton,* 181 N. C., 404; *Miller v. Howell,* 184 N. C., 119.

In *Glenn v. Bank, supra,* p. 206, the principle is succinctly stated thus: "The rule to be extracted from the decisions we consider to be this: If a statute declares a security void, it is void in whosesoever hands it may come. If however a negotiable security be founded on an illegal consideration, (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or of any one claiming through such a holder."

In *Ward v. Sugg, supra,* at p. 494, it is said: "There is a broad distinction which runs through all the cases everywhere between contracts upon an illegal consideration as to which, the parties being in *pari delicto,* the courts will aid neither party, but will protect the note in the hands of a holder for value without notice, and a contract which, in whole or in part, is declared void or forfeited in its inception which can acquire no validity by being passed on to other hands."

It may be noted that these last two decisions were rendered before the Negotiable Instrument Act of 1899. We do not think the act changes in the least this important distinction in regard to negotiable papers at common law, but is in affirmance thereof.

"The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation. *Kelly v. Courter,* 1 Okla., 277." *Vinegar Co. v. Hawn,* 149 N. C., p. 357.

From the view we take, there must be a

New trial.

J. C. EXUM v. W. E. LYNCH.

(Filed 15 October, 1924.)

1. Contracts, Written—Parol Evidence.

As not contradictory of a written instrument, it may be shown that the whole contract was not reduced to writing, but that a part rested in parol, and it may thus be shown that apart from the deed to lands purchased, the grantor and grantee agreed that upon the sale of the land

by the latter, the former would release the grantee from his obligation on his note given for the balance of the purchase price, secured by second mortgage, and take his vendee's note likewise secured in lieu thereof.

2. Same—Promise—Consideration.

Under the facts of this case: *Held*, the promise of the grantor to take the note secured by mortgage for the balance of the purchase price made by the grantee's purchaser, was for a valuable consideration, sufficient in law to enforce the promise. It is different as to merely a good consideration, such as consanguinity, etc.

3. Same—Appeal and Error—Objections and Exceptions.

A general exception to evidence which is competent in part will not be sustained on appeal.

4. Instructions—Appeal and Error.

A charge of the court to the jury will be construed contextually as a whole, and it will not be held for error because some of its parts taken disjointedly would appear to be erroneous.

APPEAL by defendant from *Daniels, J.*, at February Term, 1924, of GREENE.

Civil action for the recovery of $7,400, with interest from 1 January, 1922, alleged to be due on a promissory note executed by the defendant to the Snow Hill Banking and Trust Company and duly transferred to the plaintiff for value.

Upon the trial defendant admitted the validity of plaintiff's claim, but pleaded a counterclaim of $14,266.66, with interest from 1 January, 1920, alleged to be due the defendant by the plaintiff on certain promissory notes.

There was a denial of liability by the plaintiff in answer to the counterclaim set up by the defendant; and, upon the issue thus joined, the jury found against the defendant. Judgment was thereupon rendered in plaintiff's favor for the amount of the note admittedly due, and the defendant was denied any recovery on his counterclaim. The appeal by the defendant challenges the correctness of the trial in so far as it relates to his counterclaim.

J. Paul Frizzelle for plaintiff.
Edward M. Land and R. H. Taylor for defendant.

STACY, J. The correctness of the judgment entered below is conceded, unless, as assigned, prejudicial error or errors were committed on the trial of the cause relating to the defendant's counterclaim.

On 15 November, 1919, the defendant sold to the plaintiff and one B. D. Taylor three tracts of land, containing approximately 122 acres, for $20,000. The purchasers paid $1,175 in cash at the time of sale,

assumed two outstanding mortgages on the property given by the defendant to J. T. Holmes and M. W. Warren, and executed their joint notes, aggregating $14,266.66, secured by mortgage on the property, for the balance of the purchase price.

Thereafter, on or about 1 January, 1921, the plaintiff J. C. Exum, it is alleged, came to the defendant and stated that he desired to convey his interest in the lands to the said B. D. Taylor and wanted to be released from the notes which he and Taylor had executed to the defendant. After negotiations, it was agreed that Exum might be relieved of his liability on these notes if Taylor, as grantee of the whole property, would execute new notes aggregating $14,266.66, to the defendant's wife and secure the payment of same by giving a first mortgage on the property. This, of course, contemplated a cancellation of the Holmes and Warren mortgages; and defendant alleges that such was the sole consideration for said exchange of notes. Plaintiff, on the other hand, contends that the new notes were to be secured in the same way as the old notes by mortgage on the property, subject to the Holmes and Warren mortgages. The exchange was made at the solicitation of the defendant, according to plaintiff's contention, and the Holmes and Warren mortgages were not canceled. It is the defendant's position that he is entitled to have the old notes reinstated by surrendering up the new ones, because of the alleged failure of consideration, and then to have judgment on his counterclaim against the plaintiff J. C. Exum for the amount of the old notes. The jury did not accept the defendant's version as to the conditions and circumstances of this exchange of notes, and judgment was accordingly entered denying the counterclaim.

Before taking up the question of consideration, we observe one exception relating to the admission of evidence, which defendant contends was erroneous and prejudicial to his cause. Plaintiff, while a witness in his own behalf, was allowed to testify as follows: "At the time Mr. Taylor and I purchased this land from Mr. Lynch, the original agreement was—Mr. Lynch understood we expected to sell the land, and that we bought to sell—in case of sale, he would release us and take the obligation of the party to whom we sold." Objection by defendant; overruled and exception.

It is the position of the defendant that this evidence was in direct conflict with the express terms of the written agreement between the parties and that it should have been excluded, resting as it does in parol. It is undoubtedly the general rule 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. *Overall Co. v. Hollister Co.*, 186 N. C.,

208. "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.

It must be remembered that the purpose of this evidence was not to vary or to contradict the terms of the contract as expressed in writing, but to show the entire agreement looking to future transactions. Such was not in conflict with the written provisions, but tended to show the contract in its entirety or in its completeness, and thus rounded out its terms, according to defendant's contention. *Richards v. Hodges,* 164 N. C., 183; *Pierce v. Cobb,* 161 N. C., 300. This doctrine, as it obtains with us, is well stated in the first head-note to *Evans v. Freeman,* 142 N. C., 61, as follows: "The rule that when parties reduce their agreement to writing, parol evidence is not admissible to contradict, add to, or explain it, applies only when the entire contract has been reduced to writing; and where a part has been written and the other part left in parol, it is competent to establish the latter by oral evidence, provided it does not conflict with what has been written."

Furthermore, this evidence was clearly competent upon the mooted question as to whether the subsequent exchange of notes was made in accordance with the contention of the plaintiff or that of the defendant. It was reasonably calculated to throw light upon this particular inquiry; and even if incompetent for some purposes, while competent for others, it will not be held for legal or reversible error, unless at the time of its admission defendant asked that it be properly restricted, and such request was refused. *In re Southerland's Will, ante,* 325. The exception must be overruled.

This, then, brings us to the question of consideration, the real debate between the parties.

Generally speaking, it may be said that the term "consideration," in the sense it is used in legal parlance, as affecting the enforceability of contracts, consists either in some right, interest, gain, advantage, benefit or profit accruing to one party, usually the promissor, or some forbearance, detriment, prejudice, inconvenience, disadvantage, loss or responsibility, act, or service given, suffered, or undertaken by the promissee. *Institute v. Mebane,* 165 N. C., 644. It is usually sufficient to define it as a benefit to the promissor, or a detriment to the promissee. *Cherokee Co. v. Meroney,* 173 N. C., 653; *Findly v. Ray,* 50 N. C., 125; 6 R. C. L., 654; 13 C. J., 311. Consideration means not so much that

one party, or some one else, is profiting as that the other party abandons some present legal right or limits his lawful freedom of action in the future as an inducement for the making of the promise. Pollock on Contracts, p. 166. Ordinarily the courts "will not ask whether the thing which forms the consideration does in fact benefit the promissee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him." *Hamer v. Sidway,* 124 N. Y., 538.

The following quotation from 9 Cyc., 312, has been approved by us in a number of cases: "There is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promissor or not." *Spencer v. Bynum,* 169 N. C., 119.

"In general, a waiver of any legal right, at the request of the other party is a sufficient consideration for a promise." Parsons on Contracts, p. 444.

A "good consideration," as distinguished from a "valuable consideration," is such as that of blood, or of natural love and affection, as where one grants an estate to a near relation, being founded on motives of generosity, prudence or natural duty. *Bank v. Scott,* 184 N. C., 312; *Blount v. Blount,* 4 N. C., 389; *Candee v. Bank,* 81 Conn., 372. The relation of parent and child or husband and wife is such as may constitute a good consideration for a conveyance. *Bruce v. Faucett,* 49 N. C., 391; *Hatch v. Thompson,* 14 N. C., 411; *Slader v. Smith,* 2 N. C., 248; *Nichols v. Emery,* 109 Cal., 323; *Oliphant v. Liversidge,* 142 Ill., 160. While marriage is usually regarded and dealt with as constituting a valuable consideration. *Winslow v. White,* 163 N. C., 29; *Gurvin v. Cromartie,* 33 N. C., 174. It should be observed, however, that while "love and affection" is generally held to be a sufficient consideration to support a conveyance, at least as between the parties, it may not be a sufficient consideration to support a promise. *Sullivan v. Sullivan,* 122 Ky., 707; 6 R. C. L., 653.

The above principles have been fully recognized and approved by our decisions. *Kirkman v. Hodgin,* 151 N. C., 588; *Brown v. Taylor,* 174 N. C., 423; *Faust v. Faust,* 144 N. C., 383; *Bank v. Bridgers,* 98 N. C., 67; *Sherrill v. Hagan,* 92 N. C., 345; *Little v. McCarter,* 89 N. C., 233; *Oldham v. Bank,* 85 N. C., 241; *Watkins v. James,* 50 N. C., 105.

In the case at bar there was evidence tending to show, and the jury so found, that the plaintiff, in consideration of the defendant's promise, conveyed to B. D. Taylor one-half undivided interest in a 122-acre tract of land, valued by the defendant in 1919 at $20,000, and caused Taylor

to deliver to the defendant's wife, at the defendant's request and procurement, his notes for $14,266.66, secured by mortgage on the property in strict accord with their agreement. This was sufficient consideration, under the principles above stated and illustrated by the authorities cited, to make a valid agreement. 6 R. C. L., 652. Indeed, it was held in *Puffer v. Lucas,* 101 N. C., 281, that "the mutual agreement of the parties to do the several things stipulated to be done on the one side and on the other was a sufficient consideration to support the contract." See, also, *Jones v. Winstead,* 186 N. C., 536; *Rodman v. Robinson,* 134 N. C., 503, and 6 R. C. L., 676, under title: "Promise as Consideration for Promise."

The exceptions to the charge must be overruled under the principle that the charge is to be construed contextually, as a whole, and not disjointedly. *In re Hardee,* 187 N. C., 381. "It is to be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." *S. v. Exum,* 138 N. C., 599.

No sufficient reason having been shown for disturbing the result of the trial, the verdict and judgment will be upheld.

No error.

CLARK MILLER v. CHARLES F. DUNN, AND H. ABDALLAH v. CHARLES F. DUNN AND CLARK MILLER.

(Filed 15 October, 1924.)

1. Usury—Equity—Injunction—Statutes.

Where the plaintiffs in two separate actions seek the same equitable relief against the same defendant to enjoin the foreclosure sale of land under mortgage, the one as the original owner of the land and the other his subsequent grantee thereof, they are both proper parties to a consolidation thereof; and an order of court consolidating the cause is proper.

2. Same—Tender—Legal Interest.

Upon the principle that he who seeks equity must do equity, the plaintiff in his suit to enjoin the foreclosure of a mortgage upon the ground of usury, must tender the correct amount of the mortgage debt with the legal rate of interest thereon, the remedy to recover under the usury statute being an independent action at law. C. S., 2306.

3. Same—Evidence—Issues—Appeal and Error.

Where the plea of usury (C. S., 2306) is made by the plaintiff in the action to enjoin defendant from the sale of land securing a mortgage

note, and there is a dispute as to whether the charge made was usurious, and as to the amount due under the mortgage, it is reversible error for the trial judge to assume the correctness of plaintiff's contentions as a fact, and take the case from the jury accordingly.

APPEAL by defendant Charles F. Dunn from *Horton, J.*, at June Term, 1924, of LENOIR.

On 23 March, 1923, Clark Miller caused summons to be issued in the action entitled "Clark Miller v. Charles F. Dunn," and thereafter duly filed his complaint, to which defendant filed answer. In his complaint plaintiff alleges that the defendant, at his request, paid to Copeland Brothers on or about 17 January, 1921, the sum of $334.45, the balance due on a note theretofore executed by plaintiff, payable to Copeland Brothers and secured by a mortgage on land; that said note was thereupon assigned, without recourse, by Copeland Brothers to the defendant, who now holds the same.

He further alleges that at the time of this transaction defendant required plaintiff to execute to him a note for $100 and to secure the same by a second mortgage on the land conveyed in the mortgage to Copeland Brothers; that said note was usurious for that it was given as a bonus to defendant for advancing the money to pay the Copeland note; and that said note has been paid by the plaintiff.

Plaintiff further alleges that on 22 March, 1923, he caused to be tendered to the defendant $333.67 in payment of the Copeland note, and demanded that defendant surrender the said note and cancel the mortgage securing same; that defendant declined to accept said sum and to surrender the note and cancel the mortgage.

Plaintiff prays that an accounting be had between him and the defendant Dunn to ascertain the amount due upon the said note; that the said note be credited with the sum of $200, being twice the amount paid by plaintiff to defendant as usury, and that upon the payment of the amount ascertained to be due the defendant be required to surrender the said note and cancel the said mortgage.

On 27 March, 1923, defendant filed his answer in which he alleged that the amount paid by him to Copeland Brothers for plaintiff's note was $384.45, and admitted the payment by the plaintiff of the note for $100. Defendant, however, denied that said note was usurious.

For a further defense defendant alleged that on 6 March, 1923, plaintiff conveyed the land described in the mortgage to H. Abdallah; defendant admitted that Abdallah had tendered him $333.67, and that he had refused to accept the same in full payment of the said note, as the amount then due thereon was in excess of this sum. Defendant prays that the action be dismissed.

Thereafter, upon an affidavit filed in this action by the plaintiff, setting forth that the purpose of this action was to have an accounting with the defendant in order that the true amount due on said note might be ascertained, and alleging that the defendant had advertised the land described in the mortgage for sale, a temporary restraining order was issued. This order, upon the hearing on 25 April, 1923, was dissolved.

On 27 April, 1923, H. Abdallah caused a summons to be issued in the action entitled "H. Abdallah v. Chas. F. Dunn and Clark Miller," and thereupon filed his complaint in which he alleges the assignment without recourse of the note executed to them by Miller, by Copeland Brothers to the defendant Dunn, and that there is a controversy between Miller and Dunn as to the true amount now due on the said note.

He further alleges that on 6 March, 1923, defendant Miller conveyed to plaintiff Abdallah, by deed containing the usual covenants and warranties, the land described in the mortgage; that thereafter plaintiff tendered to the defendant Dunn, in payment of the said note and in satisfaction of the mortgage securing the same, a sum of money in excess of the amount claimed by Miller to be due thereon; that the defendant Dunn refused to accept the same. He further alleges that the defendant Dunn has advertised the land described in the mortgage, and subsequently conveyed by Miller to the plaintiff, for sale, and that unless restrained the defendant Dunn will sell and convey the same under the power of sale contained in the Copeland mortgage.

Plaintiff further alleges the pendency of the action entitled "Miller v. Dunn," in which Miller prays for an accounting and demands that the said note be credited with the sum of $200. The plaintiff Abdallah prays that the true amount due on the said note may be ascertained, and that the defendant Dunn, upon the payment of the said sum, be required to surrender the said note and cancel the mortgage securing the same. Defendant Miller filed no answer to this complaint.

On 4 May, 1923, an order was entered in this action by his Honor O. H. Allen, emergency judge, restraining defendant Dunn from proceeding further with the sale until the final hearing.

The above-entitled actions came on for trial at June Term, 1924, of the Superior Court of Lenoir County, before Judge Horton and a jury. Upon an examination of the pleadings in both actions, his Honor ordered that the two actions should be consolidated for trial.

The issues submitted to the jury were as follows:

1. Did the defendant at the time of negotiating the loan to plaintiff usuriously charge and collect $100 bonus, as alleged in the complaint?

2. Did the defendant at the time of taking up note due Copeland Brothers usuriously collect $50 additional bonus, as alleged in the complaint?

Both issues being answered "Yes" by the jury, his Honor rendered judgment that Clark Miller is indebted to Charles F. Dunn in the sum of $115.45, and directed and decreed that upon the payment of this sum by Miller or Abdallah, the note and mortgage held by Dunn should be filed with the papers in this cause and marked "canceled and satisfied." Defendant Dunn excepted to this judgment and appealed to the Supreme Court. Assignments of error by the defendant Dunn are based upon exceptions appearing in the record, all taken in apt time.

Sutton & Green for Miller and Abdallah.
Charles F. Dunn in propia persona.

CONNOR, J. The interests of Clark Miller and H. Abdallah, in the subject-matter of both these actions, upon the facts alleged in each complaint, are identical; they seek the same relief, both praying for an accounting with Charles F. Dunn in order that the amount due on the note held by him as assignee of Copeland Brothers may be ascertained, and that, upon the payment of said amount, the mortgage securing same shall be ordered canceled. Charles F. Dunn denies the material allegations in both complaints; his interest is adverse to the interest of both Miller and Abdallah. The consideration of the appellant's chief assignment of error, upon its merits, will be facilitated by treating Miller and Abdallah as plaintiffs and Dunn as defendant. This was done upon the trial in the Superior Court, after the order of consolidation had been made by the judge. Technical difficulties due to irregularities in the record which do not affect the substantial rights of the parties are thus obviated.

We have, then, an action in which Miller as mortgagor, and Abdallah as the owner of the equity of redemption in the land conveyed by the mortgage, pray for an accounting with Dunn, assignee of the note and transferee of the mortgage, in order that plaintiffs may redeem the land from the mortgage by the payment of the amount ascertained to be due on the note.

Both Miller and Abdallah are proper parties plaintiff and may jointly maintain the action. *Rogers v. Piland,* 178 N. C., 70.

Plaintiffs allege that defendant has charged the plaintiff Miller interest at a greater rate than six per centum per annum on the indebtedness evidenced by the note and that, therefore, all interest on the note has been forfeited. They further allege that plaintiff has paid defendant $100 in excess of interest at six per centum per annum on said note, and that therefore the note should be credited with $200, twice the amount of interest paid. C. S., 2306. The jury having

found upon an issue submitted to them that the defendant did usuriously charge and collect $100 bonus, as alleged in the complaint, his Honor in his judgment disallowed interest on the note, holding that same had been forfeited, and allowed a credit of $200, the penalty prescribed by statute. The defendant Dunn excepted to the judgment and assigns this as error.

We must sustain this assignment of error.

Justice Stacy, writing for a unanimous Court in his opinion in *Waters v. Garris, ante,* 305, says: "It is the established law of this jurisdiction that when a debtor who has given a mortgage to secure the payment of a loan comes into equity, seeking to restrain a threatened foreclosure under the power of sale in his mortgage as a deliverance from the exaction of usury, he will be granted relief and allowed to have the usurious charges eliminated from his debt only upon his paying or tendering the principal sum with interest at the legal rate, the only forfeiture which he may thus enforce being the excess of the legal rate of interest. *Corey v. Hooker,* 171 N. C., 229; *Owens v. Wright,* 161 N. C., 127. This ruling is based upon the principle that he who seeks equity must do equity."

Justice Stacy in his opinion, defendant's appeal, after a careful review of the authorities applicable to the proposition discussed by him, calls attention to the remedies provided by C. S., 2306, for the enforcement of the penalties for usury under the law of North Carolina. He cites the provision in the statute that "in any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest." It may be well to call attention to the opinion of the late *Justice Walker* in *Bank v. Wysong and Miles Co.,* 177 N. C., p. 389, in which it is held that in an action brought by a national bank upon an indebtedness on which usury has been paid, the defendant cannot counterclaim for twice the amount of interest actually paid. This proposition is discussed fully and with great learning by *Justice Walker,* who cites many authorities sustaining it. This Court adopts and follows the construction of the U. S. Supreme Court, ch. 5198 of the Revised Statutes (U. S. Comp. Stat., 1901, p. 3493), in which it is held that where usurious interest has been paid to a national bank the remedy is confined to an independent action to recover such usurious payments.

In this action the plaintiffs have come into equity seeking an accounting with the creditor and demanding judgment that upon the payment

of the amount found by the court to be due upon the indebtedness, the land may be redeemed from the mortgage. Having thus invoked the equitable jurisdiction of the court in order to secure the relief for which they pray, they must pay or tender the amount found to be due with the legal rate of interest thereon. The penalty prescribed by statute, C. S., 2306, cannot be enforced in favor of the plaintiffs in this action, and there was error in the judgment disallowing interest at the legal rate and allowing as a credit on the indebtedness twice the amount of interest paid.

The issue between the plaintiffs and the defendant as to what amount was due on the Copeland Brothers' note at the time it was assigned by them to Dunn, has not been determined. Plaintiffs allege that this amount was $334.45; defendant alleges that it was $384.45. The judgment assumes that the plaintiffs' contention is correct, but no issue was submitted to the jury clearly presenting this controversy. There was error in rendering the judgment upon the assumption that plaintiffs' contention was correct. An issue clearly presenting this contention should be submitted to a jury at the next trial.

Defendant Dunn in his answer admits payments by Miller amounting to $19. He also admits the payment by Miller of the note for $100; he denies, however, that the consideration for this note was usury charged by him for advancing money with which to take up the Copeland note. This presents an issue which should be submitted to the jury in order that it may be ascertained whether the $100 paid should be credited upon the said note. We do not deem it necessary to discuss the other assignments of error appearing in the record.

We are of the opinion that the order by which these two actions were consolidated for trial was proper. We suggest that the matters in controversy between the parties may be more clearly presented to the jury if an order is obtained in the Superior Court for leave to reform the pleadings. The defendant Dunn in this action is entitled to recover judgment of the plaintiff Miller for the amount found to be due on the Copeland Brothers' note at the time the same was transferred to him with interest at the rate of 6 per cent per annum, subject to payments made by Miller since the transfer. If it shall be found that the consideration for the $100 note was as alleged by the plaintiff Miller, then the payments on the said note should be applied as credits on the Copeland Brothers' note.

Let the costs of this Court as taxed under the rules be paid by the appellees. It is ordered that there be a

New trial.

ELIZABETH W. PARKER v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 22 October, 1924.)

1. Insurance, Life—Policies—Contracts—Stipulations.

A provision in a life insurance policy that in the event of the self-destruction of the insured within two years from the issuance of the policy, only the premiums paid thereon shall be recoverable, is reasonable and will be enforced.

2. Same—Actions—Defenses—Suicide—Burden of Proof.

Where an insurance company defends an action upon a stipulation in the policy limiting recovery upon the death of the insured to premiums paid thereon in the event of self-destruction, the burden is on the defendant to show this defense if it is relied on.

3. Same—Ambiguity—Interpretation of Contract.

Where a policy of life insurance is ambiguously expressed or capable of more than one meaning, its terms are construed to have the meaning that is favorable to the insured.

4. Same—Accident—Questions for Jury—Instructions.

A provision in a policy of life insurance that limits recovery upon the policy to the premiums paid thereon in case of self-destruction, sane or insane, does not preclude a recovery in the event of the insured's having met his death from a pistol shot accidentally at his own hands, and where it is established that the deceased insured met his death from a pistol shot at his own hands, and the evidence was conflicting as to whether he did so intending self-destruction or otherwise, it is proper for the court to instruct the jury in effect, that the recovery would not be limited to the amount of the premiums paid, should the jury find it was unintentionally or accidentally done.

5. Same—Issues—Appeal and Error.

Under the pleadings and evidence in this case: *Held*, an issue was correctly submitted "Did the insured die by his own hands or not, with intent to commit suicide?"

APPEAL by defendant from *Daniels, J.*, and a jury, at June Term, 1924, of CRAVEN.

T. D. Warren and J. H. Stringfield for plaintiff.
Moore & Dunn for defendant.

CLARKSON, J. The action involves collection of $1,000 life insurance policy on the life of Roger L. Parker, husband of the plaintiff, who died 29 January, 1923, within a year from the issuance of said policy. The defendant denied liability, and in defense set up a provision contained in the policy which reads as follows:

"Self-destruction: In the event of self-destruction during the first two insurance years, whether the insured be sane or insane, the insur-

ance under this policy shall be a sum equal to the premiums thereon, which have been paid to and received by the company."

The court submitted the following issue to the jury, which was answered by them in the negative: "Did the insured, Roger L. Parker, die by his own hand or act with intent to commit suicide?"

The court below charged the jury, in part, as follows: "It is alleged that R. L. Parker, the insured, died on the 29th of January, 1923; that prior to his death he had paid the premium on this policy of insurance, and that after his death in January, 1923, the plaintiff furnished the defendant with proof of his death. The defendant admits the execution of the policy, the payment of the premium, the death of Roger L. Parker, and the furnishing of proof of his death, but it alleges there was a clause in this policy of insurance as follows (the court read said clause as above set forth). So that, gentlemen, the only question presented to you under the pleadings in this case is embraced in the issue which I have submitted, 'did the insured, Roger L. Parker, die by his own hand or act with intent to commit suicide?' And upon the issue the burden is upon the defendant, the Insurance Company, to satisfy you by the greater weight of the evidence that he shot himself with a pistol with intent to take his own life. It is admitted that he died from the result of a pistol shot, and the sole question for you is whether this evidence satisfies you by its greater weight that he shot himself intentionally. If the evidence satisfied you that he shot himself accidentally, then you would answer the issue 'No.' Unless you are so satisfied, however, by the greater weight of the evidence, the burden being upon the defendant, that he intentionally shot himself and died as a result of the wound inflicted, then your answer to the issue would be 'Yes.' The desire for life is so great in all mankind, there is no presumption that a man commits suicide, and the person who alleges that he committed suicide may show by greater weight of the evidence that he intentionally killed himself, and if he does not satisfy the jury by the greater weight of the evidence, then it is the duty of the jury to answer the issue 'No.'"

The defendant tendered the issue "Did the insured cause or produce his own self-destruction?" The court below refused to submit the issue, and submitted the one set forth in the charge above.

In *Thaxton v. Ins. Co.*, 143 N. C., p. 36, an issue like the one submitted in the instant case was held not to be error. *Hoke, J.* (now *C. J.*) said:

"Again the charge of the court is urged for error in connection with the second issue, the issue being in form as follows: 'Did the insured die by his own act or hand with intent to commit suicide?' The policy, bearing date of 18 June, 1904, contains a condition that if the insured,

within one year from the issue of the policy, die by his own act or hand, whether sane or insane, the company shall not be liable for any greater sum than the premiums, etc. A condition of this kind is held to be a valid stipulation. *Spruill v. Ins. Co.*, 120 N. C., p. 141; Vance on Insurance, p. 532. And it is generally held also that such a provision, in its terms, refers to suicide and does not include a killing by accident, even although the act of the insured may have been the unintended means of causing death. Vance on Insurance, *supra*. The issue was, therefore, properly framed: 'Did he die by his own hand with intent to commit suicide?' It is also accepted doctrine that on such an issue addressed to this question, the presumption is against the act of suicide, and the burden is on the party who seeks to establish it. Am. and Eng. Ency., vol. I, p. 331; Vance on Insurance, p. 532; Lawson's Law of Presumptive Evidence, p. 241; *Spruill v. Ins. Co., supra; Mallory v. Ins. Co.*, 47 N. Y., p. 52."

In *Hay v. Insurance Co.*, 168 N. C., p. 88, the issue was as in the case at bar: "The only issue in controversy upon the second trial was the following: 'Did the insured die by his own hand or act with intent to commit suicide?' which was answered in favor of the plaintiff, and the only exceptions seriously debated are to the charge of his Honor instructing the jury that the burden was upon the defendant to prove by the greater weight of the evidence that the deceased committed suicide, and to the refusal to charge the jury to answer the issue 'Yes' if they believed the evidence. In our opinion, there is no error in either ruling. When an insurance company seeks to avoid payment of a policy on account of suicide, the burden of the issue is on the defendant (*Thaxton v. Ins. Co.*, 143 N. C., p. 37), and the 'weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed.' *Chaffin v. Mfg. Co.*, 135 N. C., 100. The evidence as to suicide was circumstantial, and while sufficient to justify an answer to the issue in favor of the defendant, it was not conclusive, and the inference of an accidental killing could be accepted."

In *Wharton v. Ins. Co.*, 178 N. C., p. 136 (This case was tried also by the learned and conscientious judge who tried the present case), the insurance company set up the same defense in that case as in the instant case. The policy of insurance contained the same clause: "In event of self-destruction during the first two years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which has been paid to and received by the company and no more." The court, in that case, said: "It can serve no purpose to elaborate the testimony for there was evidence tending to sustain the theory that the death was caused by an accident, and the burden of proof was upon the defendant to establish its allegation that the death was

deliberate self-destruction. The function of the jury was to determine the fact. The burden of proof being on the defendant to prove its defense, the court could not adjudge that an affirmative defense is proven, for that involves the credibility of the witnesses, which is a matter for the jury. *Spruill v. Ins. Co.,* 120 N. C., 141, and numerous citations therein in Anno. Ed. Besides, there was evidence to go to the jury that the death of the deceased was accidental."

The same issue was submitted in *Kinsey v. Ins. Co.,* 181 N. C., p. 478, as in the present case. In that case the jury found for the defendant, and on appeal this Court found no error.

All the evidence introduced, both by plaintiff and defendant, shows that the case was fought out on the theory whether Roger L. Parker destroyed himself by committing suicide or he accidentally killed himself. There was no evidence as to insanity. We think the issue was a proper one, under the language of the policy, and the facts in the case.

The defendant contends: "The Court can readily see that the term 'suicide" is wholly inconsistent with the provisions of this policy, because in this policy it is provided that whether the insured 'be sane or insane,' and an insane person could not commit self-murder, mental derangement would be a complete defense against self-murder or suicide, while under the terms of this policy and the decisions of the Court, the purpose of the defendant was to protect itself from any liability which might produce the insured's own self-destruction, whether he be sane or insane."

In *Union Mut. Life Ins. Co. v. Payne,* 105 Fed. Rep., p. 178, it is said: "If it occurred by suicide, whether the insured was sane or insane, the plaintiffs could not recover on the policy. If it occurred by accident or by assassination, the defendant is liable on the policy. Accidental or unintentional self-killing does not forfeit a policy for suicide. 'Self-destruction,' as used in the contract of insurance here in question, means suicide, and does not include accidental self-killing. May on Ins. (2d ed.), sec. 207; *Breasted v. Trust Co.,* 59 Am. Dec., 489, and note, sec. 3. The insurers frame their own contracts, and, when they choose, they may insert express stipulations against accident. 'If they prefer, for the purpose of getting custom, to omit such a stipulation, and to leave the matter in doubt, the doubt ought to be resolved against them.' *Keels v. Association* (C. C.), 29 Fed., 201." *Clarke v. Equitable Life Assur. Soc.* (U. S.), 118 Fed., 374.

We do not think that the language in the policy is clear enough to be construed as meaning that self-destruction included accidental killing, but the reasonable and righteous interpretation of the clause in the policy is that self-destruction meant suicide, whether the insured be sane or insane. Under the language of the policy, accidental killing

would not be so construed as to mean self-destruction, such as would avoid the policy. If the defendant so intended, how easily it could have been written in the policy, "Self-destruction: In the event of self-destruction (which includes accidental killing of one's self) during the first two insurance years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company."

We said, in *Allgood v. Ins. Co.*, 186 N. C., p. 420 (30 A. L. R., p. 652): "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."

We have examined the exceptions and assignments of error made by defendant with care, and can see no error in them.

There was some evidence to go to the jury—slight, but sufficient—that the injury was accidental. This was a question for the jury.

From the entire record we can find no error in law.

No error.

ANTHONY AND THOMAS v. AMERICAN EXPRESS COMPANY ET AL.

(Filed 22 October, 1924.)

1. Express Companies—Carriers—Negligence—Failure to Deliver—Evidence.

Where there is evidence tending to show that an express company has received from consignor a shipment to be made by it as a common carrier, and that it has failed to deliver it to consignee, it is sufficient to take the case to the jury upon the issue of defendants actionable negligence.

2. Same—C. O. D.—Contracts—Collections—Common-Law Duties.

The common-law liability of a carrier for damages for its negligence does not extend to the collection for the consignor of the price or value of the shipment, and a C. O. D. shipment received for transportation and delivery rests by special contract in the receipt given the consignor therefor.

3. Same—Questions for Jury.

Where an express receipt has been given to the consignor for a shipment C. O. D. with the provision that it would notify him in the event of nondelivery to or the refusal of the consignee to accept it and pay the money to be collected, evidence that no such notice was given by the carrier or report made concerning the shipment is sufficient for the determination of the jury in the consignor's action to recover the C. O. D. charge for the goods.

4. Same—Prima Facie Case—Burden of Proof.

Where an express company had received a C. O. D. package for transportation and delivery to the consignee, it is peculiarly within its own knowledge as to reasons that would acquit it of its duty therein; and where it has neither made delivery nor accounted for collection, the burden is upon it to show matters in defense.

APPEAL by defendant from judgment rendered by *Daniels, J.*, at March Term, 1924, of PITT.

Plaintiffs allege and, upon the issues submitted, the jury found: (1) That in December, 1919, plaintiffs delivered to defendant, at Greenville, N. C., for shipment to Jeffie Baker, at Farmville, N. C., certain goods; (2) that defendant received said goods for shipment upon the express agreement that it would deliver the same only upon payment by the consignee of the amounts specified in the receipts issued by defendant, and, further, that it would promptly remit said amounts to plaintiffs; (3) that defendant delivered said goods, collected said money, and has failed to remit same, and that defendant is indebted to plaintiff, on account of the money thus collected, in the sum of $355.88.

Upon the verdict, judgment was rendered that plaintiff recover of the defendant the sum of $355.88, with interest and cost. From this judgment defendant appealed.

There is evidence that, in December, 1919, a drayman employed by plaintiff delivered to defendant, at Greenville, certain merchandise, and that defendant issued receipts for same; that the contract between plaintiffs and defendant relative to said merchandise is contained in these receipts; each receipt shows the name of the consignor, the name and address of the consignee, a description of the goods, the letters "C. O. D.," and figures showing the amounts to be collected upon delivery to consignee; that plaintiffs have not received from defendant the money to be collected as specified in said receipts; that on 26 August, 1920, defendant acknowledged receipt from plaintiffs' attorney of four claims, each for money collected upon a C. O. D. shipment, including the three claims involved in this action; that one of these claims was paid by defendant, and that the other three have not been paid; that plaintiff has received no notice from defendant that the goods involved in the three shipments were delivered to consignee.

Said receipts contained the following provisions: "which (*i. e.,* the goods, receipt of which is acknowledged) the company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt."

Number 7 of the terms and conditions referred to is as follows:

"Section 7. 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 carriers within four months after the delivery of the property, or, in case of failure to make delivery, then within four months and fifteen days after date of shipment; and suits for loss, damage or delay shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof."

Number 8 of the terms and conditions referred to is as follows:

"Section 8. If any C. O. D. is not paid within thirty days after notice of nondelivery has been mailed to the shipper, the company may at its option return the property to the consignor."

Defendant in apt time moved for judgment as of nonsuit, under C. S., 567, and excepted to refusal of the court to render such judgment. Defendant excepted to the issues as submitted, and also to refusal of the court to submit an issue, as follows: "If so, was claim for accounting filed with defendant within four months after delivery of property, or within four months and fifteen days after a reasonable time for delivery?" Other exceptions were duly noted during the trial, all of which are grouped as assignments of error, as required by Rule 19.

Albion Dunn for plaintiffs.
F. G. James & Son for defendant.

CONNOR, J. The cause of action set out in the complaint herein is not for damages arising out of the breach of contract for shipment of goods. Plaintiffs do not seek to recover of defendant as a common carrier for loss of or injury to the goods, or for delay in transporting, or for failure to deliver the same to consignee. They allege that the goods were delivered and the money collected by defendant in accordance with its contract, and that defendant has failed to remit or pay over the same to them.

There is a distinction, uniformly recognized by the courts, between the liability of defendant, as a common carrier, with respect to the shipment of the goods received by it, and its liability under its special

contract to collect from the consignee upon delivery the value of the goods as specified in the receipts, and to remit the money thus collected to consignor.

"The peculiarity of shipment of goods C. O. D. (meaning collect on delivery), which is usually undertaken only by express companies, is that a condition is attached that the carrier, on delivery to the consignee, shall collect a specified sum of money, usually the purchase price of the goods, and shall return the sum thus collected to the consignor. Since it is well settled that there is no common-law duty devolving on an express company or other common carrier to act as the collecting agent of the shipper, such obligation arises only by contract, express or implied, and is one which the carrier may enter into or refuse at its option. When a carrier makes a contract to collect on delivery, it stands with reference to it just as any other agent, and is bound to a strict compliance with its undertaking." 10 C. J., 278.

By its exceptions chiefly relied upon by defendant upon this appeal two propositions are presented for consideration by this Court:

First. Defendant insists that the burden of proof is upon the plaintiffs to offer evidence from which the jury can find, by its greater weight, that defendant delivered the goods to the consignee and collected the money. Defendant contends that there is no evidence from which the jury could find these facts, and therefore insists very earnestly that there was error in refusing its motion for judgment as of nonsuit, and in refusing to give the instruction requested.

The goods having been received by defendant as a common carrier, the disposition made of them by defendant was a fact peculiarly within its knowledge. It was defendant's duty to deliver the goods to consignee, and for a breach of this duty the defendant was liable to plaintiffs for their value. The law will not presume a breach of duty; but where, from the facts admitted or proven, an inference may be drawn in favor of performance rather than of a breach of contract, of rightful rather than wrongful conduct, such an inference is permissible. Upon the evidence in this case the jury could well infer that defendant performed its contract as a carrier of goods and delivered the same to consignee. If the fact were otherwise, it was within the knowledge of defendant, and the burden was upon the defendant to meet and overcome the prima facie case made out by the evidence favorable to plaintiffs' contention.

"It is a principle of law, when a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, upon him rests the burden of proof." *Mitchell v. R. R.*, 124 N. C., 236 (44 L. R. A., 515); *Hinkle v. R. R.*, 126 N. C., 932 (78 Am. St., 685). There was evidence from which the jury could find delivery of the goods, in full discharge by defendant of its contract as a common car-

rier. By its special contract, defendant agreed to collect from consignee the money specified on the receipts. Defendant had the right, under the contract, to return the goods if the same were not delivered. The fact that the goods were not returned, or tendered to plaintiff, was some evidence that they had been delivered and that the money was collected.

This Court held, in *Brumble v. Brown,* 71 N. C., 513, that an officer who has received a note for collection, and who has failed to return it, is presumed to have collected it or to have converted it to his own use. As between these two presumptions—one of a rightful act, the other of a wrongful act—the jury might well infer the rightful act and find as a fact that defendant not only delivered the goods, but also collected the money.

Second. Defendant insists that by section 7 of the terms and conditions contained in the receipt issued by defendant to the plaintiff it was stipulated that as "a condition precedent to recovery, claims must be made in writing to the originating or delivering carriers within four months after the delivery of the property, or, in case of failure to make delivery, then within four months and fifteen days after date of shipment." No evidence having been offered that such claim was filed within said time, it is insisted that no recovery can be had in this action.

The validity of this stipulation as affecting claims against common carriers for loss, or damage to goods or for delay in delivering same, has been sustained by this Court. *Forney v. R. R.,* 167 N. C., 641. In *McNichol v. Pacific Express Co.,* 12 Mo. A., 405, involving facts almost identical with those of this case, his Honor, *Seymour D. Thompson,* writing for the Court, says: "In this case the suit is, clearly, not upon the carrier's common-law duty to deliver the goods safely, but is upon a special contract, which the plaintiff has set out, with the common carrier, before delivering the goods, to collect a sum of money for the consignee. So far as we know, there is no common-law duty upon the carrier to act as collecting agent of a shipper. The law does not attach any peculiar liability to such an office when the carrier assumes it, such as attaches to his ordinary office of public carrier. When he undertakes such a duty, his liability is the same as that of a bank, attorney at law, or any other collecting agent, and it arises upon the special contract by which he undertakes the duty, and not upon the ancient custom which is the foundation of his peculiar liability as carrier." See *Danciger v. Wells,* 154 Fed., 379.

Section 7 of the terms and conditions upon which the goods were received for shipment by defendant applies only to claims against the defendant arising out of a breach of contract by the defendant of its duty as a common carrier with respect to the goods. It does not apply

to claims for money collected and not remitted in accordance with its special contract with the plaintiff.

There was no error in his Honor's refusing to render judgment as of nonsuit because plaintiffs had offered no evidence of notice to defendant, as required by said section, nor was there error in refusing to submit the issue tendered by defendant.

We have examined with care the other assignments of error made by defendant. They are not sustained, and the judgment below is affirmed. There is

No error.

STATE v. GEORGE LUTTERLOH.

(Filed 22 October, 1924.)

1. Homicide—Automobiles—Evidence—Photographs.

Upon a trial under an indictment for murder where there is evidence tending to show that the deceased was killed by the criminal negligence of the defendant driving an automobile at great speed while intoxicated along a public highway, it is competent for the witnesses to illustrate their testimony by the use of photographs properly testified to be of the place and at the time of the occurrence, and accurately taken.

2. Homicide—Murder—Manslaughter—Instructions—Appeal and Error.

While under the provisions of C. S., 4640, the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. C. S., 4201.

APPEAL by defendant from *Devin, J.*, at July Term, 1924, of NEW HANOVER.

Criminal prosecution, tried upon an indictment charging the defendant with murder.

From a verdict finding the defendant guilty of manslaughter, and judgment pronounced thereon, he appeals, assigning errors.

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

Rountree & Carr, W. F. Jones, and Herbert McClammy for defendant.

STACY, J. The defendant, a respectable colored man of Wilmington, N. C., was charged with the murder of Mrs. Vera Bryant, on 13 April,

1924. He was convicted of manslaughter. The homicide was caused by the defendant's criminal negligence in the operation of an automobile. He appeals, assigning errors in the trial.

There was evidence on behalf of the State tending to show that on Sunday afternoon, 13 April, 1924, Woody Bryant and his wife, Mrs. Vera Bryant, accompanied by several friends, were out riding in a Ford car on the public road leading from Wilmington to Castle Hayne, the latter a village about eight miles north of the first-named city. As they were returning home, they stopped their car on the side of the road, with the left-hand wheels resting on the hard-surfaced portion, and were out, mending a tire, when the defendant, driving a seven-passenger Buick automobile, struck them from the rear, knocking the Ford car, with its brakes on, a distance of 51 feet, hitting the witness, Barnhill, who was in the act of mending the tire, and dragging Mrs. Bryant about 41 feet, inflicting fatal injuries upon her, from which she died that night, after having been carried to the hospital in Wilmington. It was in evidence that the defendant was driving at the rate of about 40 miles an hour, and that he was under the influence of an intoxicant at the time of the injury. There was another colored man in defendant's car, who was undoubtedly drunk, and in the bottom of the automobile two coca-cola bottles were found, with strong odors of whiskey about them.

The defendant, on the other hand, offered evidence tending to show that he was not under the influence of an intoxicant at the time of the accident; that he had only tasted a little whiskey that day, but had not swallowed any of it; that his friend and companion was not drunk, but only sick from the effects of drinking. He further testified that he was not driving over 20 miles an hour; that it was getting dark when the collision occurred; that his automobile lights were burning, but constructed so as to focus just ahead of him; that Mrs. Bryant was standing at the rear of the Ford car, leaning on the left fender, so as to obstruct the defendant's view of the rear light, if actually burning, about which there is a conflict in the testimony; and that the defendant was unable to discover the situation in time to avoid the accident.

Out of this conflicting evidence the jury found the defendant guilty of manslaughter, and so returned its verdict. It was peculiarly a question of fact for the jury.

The defendant complains at the action of the trial court in allowing the State to offer in evidence certain photographs of the scene of the accident. These photographs were designed to show the width and general topography of the road where the collision occurred, and were used by the witnesses in explaining their testimony. There was evidence as to the correctness of the photographs, and with respect to the time and manner of their taking. The evidence was sufficient to render them

competent for the purposes they were offered and used. *S. v. Jones,* 175 N. C., 709, and cases there cited.

Defendant also assigns error in the charge because the court failed, or declined, to instruct the jury that it might return a verdict of assault with a deadly weapon. *S. v. Sudderth,* 184 N. C., 753. It is undoubtedly the well-established rule of practice in this jurisdiction 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 the 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 on the evidence, had been correctly presented by the trial court. *S. v. Allen,* 186 N. C., p. 307. But the facts of the instant record do not call for the application of this rule. All the evidence tends to show that Mrs. Bryant was killed, and there is no denial of the fact. "Where the facts of a case of homicide constitute the crime of manslaughter, the same state of facts will make the case of an assault if no killing ensues." *S. v. Leary,* 88 N. C., 615. Here, a killing did ensue and manslaughter is the lowest grade of an unlawful homicide. C. S., 4201, and cases there cited. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Benson,* 183 N. C., 795.

There was no error in the charge with respect to the degree of negligence necessary to be shown on a criminal indictment for manslaughter. His Honor followed closely the language of this Court in the case of *S. v. Rountree,* 181 N. C., 535, where the matter is fully discussed.

The record is free from reversible error.

No error.

G. S. RAY v. HILL VENEER COMPANY.

(Filed 22 October, 1924.)

Appeal and Error—Judgment—Nonsuit—Second Appeal—Evidence—Review.

Where the Supreme Court, on appeal, has reversed the Superior Court in granting defendant's motion as of nonsuit upon the evidence, under the provisions of the statute; and upon the retrial, upon the same evidence,

the defendant has again entered his motion thereof at the close of the plaintiff's evidence and at the close of all the evidence, the decision in the former appeal is the law of the case, and the law as therein determined will not thus be reviewed in the Supreme Court.

APPEAL by defendant from *Cranmer, J.*, at May Term, 1924, 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.

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

"1. Did the plaintiff and defendant enter into a contract as alleged in the complaint? 'Yes.'

"2. If so, did the defendant breach said contract? 'Yes.'

"3. What damage, if any, is plaintiff entitled to recover by reason of said breach? '$210.'"

From a judgment on the verdict in favor of plaintiff, the defendant appeals.

Thos. C. Carter for plaintiff.

D. H. Parsons and Parker & Long for defendant.

STACY, J. This case was before us at a former term, 186 N. C., 773. The first appeal was from a judgment of nonsuit, entered on motion of the defendant at the close of plaintiff's evidence, and this was reversed. We are not now permitted to review any question which was then decided, as a party who loses in this Court may not have the case reheard by a second appeal. *Holland v. R. R.*, 143 N. C., 435. Where a judgment of nonsuit has been reversed and, on a second trial, the plaintiff's evidence is substantially the same as it was on the first hearing, the cause should be submitted to the jury, as the former decision has become the law of the case so far as the question of nonsuit is concerned. *Clark v. Sweaney*, 176 N. C., 529.

"A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Harrington v. Rawls*, 136 N. C., 65. To like effect are numerous decisions, among which may be mentioned: *Nobles v. Davenport*, 185 N. C., 162; *Public-Service Co. v. Power Co.*, 181 N. C., 356; *Hospital v. R. R.*, 157 N. C., 460.

Defendant's chief assignment of error, or the one most strongly urged on the argument and in its brief, is the exception addressed to the refusal of the court to grant the defendant's motion for judgment as of nonsuit, made first at the close of plaintiff's evidence and renewed at the close of all the evidence. Under the authorities above cited, our former ruling

on this question has become the law of the case as there is no material difference between the evidence appearing on the previous record and the evidence appearing on the present record. *Gerock v. Tel. Co.*, 147 N. C., 1.

The remaining exceptions are not sufficient to warrant another hearing. The verdict and judgment will be upheld.

No error.

STATE v. CLEVELAND GALLOWAY AND LEE EVERETT.

(Filed 22 October, 1924.)

1. Evidence—Gaming—Criminal Law—Prejudice—Statutes—Appeal and Error.

Where the defendants admit keeping gaming tables for which they were indicted under the provisions of C. S., 4433, they may not sustain their exception to the admission of evidence tending to show they were continuously present at the place, and as a foundation for further evidence tending to show their large share in the receipts of these tables, and other relevant circumstances, on the ground that it prejudiced them with the jury and was immaterial to the issue.

2. Same—Instructions.

An instruction based upon the evidence on a criminal trial embodying the lower degrees of the crime charged in the indictment, is not erroneous.

APPEAL by defendants from *Calvert, J.*, at May Term, 1924, of NEW HANOVER.

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

Herbert McClammy and W. F. Jones for defendants.

ADAMS, J. The defendants were convicted of the offense of keeping gaming tables in breach of section 4433 of the Consolidated Statutes, and from the judgment pronounced they appealed to this Court. They admitted that the house in which the tables were kept was a "gambling house" and that games of chance were played there.

The first seven assignments of error relate to the admission of evidence. A witness for the State was permitted to describe the tables, slot machines, and other gaming devices found in the house, and to show that games of chance had been played there for a long period of time. The defendants excepted for the assigned reason that in view of their admission as to the games and the character of the house this testimony was unnecessary and prejudicial to their defense.

We have held that the trial court should exclude evidence which is foreign to the controversy, or insufficient, or wholly collateral, or harmful in its tendency only to arouse prejudice or excite passion or to warp the judgment of the jury. *Dellinger v. Building Co.,* 187 N. C., 845, 849; *Shepherd v. Lumber Co.,* 166 N. C., 130; *Short v. Yelverton,* 121 N. C., 95; *S. v. Jones,* 93 N. C., 611. But the evidence excepted to is not incompetent on either of these grounds. It was apparently offered primarily for the purpose of laying a foundation for testimony that the defendants with knowledge of the situation were constantly in attendance upon the games and in fact received two-thirds of the profits derived therefrom. The circumscribed admission of the defendants should not be invoked as a means of excluding evidence material to the State's proof of the essential elements of the offense charged in the indictment.

The several exceptions to the charge cannot be sustained. The defendants contended that incompetent evidence was made the basis of certain instructions by which the jury was misled. We have held that this evidence was admissible; and the statute requires the judge to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon. C. S., 564. Moreover, these instructions were the mere recital of contentions and embodied no erroneous statement of law. *S. v. Ashburn,* 187 N. C., 717, 722. *S. v. Reagan,* 185 N. C., 710; *S. v. Johnson,* 172 N. C., 920.

We find

No error.

THE BANK OF ZEBULON v. M. S. CHAMBLEE ET AL.

(Filed 22 October, 1924.)

1. Contempt—Clerks of Court—Supplementary Proceedings.

Where in supplementary proceedings the defendant has willfully disobeyed an order of the clerk of the Superior Court having jurisdiction, in disposing of his property, he is in contempt of court under the provisions of C. S., 978, 981.

2. Same—Appeal and Error.

An adjudication or contempt of court not committed within the immediate presence or verge of the court is appealable. C. S., 979.

3. Same—Findings—Evidence—Inferior Courts—Review.

While the facts found by the Superior Court in an attachment for contempt when supported by evidence are conclusive upon the Supreme Court on appeal, the same principle does not apply on an appeal from

an inferior to the Superior Court, and in such instances it is the duty of the judge hearing the matter, to review the findings of fact of the lower court as well as the conclusions of law, together with additional evidence should justice require it, and make his own findings thereon.

APPEAL by defendant, M. S. Chamblee, from *Grady, J.*, at June Special Term, 1924, of WAKE.

Motion for rule upon M. S. Chamblee, respondent, to show cause why he should not be attached for contempt because of willful disobedience to an order of court, issued by the clerk of the Superior Court of Wake County in supplemental proceedings had in the above entitled cause, directing the defendant to dispose of none of his property or holdings until the matters under investigation could be fully heard and determined. C. S., 717.

From an order of the clerk adjudging the respondent in contempt, and requiring him to pay a fine of $100.00 and to be confined in the common jail for a period of 30 days, he appealed to the judge of the Superior Court, who after hearing the case, adopted and approved the findings and judgment of the clerk in all respects. Respondent excepted and appealed.

J. Crawford Biggs and J. W. Bunn for plaintiff.
Douglass & Douglass for defendant Chamblee.

STACY, J. It is provided in C. S., 978 and 981, among other things, that any person found guilty of willful disobedience of any process or order lawfully issued by any court, or of resistance, willfully offered, to the lawful order or process of any court, shall be held to have committed a contempt of court, and fined not exceeding two hundred dollars, or imprisoned not exceeding thirty days, or both, in the discretion of the court. *In re Parker,* 177 N. C., 463. Where the contempt has not been committed within the immediate presence or verge of the court, an appeal lies from the judgment entered below. C. S., 979; *Ex parte McCown,* 139 N. C., 95; *In re Walker,* 82 N. C., 95. The findings of fact, made by the judge of the Superior Court in such proceedings and which are required to be "specified on the record" (*S. v. Mott,* 49 N. C., 449), are conclusive upon us, when supported by any competent evidence. *Young v. Rollins,* 90 N. C., 125. But it has been held that where the facts have been found by an inferior tribunal, on appeal to the Superior Court, it is the duty of the judge hearing the matter to review the findings of fact as well as the rulings of law; and, if justice require it, he may hear additional evidence, orally or by affidavit, in making up his own findings of fact. *In re Deaton,* 105 N. C., 59.

In the instant proceeding, it has been found, upon competent and ample evidence, that the respondent, in willful and deliberate violation of the court's order, purposely and intentionally disposed of some $3,800.00 or $4,000.00 with the specific design to thwart the processes of the court. The respondent replies by saying that he used the moneys in question to pay debts which he then owed, alleging that he was ignorant of the law and thought he had a perfect right to use the money in this way. He disclaims any intentional contempt or contumacious conduct. But the crucial facts have been determined against him.

Upon the facts as found, we have discovered no valid reason for disturbing the order and judgment entered in the Superior Court. *In re Brown,* 168 N. C., 417.

Affirmed.

SEMINOLE PHOSPHATE COMPANY v. JOHN P. JOHNSON.

(Filed 22 October, 1924.)

1. Bills and Notes—Negotiable Instruments—Infirmity—Evidence.

Upon the defense in an action upon a note for illegality in its procurement for a purchase of stock solicited in violation of the Blue-Sky Law, it is competent to show by a witness that he had also been solicited under like circumstances by the agent of the same party.

2. Same — Blue-Sky Law — Statutes—Corporations—Domestic Corporations.

The requirements of C. S., 6367 as to soliciting the purchase of shares of stock in a certain corporation in accordance with certain conditions, applies by statutory amendment of 1919, not only to corporations formed in other states, but also to domestic corporations. C. S., 8107.

3. Same—Remedial Laws.

The statutes for the protection of the people of this State in being solicited for the purchase of shares of stock in certain classes of corporations is remedial in its effect, and will be construed to advance the remedy.

4. Statutes—Codifications—Interpretation.

Where statutes are codified, as in the Consolidated Statutes, the language used in the codification will be construed to effectuate the intent and meaning of the statutes so codified, when this may be done by a reasonable construction.

5. Corporations — Statutes — Blue-Sky Law — Evidence—Questions for Jury—Instructions—Appeal and Error.

Where there is evidence tending to show that the defendant had given his note sued on for shares of stock solicited by the plaintiff in violation of the provisions of C. S., 6367, (The Blue-Sky Law), it raises an issue for the determination of the jury, and it is reversible error for the court to hold, as a matter of law, that the plaintiff should recover.

6. Same—Bills and Notes.

Where a note is given in violation of a statute, it is not collectible by the payee, or other holders to whom it had been endorsed and who had acquired it with such notice of its illegality as would avoid it in the hands of the original payee.

7. Same—Receivers—Actions.

The defense to an action brought upon a note given to a corporation, is available to the defendant when the corporation has become insolvent, and its receiver has instituted the action.

8. Corporations—Principal and Agent—Fraud—Evidence.

Evidence that the agent for the sale of shares of stock in a corporation, had induced the defendant to purchase by falsely representing that a dividend would be credited upon his note given for the shares, is in effect a representation that the corporation had earned the dividend as represented, C. S., 1179; and it may be received as a circumstance of fraud, together with other evidence tending to establish it.

APPEAL by defendant from *Midyette, J.*, at April Term, 1924, of WAYNE.

The execution of the notes by defendant, both dated 15 July, 1920, one for $400, due 1 November, 1920, and the other for $300, due 1 March, 1921, and payable to plaintiff, a corporation organized under the laws of this State, was admitted; it was also admitted that no payment had been made on said notes, or either of them, and that both were past due when this action was begun.

For a defense to plaintiff's cause of action upon said notes, defendant, in his answer, alleged that said notes were null and void, for the reason that they were obtained from defendant by false and fraudulent representations, as set out in the answer, and for the further reason that the consideration for the said notes was the purchase price of seven shares of the capital stock of plaintiff corporation sold to defendant by an agent of plaintiff; that the sale of the said stock was made in violation of section 6367 Consolidated Statutes of North Carolina; that the contract for sale of said stock was not in writing and did not contain the provision required by said statute and that said stock has not been issued or delivered to defendant.

After the institution of this action, plaintiff became insolvent, and the receiver appointed by the court has been made a party plaintiff to this action.

After the pleadings were read at the trial, the court held, without objection, that upon the admissions contained in the answer and entered formally in the record, defendant was entitled to open and conclude, and that "plaintiff was entitled to recover upon the notes set out in the complaint, unless the jury should find by the greater weight of the

evidence that the notes were without consideration, and were procured by false and fraudulent representations as alleged in the answer."

Defendant offered as evidence the testimony of himself and of Marvin Wade, agent of plaintiff.

This evidence tends to show that Mr. Wade, agent of the Seminole Phosphate Company, on or about 15 July, 1920, negotiated a contract with defendant, by which plaintiff sold to defendant seven shares of the capital stock of plaintiff, of a new issue, and of the par value of $700; that the notes set out in the complaint were executed for the purchase price of said stock; that no writing containing the provision required by C. S., 6367, was signed by plaintiff or defendant; that no writing containing said provision was shown by the agent to defendant; both defendant and the agent testified that they did not remember whether the contract of sale of said stock was in writing or not, and the agent testified that he did not carry any contracts with him and that he did not show to defendant any contract containing the provision required by the statute; that the total amount of the new issue of stock was one million dollars, and the money was to be used for building a new plant at Raleigh.

The evidence further tended to show that the agent told defendant that a dividend of 14 per cent had been declared on the first issue of stock, then outstanding and that same would be paid immediately; defendant owned three shares of said first issue; that the stock sold would be issued upon receipt by the plaintiff of the notes; that the stock has never been tendered to defendant by plaintiff, and that defendant has not received anything of value for said notes; that no dividend has ever been paid or tendered to defendant on the shares of stock of the first issue owned by him; that the agent was instructed by plaintiff to pay 14 per cent dividend on the first issue of stock in fertilizers, or by crediting indebtedness of stockholders to the company; the agent testified that if defendant had paid his notes, he would have received credit for a dividend of 14 per cent on the shares owned by him, of the first issue.

The agent testified that plaintiff promised to pay him a commission of 10 per cent on the amount of stock sold by him, but that no commission had been paid upon the sale to defendant, because the notes had not been paid.

Ellis Goldstein was sworn as a witness for defendant and offered to testify that he agreed to purchase a portion of the second issue of stock in plaintiff company from an agent of the company; that he gave his note for said stock, upon plaintiff's agreement that said stock would be issued immediately upon receipt of his note; that said stock has never been issued and delivered or tendered to him. Plaintiff's objection to

this testimony was sustained and defendant excepted. This is defendant's first exception.

At the conclusion of the evidence plaintiff moved for judgment upon the pleadings. No issues were submitted to the jury, and judgment was signed by his Honor as follows:

"This cause coming on to be heard, and being heard before his Honor, Garland E. Midyette, and a jury, and it appearing to the court that the execution of the notes in question is admitted, and that defendant has failed to produce any staple evidence in support of any defense to the payment of the notes:

"Now, therefore, it is considered, ordered and adjudged that plaintiff recover of defendant the sum of six hundred fifty-eight dollars, with interest thereon from 1 November, 1920, together with the costs of this action to be taxed by the clerk."

Defendant excepted to the order sustaining plaintiff's motion for judgment upon the pleadings and to the judgment as signed by his Honor and these were defendant's second and third exceptions.

Defendant appealed from the judgment rendered. The case on appeal, appearing in the transcript sent to this Court, was settled by agreement of attorneys for plaintiff and defendant.

Langston, Allen & Taylor, and Kenneth C. Royall for plaintiff.
Godwin & Williams for defendant.

CONNOR, J. Defendant's exception to the exclusion of the testimony of the witness Goldstein, offered by defendant as evidence upon his allegation that the execution of the notes was procured by fraudulent representations, must be sustained. This testimony was competent as evidence tending to establish a fact proper to be considered by the jury in determining whether or not the same representation, if made to defendant, was fraudulent. If the jury should find that in selling to another stock of the same series as that sold to defendant, the same representation was made to both as an inducement to purchase the stock, and that plaintiff had failed to comply with its agreement with both purchasers, this would be a circumstance which the jury could properly consider in determining whether or not the representation was made to defendant with fraudulent intent. *Brink v. Black,* 77 N. C., 60; *Robertson v. Halton,* 156 N. C., 215. There was error in sustaining plaintiff's objection to this testimony.

In the case on appeal, agreed upon by attorneys for plaintiff and defendant, it is stated that, at the beginning of the trial, after the court had held, without objection, that by reason of the admissions in the answer, "the burden was upon defendant to satisfy the jury, by the

greater weight of the evidence, that the notes were without consideration and were procured by false and fraudulent representations, the court further held as a matter of law that the notes are for value unless the defendant satisfies the jury by the greater weight of the evidence that the consideration for the notes was without value." No exception is noted to such holding.

In the judgment signed by his Honor there is a recital that "it appearing to the court that the execution of the notes in question is admitted, and that defendant has failed to produce any staple evidence in support of any defense to the payment of said notes, it is therefore ordered, considered and adjudged that plaintiff recover of defendant." Defendant excepted to the ruling of the court upon plaintiff's motion at the conclusion of the evidence for judgment upon the pleadings and also to the judgment as signed.

A careful consideration of the foregoing statement and of the recital in the judgment leaves us in some uncertainty as to whether his Honor held as a "matter of law" that the defense based upon the allegations that the notes were null and void—for the reason that the contract for the sale of the stock was illegal, because not reduced to writing as required by C. S., 6367—would not avail defendant, or whether he held that defendant had failed to produce evidence in support of such defense. Evidence was offered from which the jury could have found that the contract of sale of stock by Wade, as agent of plaintiff to defendant, was not in writing and did not contain the provision required by C. S., 6367, relative to amount to be paid as commission for making the sale; and that the notes were given for stock in plaintiff company, sold in violation of this statute. There was also evidence that the company had agreed to pay the agent, who negotiated the sale, 10 per cent of the amount received as purchase price of the stock as his commission. We must therefore conclude that his Honor held that the defense was not available to the defendant in this action, as "a matter of law," and that plaintiff could recover on the notes, notwithstanding the facts which the jury might find from the evidence.

We are advertent to the fact that there has been some uncertainty, and some doubt expressed as to whether C. S., 6367 applies to sales of stock in corporations organized under the laws of this State. Suggestions have been made that this section applies only to sales of stock by foreign companies; that is, by companies organized under the laws of other states and seeking to do business in this State.

Section 6367 of the Consolidated Statutes is subsection 4 of section 1 of chapter 156, Public Laws of 1913. This statute amends subchapter 14, chapter 100 of the Revisal of 1905; that is, section 4805 of the Revisal, and provides that section 1 of chapter 156, Public Laws 1913,

shall be section 4805A of the Revisal. Section 4805 of the Revisal of 1905, provides that "before any bond, investment, dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company as defined in this chapter) shall be authorized to do business in this State, it must be licensed by the Insurance Commissioner of North Carolina." Specific reference is made to such companies chartered and organized in this State, and the statute by its express terms applies to such domestic as well as foreign companies. It provides that all such companies, whether organized without the State or within the State, doing business in this State, shall be licensed by and under the supervision of the Insurance Department of North Carolina.

Chapter 156, Public Laws 1913, by its express provision, applies to "every corporation company, copartnership, or association, organized, proposed to be organized, or which shall hereafter be organized, *without* this State, which shall in this State sell or negotiate for sale any stocks, bonds, or other evidences of property or interest in itself or any other company, all of which are in this act termed securities, upon which sale or proposed sale the whole or any part of the proceeds are used or to be used, directly or indirectly, for the payment of any commission or other expenses incidental to the organization or promotion of any such company." This act was ratified on 12 March, 1913; subsection 4, section 1 of the act is now C. S., 6367. As originally enacted, it did not apply to sales of stock by domestic corporations, but did apply to all corporations, organized without the State, selling stocks, etc., within the State, where commissions were paid on the sales or deductions were made from the proceeds of the sale for organization expenses. Its effect was to include within its provisions corporations not included within section 4805 of the Revisal of 1905, and to enlarge the supervisory powers of the Insurance Department. It also extended these powers to agents of the corporation, and required these agents to procure license before transacting or offering to transact business in the State as agents of such companies, and made the violation of any provision of the act by an agent a misdemeanor, punishable by fine or imprisonment.

Prior to 1919 domestic corporations, included within section 4805 of the Revisal of 1905, were only required to procure license before engaging in business in North Carolina; the more effective provision of section 4805A (chapter 156, Public Laws 1913) applied only to foreign corporations doing business included within the terms of said statute.

By chapter 121, Public Laws 1919, said section 4805A was amended by adding the following: *"Provided,* that this act and its provisions shall apply also to every corporation, company, copartnership or association organized or to be organized in this State, where such company or

organization by its organizers or promoters puts or proposes to put the stock of the company on the market in person or by agents." This act was ratified 3 March, 1919.

The effect of this amendment was to make all the provisions of section 4805A applicable to domestic as well as foreign corporations. Section 4805, and section 4805A of the Revisal of 1905, with all amendments, appear in the Consolidated Statutes as Article 10, chapter 106, sections 6363-6375, inclusive. The law upon this subject since 1 August, 1919 (C. S., 8107) is contained in these statutes. Section 6367 of Consolidated Statutes applies to both domestic and foreign corporations, corporations organized within as well as without this State, which put or propose to put the stock of the company on the market in person or by agents.

It is true, as is earnestly urged upon us by plaintiff's attorney, in his brief and on the argument of this appeal, that chapter 121, Public Laws 1921, now appears in C. S., 6363, and seems to be limited in its operation to this section. When, however, the history of this legislation, together with the conditions which have prevailed from time to time in this State, since the enactment of chapter 156, Public Laws 1913, and with which it was the manifest purpose of the General Assembly to deal, is considered, this construction ought not and cannot be sustained. The evil sought to be remedied has been progressive, as appears from the dockets of this Court, and as all men in this State know, the General Assembly has been prompt to amend and strengthen the laws designed to protect the people of the State by making the statutes more comprehensive, and the powers of the Insurance Commission more effective. A construction of these statutes, highly remedial, and hurtful to no honest person or corporation, doing business in the State, favorable to corporations and their stock salesmen, who are eager to pay or to receive excessive commissions, or to deduct from sums paid in as capital stock excessive amounts for promotion and organization expenses, ought not to be adopted by the courts—rather the courts should construe these statutes so that they may lessen the evil and advance the remedy.

At its sessions in 1921 and 1923, the General Assembly has further amended these statutes (ch. 233, Public Laws 1921 and ch. 180, Public Laws 1923), but as these amendments are not applicable to this action, they need not be discussed.

"In the case of a general revision or codification of statutes it is well settled that a mere change or phraseology or the omission or addition of words will not necessarily change the operation or construction of former statutes, for the new language may be attributed to a desire to condense and simplify the law. The language of the

statute as revised or the legislative intent to change the former statute must be clear before it can be pronounced that there is a change of such statute in construction and operation." 25 R. C. L., 1050.

"Revisers of statutes are presumed not to change the law if the language which they use fairly admits of a construction which makes it consistent with the former statutes; and it is a well settled rule that in the revision of statutes neither an alteration in phraseology, nor the omission or addition of words in the latter statute shall be held necessarily to alter the construction of the former act, excepting where the intent of the Legislature to make such change is clear." 33 Cyc., 1067. *Hughes v. Smith,* 64 N. C., 493; *In re Jenkins,* 157 N. C., 430.

"A statute should be construed as a whole, and not by the wording of any particular section or part of it. The law requires that, in the interpretation of a statute, we should give it that meaning which is clearly expressed, and if there is doubt or ambiguity we should construe it so as to ascertain from its language what was the true intention of the Legislature." *McLeod v. Comrs.,* 148 N. C., 86; *S. v. Bell,* 184 N. C., 701.

The sale of stock in the plaintiff corporation for which the notes sued on were given was made in July, 1920. At this time C. S., 6367 was in full force and effect, and applicable to this sale. There is evidence that this sale was not made in compliance with the terms and provisions of this statute; this is expressly set up as a defense to the plaintiff's action on the notes. What is the effect upon plaintiff's right to recover if the jury shall find that the notes were given for the purchase of stock sold without compliance with C. S., 6367?

This Court has said in *Fashion Co. v. Grant,* 165 N. C., 453, *Brown, J.,* writing the opinion: "It is well settled that the courts of a state will not lend their aid to the enforcement of a contract which violates the positive legislation of the State of the forum. The principle of the rule is that no man ought to be heard in a court of justice who seeks to enforce a contract founded in or arising out of moral or political turpitude. Where a party is privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him connected with the contract."

In *Culp v. Love,* 127 N. C., 460, *Faircloth, C. J.,* writing for the Court says: "The objection of a party to an illegal contract does not sound well in his mouth. It is not for his sake that the objection is allowed, but it is found in general principles of policy, of which he has the advantage by the accident of being sued by his confederate in wrongdoing; an executory contract, the consideration of which is *contra bonos mores,* or against the public policy, or laws of the State,

or in fraud of the State, or of any third person, cannot be enforced in a court of justice. *Blythe v. Lovinggood,* 24 N. C., 20."

The distinction is sometimes made between contracts *malum in se* and contracts *malum prohibitum,* but this distinction is not recognized in this State. *Annuity Co. v. Costner,* 149 N. C., 294.

An action cannot be maintained in the courts of this State upon a note or an account, the consideration of which is intoxicating liquor sold in violation of law. *Pfeifer & Co. v. Israel,* 161 N. C., 410; *Vinegar Co. v. Hawn,* 149 N. C., 355; *Bluthenthal v. Kennedy,* 165 N. C., 372.

A contract made in violation of chapter 167, Public Laws 1911 (C. S., 2563, subsection 2), Anti-Trust Act, will not be enforced by the courts of this State. *Fashion Co. v. Grant, supra.*

A note given for the purchase price of stock-food sold in this State in violation of C. S., 4742, will not be enforced in this State. *Miller v. Howell,* 184 N. C., 119.

In *Courtney v. Parker,* 173 N. C., 479, *Hoke, J.,* (now the honored *Chief Justice* of this Court) holding that there can be no recovery on a contract made in violation of chapter 77, Public Laws 1913 (amended by chapter 2, Public Laws 1919, by expressly providing that failure to comply with statute shall not affect civil liability on a contract made by or with a partnership which has not complied with statute), C. S., 3288, says: "It is well established that no recovery can be had on a contract forbidden by the positive law of this State, and the principle prevails as a general rule whether it is forbidden in express terms or by implication arising from the fact that the transaction in question has been made an indictable offense or subjected to the imposition of a penalty."

In *Covington v. Threadgill,* 88 N. C., 186, plaintiff's cause of action was founded upon notes and account; the defense was that the consideration for said notes and account was intoxicating liquor sold to defendant by plaintiff, and defendant relied upon statute, which was as follows: "No retailer of liquors by the small measure shall sell to any person, on credit, liquors to a greater amount than ten dollars unless the person credited sign a book or note in the presence of a witness in acknowledgment of the debt, under the penalty of losing the money so credited."

Chief Justice Ruffin, writing for the Court, says: "The plaintiff however, insists that inasmuch as the statute does not in positive terms declare the act of selling, though upon a credit and in excess of the designated amount, to be *unlawful,* but simply prescribes the penalty for it, its effect is not to make the selling so absolutely illegal, as that it will vitiate the whole of the note or other contract, of which it may

form, in part, the consideration. A distinction like that attempted to be made, between the effect, in this regard, of statutes which affirmatively declare acts done in contravention of their provisions to be *unlawful,* and those which merely visit such acts with penalties, has been at times, and perhaps still is, recognized in some of the authorities, but never in the courts of this State." He cites and approves the following from the opinion in *Sharp v. Farmer,* 20 N. C., 255: "After a vast number of cases, upon the subject, it seems now to be perfectly settled, that no action will be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice or the prohibition of a penal statute. The distinction between an act *malum in se* and one *malum prohibitum* was never sound and is entirely disregarded; for the law would be false to itself if it allowed a party through its tribunals to derive advantage from a contract made against the intent and express provisions of the law."

The courts of this State have uniformly and consistently held that contracts founded upon or growing out of acts or transactions, which have been declared unlawful by statutes, making such acts or transactions crimes and misdemeanors, and prescribing punishment for their violation, or which have been prohibited by statutes prescribing a penalty to be enforced against those who fail to conform to or who disregard the provisions of such statutes in matters to which such statutes are applicable, or which are merely prohibited by statutes, without regard to whether such acts or transactions are punishable as crimes and misdemeanors, or subject those who fail to conform to or disregard them, to penalties, where the manifest purpose of the General Assembly in enacting them is to safeguard and protect the people of the State from such acts or transactions, either by forbidding them or by prescribing the manner and form or the terms and conditions upon which such acts may be done or such transactions entered into—will not be enforced in this State.

In *Planters Bank and Trust Co. v. Felton, ante,* 384, this Court has said, *Justice Clarkson* writing the opinion, in which he discusses the effect of a violation of C. S., 6367 upon a contract, in which the parties did not comply with the statute, "The question arises, if these provisions are not complied with, is a note given for stock enforceable in the courts of this State? We think not, as between the parties. The courts will not lend their aid to enforce the collection of a note between the parties, given without complying with the statute and which makes the officer or agent who violates this provision of the act guilty of a crime. It would be contrary to public policy. The transaction is illegal—voidable, not void."

A full and comprehensive statement of the law with full citation of authority, with reference to this matter, will be found in Corpus Juris, Vol. 13, p. 420 *et seq.* It is there stated: "Where a statute expressly declares that certain kinds of contracts shall be void, there is then no doubt of the legislative intention, and an agreement of the kind voided by the statute is unlawful. The same is true where the contract is in violation of a statute, although not therein expressly declared to be void. It is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum.* A statute prohibiting the making of contracts, except in a certain manner, *ipso facto,* makes them void if made in any other way."

Again, "Frequently a statute imposes a penalty on the doing of an act, without either prohibiting it or expressly declaring it illegal or void. In cases of this kind, the decisions of the courts are not in harmony. The generally announced rule is that an agreement founded on or for doing such penalized act is void."

Again, "If an act is prohibited by statute, an agreement in violation of the statute is void, although the act is not penalized, for it is the prohibition, and not the penalty, which makes the act illegal. *Smathers v. Ins. Co.,* 151 N. C., 98; 6 R. C. L., p. 699, Article on Contracts, sec. 105.

We must therefore sustain defendant's assignment of error based upon his exceptions to the order allowing plaintiff's motion for judgment on the pleadings and to the judgment as signed by his Honor. Issues should have been submitted to the jury. If upon a new trial, a verdict shall be rendered sustaining the allegations in the answer that the notes sued on were executed pursuant to a contract made without compliance with C. S., 6763, then the contract or sale as between the original parties was illegal and no recovery can be had on the notes. The law as to the rights of an innocent holder for value of notes executed pursuant to a contract made in violation of this section is not involved in this action. In *Bank v. Felton, supra,* it is held that such notes as between an innocent holder for value and the maker, are not void.

The fact that the plaintiff corporation, since the beginning of this action has been declared insolvent and that a receiver has been appointed, does not affect the rights of defendant in this action. The receiver takes whatever title the corporation had to the notes and no more. *Mfg. Co. v. Buggy Co.,* 152 N. C., 633.

As there must be a new trial we shall not discuss defendant's exception for that his Honor held that the evidence offered was not sufficient to sustain the allegation that the notes were procured by false and fraudulent representations. Defendant, however, testified that the agent told

him that a dividend had been declared by the company on the first issue of stock of 14 per cent and that the same would be paid immediately. This statement, if made, was in effect a representation that the corporation had a surplus of net profits arising from its business of at least 14 per cent or that its debts, whether due or not, did not exceed two-thirds of its assets; C. S., 1179. Defendant further testified that no dividend has ever been paid to him, although he was the holder of three shares of the outstanding stock of the corporation.

Defendant further testified that the agent stated to him that the stock for which the notes were executed would be issued to defendant at once and that no stock or certificates for same have been issued or tendered to defendant; that the money derived from the sale of the new stock of the second series, amounting to one million dollars, would be invested in the building of a new plant at Raleigh. It is true that there is no evidence as to whether or not a plant costing a million dollars or thereabouts, has been built at Raleigh. If upon the new trial this and other evidence is offered, it will be for the court then to determine whether the law as declared in *DesFarges v. Pugh,* 93 N. C., 32, is applicable.

New trial.

W. C. WATFORD v. S. D. PIERCE ET AL.

(Filed 22 October, 1924.)

1. Deeds and Conveyances—Boundaries—Description — Parol Evidence—Void Descriptions.

While it may be shown by parol that the grantor and grantee of lands had previously gone thereon for the purpose of locating and making definite the lands to be granted, and that the deed made did not state the location within a larger acreage, the principle is not applicable when the deed has been made and the description made definite thereafter; and such may not render operative a deed that is void for indefiniteness of description therein.

2. Same—Estoppel—Purchaser With Notice.

Where the original owner of lands conveys a part thereof to two different purchasers, the lands of one contained within the larger boundaries of the conveyance to the other, and the owner had marked off the boundaries of the smaller tract, subsequent to the making of this deed and the grantee thereof has gone into possession and has remained therein, the original owner, and those since his death claiming as his heirs at law, are estopped to deny the boundaries of the smaller tract so as to avoid the deed for indefiniteness of the description therein, and where the purchaser of the larger tract has thereafter received his deed with knowledge of the circumstances, the estoppel applies to him also.

WATFORD *v.* PIERCE.

APPEAL by defendants from *Brown, J.*, at April Term, 1924, of BERTIE.

Action to recover land. Prior to 27 December, 1918, B. B. Robertson owned real estate known as the Ada Hardy land which contained 300 acres or more. After selling a part to S. D. Pierce and a part to W. E. Pierce and retaining 95 acres, Robertson contracted to sell the plaintiff 15 acres thereof at the price of $1,125, of which $106.25 was to be paid when the deed was delivered and the remainder in five equal installments of $202.55. Robertson delivered the plaintiff a deed containing this description: "A certain tract of No. ..... of land described and defined as follows: Lying and being in Bertie County, Colerain Township, and being a part of the Ada Hardy land, which is located and bounded by the lands of Shady Pierce and others, containing 15 acres, more or less." This deed was executed on 27 December, 1918, and registered 7 January, 1920. On the same day the plaintiff paid Robertson $106.50, and to secure the deferred payments executed and delivered to him a mortgage on the land which was registered on 24 March, 1921. The Ada Hardy farm was a well known tract, but no land was actually marked off to the plaintiff out of said farm until 1919, and after the deed and mortgage had been executed. In December, 1919, Robertson in the presence of the plaintiff Watford, D. D. Pierce, E. W. Pierce, and perhaps others laid off for the plaintiff as his 15 acres a parcel of land described as follows: "Commencing at the northeast corner of the lands of O. F. White, and of Eddie Pierce, and thence running down the line of the said Eddie Pierce lands a south course to a wooden stob placed there by Robertson, thence turning and running a straight line in a west course to another wooden stob placed there by Robertson, then running a straight line in a northern direction back to the line of O. F. White to a glazed gum tree; thence turning and running back to the line of O. F. White, to place of beginning, containing 15 acres." The plaintiff took possession of the said lands under the aforesaid boundaries, which were well understood and defined between the said Robertson and himself and remained in possession of the same until the time hereinafter stated.

In November, 1920, Robertson conveyed by deed to S. D. Pierce codefendant, all the Ada Hardy land of 95 acres, including the 15 acres claimed by the plaintiff, the description being as follows: "A certain piece of land situated, lying and being in Bertie County, North Carolina, bounded as follows: On the north by the lands of White, on the east by the lands of Edward Pierce, on the south by the land of W. Hughes, or that which was his, and on the west by the lands of Shady Pierce. Said land contains 95 acres, more or less, though it is sold in gross and

not by the acre. The land herein conveyed is known as a part of the 'Hardy Farm' located in Colerain Township, Bertie County, North Carolina."

This deed was registered 17 March, 1921, and prior to the registration of plaintiff's mortgage to Robertson.

There appears in transcript of appeal formal order at August Term, 1923, making Robert C. Bridger, administrator *c. t. a.* of B. B. Robertson, and the widow, children and legatees of B. B. Robertson, parties defendant.

The court charged the jury: "If you believe the evidence in this case you will answer the first and second issues 'Yes' and proceed to find the damages under third issue. The court instructed fully as to the measure of damages to which there was no exception by defendant."

Whereupon the following verdict was returned:

1. Is plaintiff, W. C. Watford, the owner of and entitled to the possession of the land described in the complaint? Answer: "Yes."

2. Has the defendant, S. D. Pierce, trespassed upon said land? Answer: "Yes."

3. If so, what damage is plaintiff entitled to recover therefor? Answer: "$40.00."

Judgment was given for the plaintiff's recovery of the land marked out for him in 1919.

The defendant Pierce excepted to denial of his prayers for instructions, to the charge as given, and to the judgment.

Gillam & Davenport for plaintiff.
Winston & Matthews for defendants.

ADAMS, J. This Court has stated and repeatedly approved the rule that when parties with a view to making a deed go upon the land, survey it, and actually run and mark the boundaries and thereupon execute and deliver the deed, intending to convey the land they have surveyed, the title to the surveyed land will pass to the grantee although the description in the deed may be erroneous. The ruling is aptly exemplified in the leading case of *Person v. Roundtree,* 2 N. C., 378. Roundtree entered a tract of land and ran it out as follows: "Beginning at a tree on the bank of Shocco Creek, running south..... poles to a corner, thence east..... poles to a corner, thence north..... poles to a corner on the creek, thence up the creek to the beginning." By mistake the courses were reversed and thereby the land was placed on the side of the creek opposite that on which it was surveyed. Roundtree settled on the land that had been marked out and Person afterwards entered it and obtained a deed or grant from Earl Granville. Person then

brought ejectment, and on the trial Roundtree proved the lines of the survey and possession under his grant. It was held that the erroneous description in the grant should not prejudice the defendant and that he was entitled to the land which the parties had surveyed and intended to describe in the grant. Referring to this case after the lapse of a century the court said: "The principle that applies here is the much broader one laid down in *Person v. Roundtree* and the cases that have followed it, that upon satisfactory proof that the original survey was so made as to embrace a totally different tract of land from that included in the boundaries set forth in the deed, it is the province of the jury to find that the calls for course and distance were inserted in the deed by mistake and that the true location is that which they find was made at the original survey." *Avery, J.,* in *Higdon v. Rice,* 119 N. C., 623. The rule was adopted for the sole purpose of executing the intention of the parties at the time the deed is delivered and is sustained by a long line of decisions. *Bradford v. Hill,* 2 N. C., 22; *Cherry v. Slade,* 7 N. C., 82; *Reed v. Schenck,* 13 N. C., 415; *Baxter v. Wilson,* 95 N. C., 137; *Cox v. McGowan,* 116 N. C., 131; *Deaver v. Jones,* 119 N. C., 598; *Mitchell v. Welborn,* 149 N. C., 347; *Lance v. Rumbough,* 150 N. C., 19; *Clarke v. Aldridge,* 162 N. C., 326; *Allison v. Kenion,* 163 N. C., 582; *Lumber Co. v. Lumber Co.,* 169 N. C., 80; *Lee v. Rowe,* 172 N. C., 846; *Millikin v. Sessoms,* 173 N. C., 723; *Potter v. Bonner,* 174 N. C., 20.

There are two reasons, however, why this principle cannot avail the plaintiff. In the first place, there is a defect in the description of the land which the deed from Robertson to the plaintiff purports to convey. The land is described as "lying and being in Bertie County, Colerain Township, and being a part of the Ada Hardy land, which is located and bounded by the lands of Shady Pierce and others, containing 15 acres, more or less." It is the Ada Hardy land—the ninety-five acres—that is thus bounded. The plaintiff testified that the fifteen acres marked out for him does not adjoin the land of Shady Pierce. The deed purports to convey to the plaintiff an undefined lot of fifteen acres to be carved out of a tract containing ninety-five acres, and upon its face is void for uncertainty. *Higdon v. Howell,* 167 N. C., 455. Evidence that the lines were actually marked does not cure this defect. Parol evidence, while competent to correct a mistake, cannot validate a void description, because it would amount to a substitution by parol of an essential element of the deed which the statute of frauds requires to be in writing. *Higdon v. Rice, supra.*

In the next place, the fifteen-acre lot was "taped off and marked out" to the plaintiff twelve months after the deed had been executed. The principle upon which parol evidence is admitted to correct a mistake in the description of land is based upon the theory that the contested

grant or deed was executed in pursuance of the survey and that the marked boundaries were adopted and acted upon in making such deed or grant. *Fincannon v. Sudderth,* 140 N. C., 246; *Safret v. Hartman,* 50 N. C., 185. It follows that evidence of a survey made after the execution and delivery of the conveyance is not competent for the purpose stated. For such purpose "it is always competent to show by admissible evidence the location of a contemporaneous, not of a subsequent survey." *Higdon v. Rice, supra.* See, also, *Elliott v. Jefferson,* 133 N. C., 207, on the question of a previous survey.

It is clear, then, that the description in the plaintiff's deed is insufficient and that parol evidence of a physical survey of the fifteen-acre lot made a year after the deed was executed is not admissible for the purpose of correcting such erroneous description; but in our opinion there is another principle upon which the judgment may be upheld. It rests upon the doctrine of estoppel.

In *Barker v. R. R.,* 125 N. C., 596, the plaintiff executed and delivered to the defendant a deed containing this description: "Adjoining the lands of T. G. Barker (the plaintiff), beginning at a stake on the east side of the railroad track and on said track, and runs east 20, south 270 feet to a stake; thence north 2 west 240 feet to a stake; thence west 20 north 270 feet to a stake in the railroad track; thence south 2 east with the railroad track 240 feet to the beginning, containing 1½ acres . . . for its use as a stockyard, and other railroad purposes." The plaintiff, relying on the insufficiency of the description brought suit to recover the land, and the defendant offered evidence to prove that at the time the deed was executed the plaintiff had a surveyor to run out and locate the lot in controversy, and put the grantee in possession. The Court said: "While we have come to the conclusion that the description in itself is too vague to be located by outside evidence, it appears from the testimony that the land was in fact located by the plaintiff himself, who is thus estopped from denying his own act. Having had the lot surveyed, and placed the defendant in actual possession thereof under designated lines and marked corners, he is now bound by his own admission, and cannot be permitted to controvert the legal effect of his own conduct to the prejudice of another, especially after such long acquiescence. There is a clear distinction between cases where the parties themselves have definitely located the land and where it is merely sought to locate it by outside testimony not in the nature of admissions. We think this distinction is recognized inferentially in *Massey v. Belisle, supra,* where the Court says on page 177: 'The stakes may be real boundaries when so intended by the parties, but it is a settled rule of construction with us that when they are mentioned in a deed simply, or with no other description than that of course and distance, they are intended by the

parties, and so understood, to designate imaginary points.' If the facts are true as testified upon the trial, we think the plaintiff is clearly estopped from denying his location of the land, and therefore cannot recover." See, also, *Elliott v. Jefferson,* 133 N. C., 207, approving this decision.

In *Barker's case,* as in the one before us, the description of the land was insufficient. True, the lines were run when the deed was made, but that fact is not controlling, for the doctrine of estoppel, unlike the ruling which admits parol evidence to correct an erroneous description, is not confined to such acts or declarations as are contemporaneous with the execution of a deed. It is upon this theory that Washburn says: "To sell ten acres of land without describing any boundaries to the same would be void; but if the parties then go on and stake out that quantity of land, and the grantee takes possession of it, it ascertains the grant, and gives effect to the deed. 3 Real Prop., 435. The principle is sustained in sundry decisions. In *Simpson v. Blaisdell,* 35 A. S. R. (Me.), 348, the plaintiff claimed title to an undivided interest in a lot described as "one-half of an acre of land near the wharf and at the wharf." The defendant contended that the deed so far as it affected this lot was inoperative and void for want of a sufficient description; but the Court held otherwise, *Peters, C. J.,* saying: "Now, there were two ways in which the parties might have consummated the conveyance of the half-acre according to their intention. They could survey out the parcel from the grantor's surrounding land, and then make the deed of it, or could first make the deed and survey out, and identify the parcel afterwards. The defendant's position is that one or the other of these methods of making certain the location of the parcel was adopted. While either mode would be legitimate, the indications are that after the deed was delivered the grantor assigned a certain half-acre to the grantee, which the latter accepted; or that the grantee appropriated to himself a certain half-acre with the acquiescence of the grantor, possession and occupation following afterwards. Suppose that Hinman, after receiving his deed, had selected out a half-acre, and entirely covered it with permanent structures, or had surrounded it with a permanent fence, the structures of fence remaining to this day, and the grantee being in possession all the time, could any possible criticism defeat the title of the latter?"

In *Purinton v. R. R.,* 46 Ill., 297, the appellants bound themselves to convey to the company a right of way, eighty feet wide, across a tract of land. Some time after the execution of the agreement the apellants gave the company possession and subsequently brought ejectment to recover the land. Refusing the relief sought the Court said: "It is insisted that this contract is too indefinite and uncertain in its descrip-

tion of the land to be enforced. There might be force in this objection if it were not that the company had gone into possession and constructed their road with the permission of appellants. By letting the company into possession, the parties locate the eighty-feet strip through this piece of ground. They give a construction to the agreement, by the manner in which they have, in part, executed it. If a vendor gives a bond for the conveyance of ten acres, part of one hundred and sixty acres, or other larger tract, without any other designation of the particular portion, such a contract would no doubt be inoperative for want of certainty, nor could the purchaser or a stranger to the contract do any act by which that uncertainty could be aided or removed. But if the vendor and vendee were to select the number of acres and separate them from the remainder, and the purchaser were permitted to enter into the same, make improvements thereon, and to hold possession, the contract would thereby be so far executed as to remove the uncertainty, and a court of equity would compel the execution of a deed. By permitting the purchaser to hold possession, and to make lasting and valuable improvements, the vendor is estopped from urging the uncertainty of his obligation." See, also, *Farrar v. Cooper,* 34 Me., 394; *Armstrong v. Mudd,* 50 A. D., 545, and note citing several cases; *Patterson v. Patterson,* 27 S. W. (Tex.), 837.

It appears, then, from our own decisions and those of other States that the devisees of Robertson are estopped to deny the plaintiff's title; and the remaining question is whether the estoppel affects the alleged title of the defendant Pierce. In discussing a similar question, in *Simpson v. Blaisdell, supra,* the Court said: "The question presented here is to be considered precisely as it might have been had it arisen between the original parties to the deed, inasmuch as the present parties make their claims respectively by inheritance through and under him." And in *Dudley v. Jeffress,* 178 N. C., 111, the doctrine is upheld as to those in privity with the original parties. "Privity," it is there said, "exists between two successive holders when the later takes under the earlier, as by descent or by will, grant, or voluntary transfer or possession. . . . He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title, and thus takes it with the burden attending it." It was also said: "The plaintiff Dudley, having bought and taken the deed with knowledge that the line as claimed by the defendant had been settled and marked on the ground by a fence and a line of chopped trees to the river, and that the parties, since said partition, including those under whom he claims, had recognized and held up to that line, cannot go beyond that boundary by reason of any error of the parties in drawing the deed not in conformity to said line."

Upon this principle we think the defendant Pierce is estopped equally with his grantor. The plaintiff and two others contracted to purchase different parts of the tract containing 95 acres. When the deeds were executed, the purchasers went into possession of the entire tract; and, afterwards, when the plaintiff's lot was set apart by metes and bounds, he went into possession of the 15-acre lot. The defendant Pierce attended the survey and saw the lines run. He knew their location. After the plaintiff's deed had been registered, and after he had gone into possession of the land, the defendant, with full knowledge of the plaintiff's deed, boundaries, and possession, received his deed from Robertson, and "stands in his shoes and sits in his seat."

The defendant Robertson filed an answer, admitting the plaintiff's title; and while the defendant Pierce alleged that he was an innocent purchaser for value, we find nothing in the record to support his allegations. In fact, he introduced no evidence.

After a careful examination of the record and the authorities, we find No error.

STATE v. LEN WALTON.

(Filed 22 October, 1924.)

1. Criminal Law—Admissions—Evidence—Appeal and Error.

Where, after the prisoner had been delivered to the sheriff on extradition papers, the sheriff has testified that the prisoner, charged with murder, had made a voluntary admission of a circumstance tending to prove his guilt, without threats or offer of reward, etc., it is not error for the trial judge to exclude a question asked by prisoner's attorney, if the officers at the place of extradition had not previously, before the arrival of the witness, used threats that had induced the prisoner to make the confession.

2. Homicide—Murder—Evidence—Questions for Jury—Trials.

Circumstantial evidence in this case tending to show that the prisoner had a grievance against the deceased, had waited at a cross-road for him, and during that time the deceased had met his death from gunshot wounds, etc., *is held* sufficient to sustain a verdict of murder in the first degree.

APPEAL by defendant from *Cranmer, J.*, and a jury, at April Term, 1924, of HOKE.

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

Smith & McQueen and Currie & Leach for defendant.

CLARKSON, J. At August Term, 1923, of Hoke County, before Sinclair, J., Will Walton, Floyd Walton, and Jule Bethea were convicted on 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 to the Supreme Court.

The late lamented *Clark, C. J.*, writing the unanimous opinion of the Court, found no error. *S. v. Walton,* 186 N. C., p. 485.

The defendant Len Walton was a fugitive from justice and was captured in Buffalo, N. Y. Extradition papers from the Governor of North Carolina on the Governor of New York were duly honored, and the defendant was brought back to North Carolina by Edgar Hall, sheriff of Hoke County, who went after the prisoner. The defendant was tried at April Term, 1924, of Hoke County Superior Court upon the bill charging him with murder in the first degree, and upon which charge he was found guilty, and was sentenced by the court to be electrocuted, and appealed to the Supreme Court.

Dewey Castleberry, the deceased, was found desperately wounded near a cross-roads about five miles from Red Springs, in Hoke County, on Sunday morning, 15 July, 1923. Later in the afternoon of the previous day the deceased had some difficulty, while driving his Ford car along the road, with Floyd Walton, a brother of the defendant Len Walton. Floyd Walton was driving a Chalmers car, the property of Mr. Henry McNeill, at the time of the difficulty. It does not appear what was the cause of this difficulty, but it seems that the deceased, Castleberry, fired a pistol at Floyd and wounded him in one of his arms. The State's evidence tended to show that the defendant Len Walton and two others were lying in wait that night for the deceased, Dewey Castleberry, between dark and 9 o'clock p. m., at the cross-roads, the intersection of the Duffie-Red Springs Road and the Newton Road, near which Castleberry was found the next morning. Neighbors near the cross-roads heard three shots that night at the cross-roads or in the direction of the cross-roads, and the defendant Len Walton was identified by witnesses as one of those lying in wait, evidently for the deceased, Dewey Castleberry. After the killing, the defendant Walton made his escape, and was arrested, in March, 1924, at Buffalo, N. Y.

While in the jail at Buffalo, N. Y., the defendant made a statement to the sheriff, which appeared, upon the sheriff's own testimony, to have been voluntary, and was in the nature of a confession. Sheriff Hall testified: "I didn't say anything to him; I didn't ask him any question. He just began talking to me himself. When he began talking, it was in what I would call the lobby of the jail. I didn't ask him anything about it, and nobody else said anything to him or promised him anything or threatened him in any way that caused him to make the statement to me. At the time he made this statement I did not, nor did anybody else in my presence, offer him any reward or any hope of a reward for any statement he might make. I did not, nor did anybody in my presence, threaten him or promise him, or in any way put him in fear, nor hold out any promise to him in any way."

Defendant's exceptions and assignments of error arose out of the following circumstances: After Sheriff Hall had testified as above quoted, defendant's counsel put this question to him: "I ask you, sheriff, if, before any statement was made by Len Walton, he did not state in your presence that he had been cruelly treated and beaten and forced to make a statement to the officers up there that then had him in custody?" To this the State objected. Upon examination, however, by the court, the witness stated that Walton at that time was in his custody, and only one Buffalo officer was present. The court then excluded the answer to the question as put by defendant's counsel, and they excepted. The only ground upon which this statement by the defendant could have been admissible was that it was made at the time that the so-called confession was made. The question assumes that it was made before the confession was made and at the time that the officers had him in custody. It does not appear how long before he made the confession that this statement was made, nor does it appear what the sheriff's answer to the question would have been. He was certainly, in his conversation with the sheriff, not making any statement to the officers at Buffalo, or directing his conversation to them at all.

For these reasons we think the ruling of the court below was correct. Walton's statement to Sheriff Hall was this: "I shot, but the other boys shot, too; and I think you ought to get them. Don't put all the blame on me."

The other exceptions and assignments of error, from the evidence, we do not think material or prejudicial, and cannot be sustained.

From a careful inspection of the record, there was abundant evidence to go to the jury that the defendant, with a motive of revenge, armed, had waited with others at the cross-roads, some time between dark and 9 o'clock, the evening of 14 July, 1923, and killed Dewey Castleberry,

with malice and with premeditation and deliberation. After shooting him, they left him in a terribly wounded condition.

A. Z. McLenden testified, in part, as to the circumstances: "I live in Allendale Township, near this cross-roads they speak of. I live on what they call the Newton Road. That is not the road that leads to Red Springs, but it is one of the cross-roads. I know Jones, who just left the stand, and know where he lives. I saw him on the night of 14 July at my house. My house is 547 yards from the cross-roads. I seen him just a short time after I lay down to go to sleep, which was about a quarter of 9 o'clock. He came there, home, and hollered for me, and it was in the summer-time, and I got up and lay across the bed, with my head in the window, and talked to him out at the road. He told me that he was held up at the cross-roads, and I asked him who held him up, and he said it looked like the fellow that hit the man in the head with a baseball bat out at the fair grounds, and I told him that was Len Walton; and then, while we were talking—while he was out there talking—there come a car by this cross-roads. He said that the man who held him up had a gun, and also he said that this fellow was inquiring from him about a Chalmers car, and he told him he didn't have a Chalmers car, and he told him it was a big car with one light on it; and while we was talking, there come a car along up there and stopped just long enough—it looked like—it might have stopped long enough to speak a few words; and then, after it left, another one came on from towards Red Springs, and it come on up there and made its turn to go in towards Newton's, or down the Newton Road, and it seemed that it might have gone into low gear; and the shooting taken place right there—three pops of the gun. I did not see or hear anything else that night. Jones then went on home, and told me he was intending to go to some colored church. The next morning Jones came to my house, between daylight and sun-up. I hadn't got up, and he called me, and I got up and lay across the foot of the bed, as I did the night before, and talked with him. I got up and put on my clothes, and we walked towards the cross-roads, and we got pretty close by, and I seen for sure that there was a car stopped down there, and I got down a little nearer, and I said to Jones, 'I believe that is Dewey's car'—Dewey Castleberry's. And we went on and got nearer by, where I could see, and Dewey was lying over in the field, and when I got up to the car I walked down from the front of the car, down into the cotton patch, about 10 steps, to where Dewey was lying, and I seen he was alive. The car was something like I would say 75 yards from the cross-roads, at that time, in the edge of the cotton patch. I told Jones to go to Dewey's brother's and tell him, and I would go to Mr. Brown's. It had run a good distance from the way it was at the cross-roads, right into the edge of the

cotton patch—something like about half the distance, probably—that is, the car had left the road and run along in the edge of the cotton patch. All on the radiator and right fender was bloody, and all over the cotton and around was bloody, and where he had lay out there in the field, and there was pieces of windshield all in the seat and all over the hood, and the car was shot from the right-hand side, and—well, it was shot from both sides. There was more evidence of shots in the windshield than anywhere else. There were also shots on the right-hand side, in the side of the car, like, and it was shot-up pretty bad, and it was also shot in the top of the car. We put out then to get a crowd there, you know. Mr. Castleberry was as bloody—well, he was the bloodiest man I ever saw, in the way of—in a condition of that kind, and he was the worst-looking man I ever saw. He was shot in the head. The ground was torn up all around there where he had wallowed all night, it seemed—bloody. The blood stayed there for some six or eight weeks—all on the cotton—after that."

It is true that E. P. Baker, chief of police of Red Springs, said that the morning Castleberry was found he went there about half an hour of sun and found an automatic pistol on the front seat of Castleberry's automobile. It was loaded all the way around—nine balls in it. But he said, on cross-examination: "We saw some shells lying around there, and I picked up two empty shells—shotgun shells, twelve-gauge. I also tracked three tracks. I investigated them very closely. I saw where three men had been sitting out on the edge of the side of the road—all three had sat there on the cotton row. That was right on the edge of the big road—the main road, leading from Red Springs to Duffie's Station—just right at the cross-roads."

These were questions for the jury as to whether the defendant and others were lying in wait to commit a willful, deliberate and premeditated killing.

Castleberry was carried to Fayetteville, to the hospital. J. D. Castleberry, his father, testified as follows: "I live now in Chatham County. On 14 July, 1923, I lived at this same point. Dewey Castleberry was my son. I saw him after the shooting, in the hospital in Fayetteville. He died in Fayetteville, in the hospital, and was buried up in Chatham County, at my old home and his old home. He died the next Friday night after having been shot on Saturday. He lived until Friday night following the shooting on Saturday night. He was buried on Sunday. I saw his wounds. His left eye and temple was all shot-up."

The court below gave a careful, painstaking and accurate charge. We have examined carefully the numerous exceptions and assignments of error, and, from an examination of the entire record, we can find no prejudicial or reversible error.

No error.

N. JACOBI HARDWARE COMPANY v. JONES COTTON COMPANY AND R. J. JONES, AGENT.

(Filed 22 October, 1924.)

Actions—Controversies—Anticipated Damages—Equity—Actions at Law.

An action brought by the seller of a cotton-scale beam may not be maintained against the purchaser thereof in anticipation of the latter's claim for damages arising upon the breach of an implied warranty against defects that caused damage to the purchaser, and upon demurrer the controversy may not be considered by the court as upon a case agreed. C. S., 626. Equitable rights of bills of peace, *quia timet*, and to remove clouds on title to lands distinguished.

APPEAL by plaintiff from *Calvert, J.*, upon a demurrer, at April Term, 1924, of NEW HANOVER.

E. K. Bryan for plaintiff.
W. H. Weatherspoon for defendants.

CLARKSON, J. The plaintiff contends: "On 4 October, 1923, the defendant, R. J. Jones, ordered from the plaintiff one Fairbanks Scale Beam, 202-700 pounds and a pair of cotton hooks, which plaintiff caused to be shipped C. O. D., to Jones charging him therefor the sum of $44, and which Jones received and paid for and turned same over to defendant Jones Cotton Company for whom the defendant Jones now claims he was purchasing the scale beam, though the plaintiff did not know that Jones was buying the scale beam for the Jones Cotton Company. The defendant Jones, ordered from plaintiff, the Fairbanks Scale Beam knowing that plaintiff did not manufacture same, but was selling such scale beam as furnished by the manufacturer thereof, and the plaintiff furnished to the defendant a scale beam manufactured by the manufacturer, and the scale beam was a Fairbanks Scale Beam, and the plaintiff did not know what use the purchaser intended to make of the article; but the defendants contend that the plaintiff in selling the scale beam made an implied, but not an express representation and warranty that the scale beam would weigh correctly and that the plaintiff had notice from the fact of the article the use for which it was purchased, and that the defendant relying upon the implied representation and warranty used the scale beam in the purchase of cotton, and the scale beam not weighing correctly, the defendant claims that he was damaged in the sum of $2,000, and had demanded such damages of the plaintiff, and that the defendants had threatened to, and were going to sue the plaintiff for such damages; and the parties being unable to agree upon the law and to the extent of the

responsibility and liability, the plaintiff brought this action to have the court to determine the dispute and adjudicate the rights, liabilities and responsibilities of the respective parties. The plaintiff claiming that there was no implied warranty in the sale of the scales, the defendants contending that there was, and by the demurrer the defendants admit that there is a bona fide dispute existing between the parties, and that they had made claim against the plaintiff for the amount alleged, and that they had threatened, and were going to bring suit against the plaintiff, and on this state of facts the judge sustained the demurrer and dismissed the action upon the ground that the courts were not open to the plaintiff on such allegations, but that the court would be open to the defendants and upon their application the court would adjudge the rights and liabilities, but that it would not so adjudge them at the plaintiff's request and upon plaintiff's complaint."

The defendants contend: "This is an action instituted by the Jacobi Hardware Company, of New Hanover County, against the Jones Cotton Company, of Scotland County. In the complaint, the plaintiff does not allege a cause of action against the defendant, but alleges that the defendant claims to have a cause of action against the plaintiff and seeks to require the defendant, Jones Cotton Company, to go into the Superior Court of New Hanover County and establish its claim, or be forever denied the right to do so, if it has a just claim. In the early Fall of 1923, the Jones Cotton Company, through one of its members, R. J. Jones, ordered cotton scales from the Jacobi Hardware Company. The scales were duly received and appeared to be accurate and in perfect condition. Without the poise, the beam balanced. With the correct poise, the scales would have been accurate. The poise, which was received by the Jones Cotton Co., should have weighed sixteen (16) pounds, and the poise, which was received, had the figures 16, moulded on the poise, as an indication of its weight. After the Jones Cotton Company had used the scales for a considerable time, the purchasers of cotton from the Jones Cotton Company began to complain about the shortage in weights. After an exhaustive investigation, it was finally discovered that the poise, which should have weighed sixteen (16) pounds, weighed only fifteen (15) pounds. At that time, the loss of the Jones Cotton Company, by reason of the erroneous weight of the poise, had amounted to approximately two thousand dollars ($2,000). The defendant advised the Hardware Company of the situation and the loss which it had suffered and asked that the Hardware Company make good the loss. The matter was left open for the Hardware Company and the present suit was instituted within a short time thereafter. In apt time, the defendant filed a demurrer to the complaint as

will appear in the record, upon the ground that the plaintiff had not stated facts sufficient to constitute a cause of action. The demurrer was sustained."

Plaintiff cites C. S., 626, which is as follows: "Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall hear and determine the case, and render judgment thereon as if an action were pending."

In the instant case the plaintiff does not come within the provision of this section. Both parties did not "agree upon a case." If the defendant had answered and set up their claim and waived the venue and agreed to try the cause in New Hanover County, we think this could be done. But this was not done, and the defendant in apt time demurred to the complaint.

Plaintiff also cites Art. I, sec. 35, Const. of N. C., as follows: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

This is a wise provision. The courts shall be open for an injury done plaintiff. The vice of plaintiff's contention is that plaintiff does not allege an injury done it, but an injury, if properly pleaded and found to be true, perhaps, it has done the defendants. This is an orderly government and all remedies must conform to our Code of Civil Procedure and the lawful rules laid down by this Court under authority given it. Art. I, sec. 8, and Art. IV, secs. 2, 8, and 12, Const. of N. C.

Under civil procedure, an action (C. S., 392) is defined to be "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." Every other remedy is a special proceeding.

Under C. S., 511, it is provided that a defendant may demur to the complaint when it appears upon the face thereof (subsec. 6) that "the complaint does not state facts sufficient to constitute a cause of action."

We can see no actionable wrong set forth in the complaint done by defendants to plaintiff. Defendants in their brief facetiously state that plaintiff in the court below took the position that its complaint was a "Bill of peace." There is such a bill in equity, but not under facts as alleged in the complaint.

"'Bills of peace' were used, first, to prevent vexatious recurrence of litigation by several asserting the same right, and, second, to prevent reiteration of an unsuccessful claim. Where a man sets up a general and exclusive right to lands or tenements, and many persons controvert it and he cannot quiet it except by resort to numerous actions at law, he has his remedy by a 'bill of peace' in equity, in which he may join all of the adverse claimants. *Vandalia Coal Co. v. Lawson,* 87 N. E., 47, 50; 43 Ind. App., 226." Words and Phrases, (2d Ser.) p. 451. *Detroit Trust Co. v. Hunrath,* 131 N. W., 147, 152; 168 Mich., 180.

There is a bill known as *quia timet.* "A bill *quia timet* is in the nature of a writ of prevention and is entertained as a measure of precaution, justice, and to forestall wrongs or anticipated mischiefs, as where a guardian or other trustee is squandering an estate, or where one in possession of property which another unjustly claims is likely to lose the evidence of his title by delay in asserting and testing the hostile claim. *Bailey v. Briggs,* 56 N. Y., 407, 415." Words and Phrases, p. 452. *Fittichauer v. Metropolitan Fire Proofing Co.,* 61 Atl., 746, 748, 70 N. J. Eq., 429.

We have a remedial statute which has been liberally construed quieting land titles, more comprehensive than the old suit in equity to remove a cloud from title.

C. S., 1743, in part, is as follows: "Titles quieted. An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims, etc. . . . If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs, etc." *Mining Co. v. Mills Co.,* 181 N. C., 361, in this case a "bill of peace" is mentioned. *Stocks v. Stocks,* 179 N. C., p. 289; *Power Co. v. Power Co.,* 175 N. C., p. 668; *Satterwhite v. Gallagher,* 173 N. C., p. 525.

We have treated the suit seriously. Neither plaintiff nor defendants have cited any statute or authority, as we construe them, giving any cause of action to plaintiff on facts as set forth in the complaint. The plaintiff "jumps before he is spurred."

It may be that defendants will never sue plaintiff, they may forego their right. *Locus pœnitentiæ.*

For the reasons given, the demurrer must be sustained and the suit dismissed.

Affirmed.

FIRST NATIONAL BANK OF SPARTANBURG, SOUTH CAROLINA, v. W. McK. MONROE.

(Filed 22 October, 1924.)

Bills and Notes — Negotiable Instruments — Banks and Banking — Due Course—Evidence—Principal and Agent—Questions for Jury.

Evidence that a bank received a negotiable note from the payee, credited him therewith, but with the right to charge it back to his account, should the maker fail to pay it, is of an agency for collection; and where there is other evidence which tends to show that the bank, the plaintiff in an action upon the note, was a holder for value in due course, before maturity, it is reversible error for the trial judge to direct a verdict upon the appropriate issue in the plaintiff's favor.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1924, of CUMBERLAND.

Civil action, to recover upon a promissory note executed by the defendant to the Lummus Machinery Company, and alleged to have been duly transferred and assigned to the plaintiff for value, before maturity and without notice of any equities.

The jury returned the following verdict under instructions from the court, that if they found the facts to be as testified to by the witnesses, they should answer the issues as shown below:

"1. Was the execution of the note sued on obtained by the fraud of J. L. Lummus, as alleged in the amended answer? Answer: Yes.

2. Is the plaintiff the holder in due course of said note? Answer: Yes.

3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: Two thousand dollars and interest."

Judgment on the verdict for plaintiff. Defendant appeals, assigning errors.

Cook & Cook for plaintiff.

Shaw & Shaw, Bullard & Stringfield, and Dye & Clark for defendant.

STACY, J. The president and assistant cashier of the plaintiff bank testified that the note sued on, admittedly negotiable in form and executed by the defendant to the Lummus Machinery Company on 8 April, 1920, was purchased from the payee by the First National Bank of Spartanburg, S. C., in good faith, for value, before maturity, and without notice of any infirmity in the instrument or defect in the title of the party negotiating it. C. S., 3033. But there is other evidence on the record tending to show that the plaintiff bank took the note in question with the right to charge it back to the account of Lummus Machinery Company if not paid by the maker at maturity.

The written deposit slip, used by the parties at the time the note was discounted and placed to the credit of the Lummus Machinery Company upon the books of the plaintiff bank, contained the following stipulation: "All items not actually collected will be charged back to depositor's account. . . . Read carefully above agreement." The plaintiff tried to collect the note out of the payee before bringing the present suit. This evidence made it a question of fact for the jury to say whether the plaintiff took the note in suit as purchaser or as agent for collection; and the court's instruction, which virtually amounted to a direction of the verdict, must be held for error. *Sterling Mills v. Milling Co.*, 184 N. C., 461.

The principle applicable is stated by *Allen, J.*, in *Worth Co. v. Feed Co.*, 172 N. C., p. 342, as follows: "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper and places the amount, less the discount, to the credit of the endorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the endorsement, the bank is an agent for collection, and not a purchaser," citing a number of authorities for the position. See, also, to like effect, *Finance Co. v. Cotton Mills Co.*, 187 N. C., 233.

The real determinative question was as to the intention of the parties; and this is a question of fact to be ascertained by the jury, where the evidence is equivocal or conflicting, as it is here. *Sterling Mills v. Milling Co., supra.*

For the error, as indicated, in directing a verdict on evidence, from which different inferences may be drawn, we are of opinion that the cause must be submitted to another jury, and it is so ordered.

New trial.

STATE v. T. C. BRADSHER.

(Filed 22 October, 1924.)

Intoxicating Liquor—Spirituous Liquor—Evidence.

Circumstantial evidence is sufficient, upon the trial of two consolidated cases, to convict of unlawfully transporting intoxicating liquor and driving an automobile while under its influence.

APPEAL by defendant from judgment rendered by *Cranmer, J.*, at August Term, 1924, of PERSON.

At August Term, 1924, of said court, two indictments were pending—one charging defendant with transporting intoxicating liquor; the other,

with driving an automobile while under the influence of intoxicating liquor. Defendant's plea to each indictment was "Not guilty." The two actions were, by consent, consolidated for trial, and verdict of "Guilty" returned in each. From the judgments rendered, defendant appealed.

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

Nathan Lunsford for defendant.

PER CURIAM. Defendant excepted to portions of the charge of the court to the jury. He contends that there was no evidence from which the jury could find, beyond a reasonable doubt, that the quart fruit jar which he threw from his automobile while the officers were pursuing him contained intoxicating liquor. He testified that it contained gasoline which he had bought from a colored man, and that he had not drunk any intoxicating liquor during the day on which he was arrested.

While no witness testified that the fruit jar contained intoxicating liquor, there was evidence from which the jury could find facts and circumstances sufficient to justify an inference, beyond a reasonable doubt, that the liquid in the jar was an intoxicating liquor, and that defendant was under the influence of such liquor while driving the automobile on the public road. We do not deem it necessary to set out the evidence.

The instructions of his Honor, excepted to and assigned as error, were correct statements of the law applicable to the facts which the jury might find from the evidence, and did not contravene C. S., 564, as contended by defendant's attorney in his brief filed in this Court.

There was evidence sufficient for the submission of the issues to the jury; the charge of the court was free from error, and the judgments rendered were within the discretion vested by law in the presiding judge. There was

No error.

EULA VICKERS v. BAXTER VICKERS.

(Filed 22 October, 1924.)

1. Husband and Wife—Alimony—Judgments—Orders—Evidence—Findings.

Upon a motion to set aside or modify an order for alimony without divorce, the effect of the refusal of the court to grant the motion is an affirmance of the findings previously made; and when these are sufficient, the order presently made will be upheld.

2. Same—Affidavit of Wife.

Where, in an action for alimony without divorce, the evidence is otherwise sufficient to sustain the order granting the alimony or refusing to modify it, the fact that the affidavit of the wife upon the subject-matter forbidden by statute was filed at the hearing will not have the effect of disturbing the order appealed from; the finding of the willful abandonment of the husband being found by the judge upon supporting evidence.

3. Same—Issues—Jury.

Under the amendment to the statute, alimony without divorce may be allowed to the wife, etc., before the determination of the issue by the jury.

CIVIL ACTION, to obtain alimony without divorce, heard, on motion to set aside or modify an order allowing alimony *pendente lite* theretofore made, before *Cranmer, J.*, at chambers, on 24 July, 1924. From DURHAM.

The original order, allowing alimony *pendente lite,* and appointing receiver of defendant's property, was made by his Honor, Sinclair, Judge, on 9 July, 1924, and on further findings of fact by him, as follows:

"The court further finds as a fact that the defendant, Baxter Vickers, has separated himself from his wife, the plaintiff, and his child, and has failed to provide for her and the child, William Vickers, with the necessary subsistence, according to his means in life.

"The court further finds it to be a fact that he has abandoned his wife and child, and since said abandonment has committed various acts of adultery, and that he has left the State, having left with women of lewd character, and the court finds as a fact that his leaving amounts to an abandonment of his wife and child.

"It is further found as a fact that the defendant is a man of property, and that the same is in danger of being squandered and this judgment rendered worthless unless a receiver is appointed to collect the rents and care for said property."

On the hearing of defendant's present motion, the court in effect approves the order of Judge Sinclair as to findings of fact and appointment of receiver, modifies allowance as to amount of alimony, but declines to set aside or otherwise change the former order. Defendant excepts and appeals.

Brogden, Reade & Bryant for plaintiff.
Brawley & Gantt for defendant.

HOKE, C. J. The findings of fact in the original order by Judge Sinclair, supported by the affidavits and evidence offered in behalf of plaintiff, are fully sufficient to uphold the orders made by Cranmer,

Judge, from which the present appeal is taken. True, Judge Cranmer himself does not in express terms make specific findings of fact, but the force and effect of his order is to affirm the findings of Judge Sinclair, his judgment only affecting such former order to the extent of reducing the amount of the allowance.

In *Crews v. Crews,* 175 N. C., p. 169, a case cited and to some extent relied on by appellant, the Court held that, under the statute as it then was, and on issuable facts in bar of plaintiff's right being formally presented in the answer, an allowance for alimony could not be made until the determination of the issues by a jury. At the next session of the Legislature, however, after this decision rendered, and no doubt in consequence of it, the statute was amended so as to permit an award of alimony *pendente lite* for both counsel fees and subsistence, to be realized and secured according to the course and practice of the court. This change in the law, and the effect and purpose of it, was pointed out and applied in *Barbee v. Barbee,* 187 N. C., p. 538, opinion by *Associate Justice Stacy,* and according to the decision of that case, and under the statute as it now prevails, the ruling of the lower court must be approved.

On perusal of the record it appears that the affidavit of the wife, charging adultery on the husband, is submitted as part of her evidence pertinent to the inquiry. As an independent fact, such evidence seems to be absolutely forbidden by the statutes and public policy controlling in the matter. C. S., 1662; *Hooper v. Hooper,* 165 N. C., p. 605. But, apart from this testimony, and on evidence sufficiently supporting them, are the express findings by the court of abandonment on the part of the husband, and of a willful failure to provide for their "necessary subsistence according to his means and condition in life," thus bringing the judgment of the court clearly within the statutory provision on the subject.

There is no error, and the judgment of the lower court is

Affirmed.

SARAH E. KING ET AL. v. ISABELLA TAYLOR ET AL.

(Filed 22 October, 1924.)

1. Certiorari—Discretion of Court—Constitutional Law—Statutes—Appeal and Error.

The granting or refusing of a petition for a *certiorari,* under the provisions of our Constitution, Art. IV, sec. 8, and C. S., 630, passed in pursuance thereof, is a matter within the discretion of the Supreme Court, and will not be issued when it will serve no good purpose.

2. Same—Consent Judgments—Waiver.

A writ of *certiorari* will not issue from the Supreme Court to bring up for review the action of the Superior Court judge in refusing to settle a case on appeal, when it appears that a judgment had been entered by the court upon the consent of the parties, such judgment being a waiver of the right of appeal. *Semble*, the only remedy is a motion in the lower court to set aside the judgment.

APPLICATION for *certiorari* to obtain a review of a judgment entered in this cause at March Term, 1924, of CUMBERLAND.

This was a special proceeding before the clerk to establish a dividing line between these parties, transferred on issues joined to Superior Court docket for trial, and wherein it appears that after the jury was impaneled on the issue, the matters in dispute having been adjusted between the parties, a juror was withdrawn and judgment by consent entered of record, according to the agreement then had.

It further appears from the affidavits filed on this application that plaintiffs, having become dissatisfied, and after judgment signed, protested same and gave notice of an appeal in open court and asked for the usual entries to be made looking to a perfection of said appeal, which motions were refused by the judge, his Honor being of opinion that no appeal would lie from a consent judgment. On the facts appearing of record, plaintiff's application is denied.

A. M. Moore, for plaintiffs.
Bullard & Stringfield for defendants.

HOKE, C. J. Under Article IV, section 8, of our Constitution, power is conferred upon the Supreme Court to issue "any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts, and in furtherance of such power the General Assembly, in C. S., 630, has provided for the issuance of the writs of *certiorari*, as heretofore in use, etc." A proper consideration of the authorities apposite is to the effect that as a substitute for appeal the writ does not issue as of right, but only in the sound discretion of the appellate court, to review an adverse judgment where no provision for appeal has been made by law or the right thereto has been lost or wrongfully refused without default of the applicant, and is allowed only on a reasonable show of merits and that the ends of justice will be thereby promoted. *S. v. Farmer*, 188 N. C., p. 243; *Mimms v. R. R.*, 183 N. C., p. 436; *Deslauries v. Louice*, 222 Ill., p. 522; *Rudnick v. Murphy*, 213 Mass., p. 470; 5 R. C. L., pp. 253-254.

In the present case, a perusal of the record as now presented will disclose that a judgment below has been entered by consent and stands now in the lower court as the final determination of the rights of the

parties of record, and in such case it is very generally held that no appeal lies, the consent being regarded as the waiver of such right. *Hartsoe v. R. R.*, 161 N. C., p. 215; *Skinner v. Maxwell*, 67 N. C., p. 257; *Schmidt v. Virgin Gold Mine Co.*, 28 Ore., p. 9; 3 Corpus Juris, p. 671; 2 R. C. L., p. 31, sec. 9.

In this last citation the recognized position on the subject is very well stated as follows: "A judgment or decree rendered by the consent of the parties is in the nature of a solemn contract and is in effect an admission by the parties that the decree is a just determination of their rights on the real facts of the case, had they been proved. As a result such a decree or judgment is absolutely conclusive between the parties, and it can neither be amended nor in any way waived without a like consent, nor can it be appealed from or reviewed on a writ of error. Thus consent to the rendition of a decree in proceedings for the foreclosure of a mortgage is a waiver of error precluding a review on appeal."

This being true, we are of opinion that a writ of *certiorari* would avail nothing to the applicant in the present condition of the record, for while that judgment by consent stands, and on the facts as they now appear, this Court is without power to review or question it. Even if the record were certified here with evidence in case on appeal tending to impeach it, the judgment would control and the cause would have to be dismissed, our decisions being that in each case the record must prevail. *Southerland v. Brown*, 176 N. C., p. 187; *Bell v. Harrison*, 179 N. C., 190.

In order to a further presentation of their claims, the only course apparently open to plaintiffs is by motion in the lower court to set the judgment aside and if their application is refused it may then be in their power to review the action of the lower court by appeal or *certiorari* as they may be advised. As the matter now appears they are without right to relief in this Court and their application is denied.

Application denied.

STATE v. H. C. O'BRIANT.

(Filed 29 October, 1924.)

Taxation—Peddler's Tax—Statutes.

One who travels with an auto-truck loaded with merchandise and delivers goods purchased by retail dealers therefrom, though in the manufacturers' original packages, is a peddler within the terms and intent of our statute requiring the payment of a peddler's tax.

STATE *v.* O'BRIANT.

APPEAL by the State from judgment rendered on special verdict before *Cranmer, J.*, and a jury, at August Term, 1924, of PERSON.

Attorney-General Manning, Assistant Attorney-General Nash, and C. A. Hall for the State.

L. M. Carlton for defendant.

PER CURIAM. The defendant was indicted for "unlawfully and willfully engaging in the business of an itinerant merchant and peddler of goods, wares and merchandise without first having paid the license tax and obtained a license so to do, as required by law."

The following is the special verdict and judgment:

The jury, after being impanelled to try the issue in the case, find the following special verdict: That the Durham Seed Company is engaged in the retail seed business and in the wholesale candy, cigar and tobacco business, located in the city of Durham, N. C.

That the defendant, H. C. O'Briant, is an employee of the Durham Seed Company and as such travels in Durham and surrounding counties, including Person County, in an automobile truck and makes sales of candy, cigars and tobacco for the Durham Seed Company, in the following manner, to wit: He carries a stock of candy, cigars and tobacco in said automobile truck and solicits orders for same, carrying with him samples and a sample case, which he displays to the merchants and those having a fixed place of business and sells only in unbroken packages, as put up by the manufacturers.

That the defendant takes orders for his sales in duplicate and delivers a copy to the purchaser and thereupon delivers said goods from said truck to fill the order, and in the event he has not the goods on his truck with which to fill the purchase, he delivers it later, by express or mail if the customer requests.

That on or about 3 June, 1924, the defendant came to Roxboro, as was his custom, with his truck loaded with goods, and went into the retail store of one A. B. Brown, on Main Street, with his samples of candy in sample case, which he displayed to said Brown and took an order for a box of candy in an unbroken package, and after taking said order, and delivering a copy to said Brown, he delivered said box of candy from said truck.

For the past several months, the defendant, H. C. O'Briant, has been making trips to Roxboro for the purpose of making such sales, as set forth above, once a week and sometimes twice a week, and most of the time the defendant carries sufficient goods on his truck to make deliveries in fulfillment of the orders received on the trip.

That neither the Durham Seed Company, nor the defendant, H. C. O'Briant, had, prior to 3 June, 1924, applied for the license imposed in section 45, ch. 4, of the Public Laws of 1923, and neither the Durham Seed Company, nor the defendant, H. C. O'Briant had paid the license tax imposed in section 45, ch. 4, of the Public Laws of 1923.

If, upon the foregoing facts, the court should be of the opinion that the defendant is guilty, then the jury so find, but if the court should be of the opinion that the defendant is not guilty, then the jury find him not guilty.

The court is of the opinion, upon the foregoing facts, found by the jury, that the defendant is "Not Guilty."

The State appealed from the judgment of the court below.

The statute, sec. 45, of the Revenue Act, ch. 4, Public Laws of 1923, defines a peddler as follows: "Any person who shall carry from place to place any goods, wares or merchandise and offer to sell or barter the same, or actually sells or barters the same." The original idea, of course, of the peddler is one who carries his goods about with him in a pack on his back and retails them to consumers. The statute, however, broadens the term "peddler" so as to include other classes of persons who otherwise would not come within the signification of that term. It includes those who carry goods about with them in a vehicle of any kind; it includes medicine fakers; it includes itinerant salesmen, and then lower down in the section it gives another inclusive definition of a peddler, as follows: "Any person carrying a wagon, cart, buggy or motor-driven vehicle or traveling on foot for the purpose of exhibiting or delivering any wares or merchandise shall be considered a peddler. . . . This section shall not apply to drummers selling by wholesale, and bona fide residents who are blind."

The State contended that this latter definition includes the defendant, notwithstanding the fact that he was selling goods in original packages to those who bought regularly from him, and to retail dealers. The defendant contended that he was a drummer within the statute and consequently, it does not apply to him. The term "drummer," however, has a definite and distinct meaning as ordinarily understood. He is one who travels from place to place, carrying with him samples from which he sells goods to customers, to be delivered thereafter. He in no sense carries the goods with him, but as agent for his employer, sells by sample and does not deliver the goods. He is a commercial traveler who carries no goods with him.

We are of the opinion that the statute intends to tax as peddlers persons who carry the goods with them in a truck and sell and deliver them to purchasers from the truck, even though those purchasers may

be retail dealers and the goods are sold in small original packages. It is the *method* of sale which is taxed, and not the sale itself. There is in the statute a certain measure of protection for local dealers who pay taxes locally and are dependent upon their local trade for a profit. To make the statute depend upon whether or not the goods are delivered in the original package would open the door to continual frauds upon the statute itself. All the peddler would have to do would be to get the dealer who sells to him to put up the goods in small packages, take them about with him and sell and deliver them from a truck.

Nor, do we think it would make any difference what class of people he sells to, if he does sell and deliver from a stock of goods carried about with him. Of course, it would be otherwise with reference to goods sold by sample which are thereafter to be delivered either by mail, express or truck. That would not be peddling within the statute. See 3 Words and Phrases, title "Drummer," p. 2207; 2 Words and Phrases (N. S.), title "Drummer," p. 155. *S. v. Miller,* 93 N. C., 511; *Robbins v. Shelby Taxing Dist.,* 120 U. S., 489; *Emert v. Missouri,* 156 N. S., 296; *S. v. Lee,* 113 N. C., 681; *Greensboro v. Williams,* 124 N. C., 167; *S. v. Frank,* 130 N. C., 724.

See "Hawkers and Peddlers," Enc. Digest of N. C. Reports, Vol. 7, p. 1, *et seq.,* Vol. 14, p. 287.

We are indebted to Mr. Nash for a most excellent and able brief in this case, and take the liberty of using most of it in this opinion. We think there was error in the court below rendering a verdict of "Not Guilty." For the reasons given,

Reversed and remanded.

O. McLAWHORN v. D. W. COPPAGE.

(Filed 29 October, 1924.)

1. Trespass—Issues.

The refusal of the trial judge to submit an issue tendered by the party will not be held for error when the one submitted by the court arises upon the pleadings, is supported by the evidence, and is determinative of the question, no particular form therefor being required.

2. Same—Instructions.

Where an action of trespass involving title to lands depends upon an issue as to the true dividing line between adjoining owners only, an instruction which confines the verdict to their findings upon the conflicting evidence thereon of the parties is not erroneous.

APPEAL by plaintiff from *Midyette, J.*, at the April Term, 1924, of CRAVEN.

The plaintiff tendered these issues which the court refused to submit:

1. Where is the true dividing line between the lands claimed by the plaintiff and the lands claimed by the defendant in this action?

2. What damage, if any, is the plaintiff entitled to recover for wrongful trespass on his lands by the defendant?

3. What damage, if any, is the defendant entitled to recover for wrongful trespass on his lands by the plaintiff?

The following verdict was returned:

"1. Is the plaintiff McLawhorn, the owner and entitled to the possession of the land in controversy shown on the official map from A to B to C to X to 4 to Y and from Y to A? Answer: 'No.'

"2. If so, did defendant Coppage wrongfully enter upon said land and remove timber and trees therefrom as alleged in the complaint? Answer: 'No.'

"3. If so, what damage, if any, is plaintiff McLawhorn entitled to recover? Answer: 'No.'

"4. Is the defendant Coppage the owner and entitled to the possession of the land in controversy shown on the official map from A to B to C to X to 4 to Y and from Y to A, as alleged in the cross-complaint? Answer: 'Yes.'

"5. If so, did plaintiff McLawhorn wrongfully enter upon said land and remove timber and trees therefrom, as alleged in the cross-complaint? Answer: 'Yes.'

"6. If so, what damage, if any, is defendant Coppage entitled to recover? Answer: '$1.00.'"

Judgment for defendant.

Moore & Dunn for plaintiff.

D. L. Ward and R. A. Nunn for defendant.

ADAMS, J. The plaintiff alleged that he was the owner and in possession of a tract of land described in the complaint and that the defendant had trespassed thereon to his damage. The defendant admitted the plaintiff's title, but denied the trespass. Thereafter the defendant brought a cross-action alleging that he was the owner of certain lands and that the plaintiff had trespassed thereon by cutting and removing timber. No answer was filed, and at the trial the actions were consolidated. The plaintiff introduced evidence tending to show that he was the owner and in possession of a tract of land represented on the plat by A, B, C, D, A, and the defendant offered evidence tending to show that he was the owner and in possession of the land represented by the figures 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11-1. The deed under which the

plaintiff claimed called for the Dinking line. It was agreed that the land in controversy is shown on the plat by the lines A-B-C-X-4-Y-A.

The plaintiff excepted to the judge's refusal to adopt the issues which he tendered and to the submission of the issues which appear of record. Neither exception can be sustained. The allegations in the pleadings and the admission of the parties as to the land in controversy fully justify the ruling complained of. The issues should present the material facts arising upon the pleadings, though the form in which they are presented is largely in the discretion of the trial judge. *Mann v. Archbell,* 186 N. C., 72; *Dalrymple v. Cole,* 181 N. C., 285; *Potato Co. v. Jeanette,* 174 N. C., 236.

His Honor charged the jury if they were satisfied by the greater weight of the evidence that A-B-C-D-etc., represented the true location of the Dinking line to answer the first issue "Yes," and unless so satisfied to answer it "No." Exception was taken on the ground that the instruction deprived the jury of the "latitude of determination" which they would have had if the first of the issues tendered by the plaintiff had been submitted. The plaintiff's deed called for the Dinking line and his land could not extend beyond it; the location of this line was in dispute; the plaintiff contended that its location was represented by certain lines and the defendant contended that its location was represented by other lines. If the plaintiff's contention was correct he was entitled to recover damages of the defendant; if the defendant's contention was correct he was entitled to recover of the plaintiff. The evidence related to these two contentions and with respect to the location of the Dinking line his Honor clearly applied the law to the evidence that had been offered.

What we have said disposes of all the exceptions except the seventh. We have given it due consideration and find it to be without merit. In answer to the question whether the jury had a right to divide the land between the parties the judge properly held that the issues should be answered according to the evidence.

No error.

F. W. WHELESS v. W. P. EDWARDS ET AL.

(Filed 29 October, 1924.)

1. Liens—Landlord and Tenant—Evidence—Burden of Proof—Payment.

Evidence in this case that the plaintiff had received certain cotton from the cropper is competent upon the question as to whether he was a purchaser of defendant of the lands, or whether it was intended only as a payment of rent by the one in possession as defendant's tenant.

2. Evidence—Pleadings—Admissions.

A part of the paragraph of the pleadings is competent as evidence, without the introduction of the whole, upon the facts of this case.

3. Instructions—Appeal and Error.

An instruction will not be held for reversible error, if taken in its connection with the whole it is so connected as not to erroneously mislead the jury as to the principles of law arising from the evidence in the case.

APPEAL by defendants from *Grady, J.*, at February Term, 1924, of FRANKLIN.

Action for the recovery of cotton seized under claim and delivery and replevied by the defendants.

In 1922 the defendants agreed to sell to a colored man named Paul Jones certain tracts of land at the price of $5,000, of which $500 was to be paid in cash and the remainder in installments secured by a deed of trust. On 1 January, 1923, the grantors, W. D. Edwards, his wife, and her mother, signed a deed for the land and acknowledged the execution thereof before a notary public. On the same day Paul Jones, the proposed purchaser, and his wife made a deed of trust to secure the deferred payments and acknowledged the execution thereof before a justice of the peace. The deed and the deed of trust were probated by the clerk of the Superior Court on 4 December, 1923, and registered on the same day. Jones took possession of the land in December, 1922, and on 5 March, 1923, executed to the plaintiff an instrument in the nature of a crop lien and chattel mortgage on the crops to be grown during the year to secure advances and perhaps other indebtedness to the amount of $800. In the fall of 1923 he delivered to the plaintiff five bales of cotton and four bales to the defendants. The plaintiff claimed title to these four bales and brought suit to recover them. The defendants contended that in the latter part of January, 1923, Jones said he could not make the cash payment of $500 and then rented the land for the year; that he paid the four bales as rent, and afterwards renewed his trade for the purchase of the land. Edwards testified that he kept the deed and Jones kept the deed of trust from 1 January to 4 December, 1923. The plaintiff contended that Jones held the land under a contract of purchase and not as tenant. The issues were answered as follows:

"1. Is the plaintiff the owner of the four bales of cotton described in the complaint? Answer: 'Yes.'

"2. What was the value of said cotton on the date of seizure under claim and delivery? Answer: '$560.67.' "

Judgment for plaintiff. Appeal by defendants.

White & Malone, Ben T. Holden and W. H. Yarborough for plaintiff.
T. T. Hicks & Son for defendants.

ADAMS, J. The controversy is simplified by the admission of the parties, as stated in the charge, that if the relation of landlord and tenant existed between Edwards and Jones on 5 March, 1923, the cotton in question is the property of the defendants and if such relation did not exist the cotton is the property of the plaintiff. The answer to the first issue depended upon a determination of this question. In reference to the issue his Honor instructed the jury that the burden was on the plaintiff to prove by the greater weight of the evidence that Jones was in possession of the land under a contract of purchase. This was correct; but to make good his contention it was not necessary for the plaintiff to show that the purchaser had received a deed for the land. If Jones held possession under such contract he did not hold possession as tenant. Edwards testified he had agreed to sell him the land and raised no question as to the sufficiency of the contract on the ground that it had not been reduced to writing. The deed, if not delivered until 4 December, was in fact signed and acknowledged by the defendants on 1 January, 1923. We do not regard the charge as susceptible of the construction that the execution and acknowledgment of the deed necessarily implied the consummation of the purchase. This evidence was competent on the question whether Jones had taken possession of the land as vendee and was evidently admitted for this purpose; for the paragraph referred to in the fifth exception contained merely a statement of the plaintiff's contentions. It seems to be apparent, then, that exceptions 1, 2, 4, 5, 8, 9, 10, 11 should be overruled. *Killebrew v. Hines,* 104 N. C., 182; *Warrington v. Hardison,* 185 N. C., 76; C. S., 2480, 2481.

The plaintiff introduced a part of the defendant's answer in which the defendants admitted they had applied the value of the cotton received from Jones as the cash payment for the purchase of the land, and the defendant objected on the ground that the plaintiff did not offer the remainder of the allegation, "and then and not before the deed and deed of trust were delivered by these defendants to the office of the register of deeds of Franklin County for registration, and only then did the contract of purchase go into operation." The admission of the evidence is in accord with these decisions: *White v. Hines,* 182 N. C., 275, 279; *Modlin v. Ins. Co.,* 151 N. C., 35, 39; *Hockfield v. R. R.,* 150 N. C., 419; *Stewart v. R. R.,* 136 N. C., 385; *Hedrick v. R. R., ibid.,* 510.

The defendant excepted to the instruction that "the delivery on the papers would have nothing to do with the case." They were delivered 4 December, 1923. Considered as a detached sentence this instruction may not be strictly accurate; but when considered in relation to other portions of the charge it does not constitute reversible error. It is obvious, we think, that the judge used the expression in emphasizing the instruction that under the admission of the parties the cardinal question was the relation existing between the defendants and Jones at the time the crop lien was executed; and this was about nine months before the deed was actually delivered.

The other exceptions present no sufficient ground for a new trial.

No error.

STATE v. FRED ROBERTS AND CLARA ADAMS.

(Filed 29 October, 1924.)

1. Criminal Law—Evidence—Declarations—Fornication and Adultery.

Where the defendants are being tried for fornication and adultery, testimony of the wife that the feme defendant accompanied by her husband had entered the store where she was at work, and had left together after the feme defendant, uninterrupted by her husband, had assaulted her and told her of matters inferring the guilt of her husband, etc., while the declarations are primarily the declarations of the feme defendant, they are also competent against the male defendant who stood silent at the time and by his conduct acquiesced therein. C. S., 4343.

2. Same—Nonsuit—Statutes.

Upon the demurrer by the male defendant to the State's evidence, upon a trial for fornication and adultery, the principle that the declarations of one defendant may not be received in evidence of the guilt of the other does not apply when the declarations of the paramour of the male defendant is made in his presence, while the female defendant is assaulting his wife and he is standing inactively by and encouraging her therein by his conduct, and remains silent when the paramour's declarations are so made.

CRIMINAL ACTION charging defendants with fornication and adultery, tried before *McElroy, J.*, and a jury, at July Term, 1924, of FORSYTH.

It appears that these defendants, charged in separate warrants, were each found guilty of the offense by the municipal court, and from judgments imposed appealed to Superior Court, and the cause having been there consolidated were tried and determined, as stated, in the Superior Court.

There was evidence on the part of the State tending to show that in 1924, male defendant's wife having left his home, defendant, Clara Adams, came to live at said home in response to an advertisement by male defendant for a housekeeper, etc., and was hired at the rate of $7.50 per week. There was evidence offered permitting the inference of guilt on the part of defendants while living in the house together.

The State having rested its case, there was motion for nonsuit by defendant Roberts. Overruled. Exception. Thereupon defendant Roberts offered no testimony, and again excepted on refusal of a second motion for nonsuit. Defendant, Clara Adams, then offered evidence tending to establish that she was at no time guilty of illicit relations with the male defendant and herself testified to that effect. On cross-examination she further testified that during her stay with defendant as housekeeper, etc., he took her to Pittsburgh, Pa., to see some of her relatives and on the road they spent the night together in the automobile.

State then, over objection of defendant, Roberts, was permitted to offer further evidence tending to show the guilt of the parties and defendant Roberts excepted. There was verdict of guilty, judgment, and defendant Roberts appealed, assigning errors.

Attorney-General Manning, Assistant Attorney-General Nash, and Swink, Clement & Hutchins for the State.

John C. Wallace, Raymond G. Parker for defendant.

HOKE, C. J. The statute forbidding the offense, C. S., 4343, closes with the provision "that the admissions or confessions of one shall not be received in evidence against the other," and it is insisted for appellant that on the trial this proviso was disregarded to his prejudice in allowing the State to introduce certain conduct and declarations of Clara Adams on the issue of appellant's guilt, as follows:

There was evidence tending to show that while the defendants were living at the home of defendant Roberts, on one occasion the two went to a store in Winston-Salem where the wife was then employed and at work, and Clara Adams approached the wife and began to abuse her, saying that she, Clara Adams, was now Fred Roberts' second wife and she had papers to show it. That she then and there assaulted Mrs. Roberts with great violence, grabbed her around the neck, jerked her to the floor and kicked her in the breast and on the mouth, pulling out some of her hair, etc. That when the assault began, Clara Adams handed her pocket book and vanity case and handkerchief to defendant Roberts, telling him to hold them for her, which he did. That they had come in together and Roberts stood by during the fight, in

two or three feet of them, holding these articles and making no effort to interfere, and after the beating he and Clara Adams went out of the store together, etc. The proprietor of the store said that he pleaded with Roberts to interfere for the protection of his wife and to restrain her assailant, but he would not.

While this is primarily the speech and conduct of Clara Adams, and would ordinarily be excluded by the statute, when made in the presence of Roberts it becomes a relevant and pregnant circumstance, not from the declaration itself, but by reason of the behavior of Roberts concerning it. For he not only did nothing to restrain his alleged paramour, but was apparently encouraging her misconduct. The failure of a man to act in the presence of conditions presented here is fully as significant if not more so, than his silence in the presence of a direct accusation, and the character and violence of the assault which he permitted, if he did not encourage, has a tendency at least to show the extent of his infatuation. In our opinion the entire occurrence contains pertinent evidence tending to uphold the charge made against appellant. *Gilliland v. Board of Education,* 141 N. C., p. 482; *S. v. Walton,* 172 N. C., p. 931; *Toole v. Toole,* 112 N. C., p. 153; *S. v. Suggs,* 89 N. C., p. 527.

Appellant excepts further that the court allowed the introduction of additional evidence tending to convict him after the State had rested and when appellant had neither testified nor offered any evidence in his defense, but the objection is without merit. The female defendant had the constitutional right to be examined and to offer evidence in her own behalf, and this matter of allowing additional testimony to be introduced after the State has rested or the case closed, under our decisions is referred to the sound discretion of the trial judge, to be reviewed, if at all, only in case of manifest abuse, a condition that is by no means presented in this record. *Olive v. Olive,* 95 N. C., 486; *In re Abee,* 146 N. C., 273; *S. v. Lee,* 80 N. C., 483.

In our opinion the case has been correctly tried and the judgment of the lower court must be affirmed.

No error.

R. L. McCOLLUM v. SID STACK.

(Filed 29 October, 1924.)

1. Actions—Appearance—Courts—Jurisdiction—Waiver.

An appearance is general when the defendant answers to the merits of the case and thus acknowledges the jurisdiction of the court by whatever name, whether special or otherwise, the pleader calls it, and all defects in the service of the summons are thereby waived by him.

2. Same—Appeal—Exceptions.

Where a defendant enters a special appearance for the purpose of a motion to dismiss the action, he loses whatever right he may thereby have acquired by failing to except to the order of court denying his motion, and may also acquiesce in the jurisdiction of the court by his conduct thereafter.

APPEAL by plaintiff from *Lane, J.*, at November Term, 1923, of ROCKINGHAM.

The facts are stated in the opinion.

Ivie, Trotter & Johnston for plaintiff.
Leland Stanford for defendant.

ADAMS, J. The plaintiff instituted an action in a justice's court and sued out a warrant of attachment against the defendant for the recovery of $200 alleged to be due for goods sold and delivered. The defendant appeared by his counsel and moved to vacate the warrant of attachment on the ground that the affidavit, the undertaking, and the warrant were defective. The motion was overruled and the defendant without excepting filed a written answer. Thereafter on defendant's motion the cause was continued and on the day set for the hearing he demanded a trial by jury. After another continuance the case was tried and the issues were answered and judgment was rendered in favor of the plaintiff. The defendant appealed to the Superior Court and after several other continuances the case came on for hearing when the defendant, assuming to enter a special appearance, moved to vacate the attachment and dismiss the action. The motion was denied at that time, but during the trial it was ascertained that the summons and warrant of attachment had been served on Sunday, and the judge, holding that the service was void, dismissed the action; whereupon the plaintiff appealed to the Supreme Court.

It is not denied that the magistrate issued the summons and the warrant of attachment. If, then, the defendant entered a general appearance and submitted himself to the jurisdiction of the court it is immaterial whether or not the summons was actually served. If he made a general appearance it is likewise immaterial for the present purpose whether the service was void or merely irregular and voidable. C. S., 3958 and 768 (5); *Cowles v. Brittain,* 9 N. C., 204; *Bland v. Whitfield,* 46 N. C., 122; *S. v. Ricketts,* 74 N. C., 187, 192; *Devries v. Summit,* 86 N. C., 126, 131; *White v. Morris,* 107 N. C., 93.

Upon the facts appearing in the record we are of opinion the defendant's appearance was general, not special. The pretended special appear-

ance in the magistrate's court was limited to a motion to vacate the warrant of attachment; nothing was then said in reference to dismissing the action. When the motion to vacate the attachment was overruled no exception was noted, but a written answer was filed, and the jurisdiction of the magistrate was not questioned. "The court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits. An appearance for any other purpose than to question the jurisdiction of the court is general." *School v. Peirce,* 163 N. C., 424, 429. Again, in *Motor Co. v. Reaves,* 184 N. C., 260, 262: "Said an able and learned judge (*Justice Mitchell*), in *Gilbert v. Hall,* 115 Ind., 549: 'A special appearance may be entered for the purpose of taking advantage of any defect in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion, which pertains to the merits of the complaint or petition, constitutes a full appearance, and is hence a submission to the jurisdiction of the court. Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general." There are cases where the defendant may make a *quasi* appearance for the purpose of objecting to the manner in which he is brought before the court, and, in fact, to show that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court, and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not. *Nichols v. The People,* 165 Ill., 502; 2 Enc. Pl. and Pr., 625." See, also, *Barnhardt v. Drug Co.,* 180 N. C., 436; *Currie v. Mining Co.,* 157 N. C., 209, 220; *Scott v. Life Asso.,* 137 N. C., 515.

In the judgment rendered in the Superior Court there is a recital that the defendant through his counsel had entered a special appearance and had moved "to dismiss the summons and warrant of attachment"; but since he had entered a general appearance in the magistrate's court, had filed an answer, had appealed from a judgment rendered on the merits, and had consented to a continuance in the Superior Court he could not by the use of a phrase transform the nature of his previous

acts. "If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character." *Scott v. Life Asso., supra.*

If, however, the defendant's appearance had been special and the motion in the magistrate's court had been addressed to the dismissal of the action, he would have been in no better situation, because he did not except to the denial of his motion. *Allen-Fleming Co. v. R. R.,* 145 N. C., 37, 41; *Moody v. Moody,* 118 N. C., 926.

By making a general appearance and filing an answer upon the merits the defendant waived any defect in the service of the summons. The statute provides that the voluntary appearance of a defendant is equivalent to personal service of the summons. C. S., 490. Pursuing the subject the Court said in *Harris v. Bennett,* 160 N. C., 339: "The record of the proceeding for the sale of the land, which was made a part of the same, discloses that a summons was issued, but not served, but that the defendants named in the writ came in and answered. This is equivalent to appearance, and waives the service of process, the object of which is to bring the defendants into court and to subject them personally, by service of the writ, to its jurisdiction. If they come in voluntarily and appear or answer, the same result is accomplished. A general appearance cures all defects and irregularities in the process. *Wheeler v. Cobb,* 75 N. C., 21; *Penniman v. Daniel,* 95 N. C., 341; *Roberts v. Allman,* 106 N. C., 391; *Moore v. R. R.,* 67 N. C., 209."

The judgment dismissing the action is

Reversed.

MYRTLE M. HANES, ADMINISTRATRIX, v. SOUTHERN PUBLIC UTILITIES COMPANY AND T. R. WILLIARD.

(Filed 29 October, 1924.)

1. Evidence—Nonsuit.

A motion as of nonsuit should not be granted if the evidence, viewed in the light most favorable to the plaintiff, may reasonably be inferred by the jury to sustain his action.

2. Same—Street Railways—Collisions—Negligence—Questions for Jury.

Evidence is sufficient to be submitted for the determination of the jury to recover damages for a wrongful death, against a street car company, which tends to show that its street car struck an automobile and killed one riding therein as a guest, as the automobile was attempting to pass another, going in the same direction, and the employees of the defendant traveling in the opposite direction failed to give signals or warnings of

the approach of the street car; that the car was traveling at a speed forbidden by the ordinance of the city; and that the servants of the defendant might have avoided the injury in the exercise of ordinary care under the circumstances.

APPEAL by plaintiff from *Bryson, J.*, at May Term, 1924, of FORSYTH.

Civil action, to recover damages for an alleged negligent injury, resulting in the death of plaintiff's intestate.

From a judgment of nonsuit, entered at the close of all the evidence, plaintiff appeals.

John C. Wallace, Richmond Rucker Hastings, and Booe & DeBose for plaintiff.

Manly, Hendren & Womble, and Swink, Clement & Hutchins for defendants.

STACY, J. This case has been tried twice in the Superior Court of Forsyth County. At the first hearing there was a verdict for the plaintiff, which was set aside by the presiding judge as being contrary to the weight of the evidence. On the second hearing, from which this appeal is prosecuted, there was a judgment as of nonsuit entered at the close of all the testimony. Much evidence was offered tending to show that the injuries and death complained of were the result of an accident, so far as the defendant was concerned, but it is not all one way. Considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the cause should be submitted to another jury for a determination of the mooted questions of fact raised by the testimony of the several witnesses. Speaking to a similar question in the recent case of *Oil Co. v. Hunt,* 187 N. C., 157, it was said: "On a motion to nonsuit, the evidence is to be taken in its most favorable light for the plaintiffs, and 'they are entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.' *Christman v. Hilliard,* 167 N. C., p. 6."

There was allegation and evidence tending to show that on 22 November, 1922, Charles D. Hanes was fatally injured in a collision between an automobile, in which he was riding, and one of the defendant's street cars. The collision occurred on Main Street in the city of Winston-Salem, about 7 a. m. The deceased was going to his work and was riding, as an invited guest, in the automobile of one C. C. Shelton at the time he received the injuries from which he died on the following day.

Miss Lola Shelton, a witness for the plaintiff, who was riding in the automobile with her brother and the deceased at the time of the injury, testified, in part, as follows: "We were coming over the top of the hill at Centerville Store about 7 o'clock, and Mr. Hanes, the deceased, was standing on the side of the street, and my brother asked him if he wanted to go to town. He said 'Yes,' and my brother stopped the car, and Mr. Hanes got in the rear seat, and we started to town. When we got down almost to the bottom of Salem Hill, and about the middle of the block, there was a truck in front of us, and it kind of slowed up, and my brother started to pull out to go around the truck, and when he got on the car track I saw the street car coming. After we got on the track, the rear end of the street car was just passing Race Street. We were about the middle of the block. I judge the street car was about 60 or 75 feet from us after we got out on the car track. I saw the street car just as my brother pulled out from behind the truck, and at the time we got on the track the street car was as far from us as from where I am sitting to the corner of the courtroom. The truck we passed was going north—the same direction we were going. There was a line of cars ahead of the truck, also going north. On the other side of the street, to our left, cars were coming south—a string of cars coming that way. At the time I saw the street car coming, it was running about 20 miles an hour—coming at a rapid speed. We went around the truck. My brother put the gas on—speeded the engine, to try to get around the truck before the car got to us, and when he turned off of the street-car track the street car hit the rear door of our car, on the left-hand side, and turned the car around. When it stopped, the rear of the car was sitting against the curb and the front wheels sitting against the street car—the rear truck of the street car. The front end of the automobile was standing facing the rear truck of the street car. It threw my brother out. I saw him fall out, as I was sitting on the front seat, beside him. I don't know whether Mr. Hanes was thrown out, or not, as I didn't see him go out of the car; but when I saw him he was outside of the car, lying with his head against the curb, and was unconscious. It battered up our car—almost completely wrecked it; tore both wheels down. I did not hear any gong, or bell, or horn, or any warning whatever from the street car. I think I was in position to have heard it if there had been any; I think I could have heard it."

This evidence, though unsupported, and contradicted in the main by other witnesses, is sufficient to carry the case to the jury, especially in view of the fact that it is made unlawful by ordinance for the defendant to operate its street cars at a rate of speed in excess of 15 miles per hour in the residential section of the city, as was the case here.

We are not permitted to pass upon the probable truth of conflicting evidence when considering a judgment of nonsuit. Our inquiry in such a case is directed to its sufficiency to warrant a verdict in favor of the plaintiff. The jury alone may consider its credibility and determine its weight. *Loggins v. Utilities Co.*, 181 N. C., p. 227.

As to the nonimputability of the negligence of the driver to the passenger or invited guest, under circumstances similar to those here disclosed, see *White v. Realty Co.*, 182 N. C., 536.

Reversed.

WILLIE POOLE v. IMPERIAL MUTUAL LIFE AND HEALTH INSURANCE COMPANY.

(Filed 29 October, 1924.)

1. **Insurance Policies—Contracts—Interpretation.**

Where the terms of a policy of insurance are therein ambiguously expressed, the interpretation more favorable to the insured will be given them.

2. **Same—Accidents—Stipulations — Unlawful Acts.**

A policy of accident insurance that excepts from the company's full liability diseases contracted before the date of the policy, "nor for sickness due to immorality or the violation of law," does not of itself exclude such liability for an injury caused by the plaintiff's stealing a ride on a railway train, made a misdemeanor by C. S., 3508, unless the plaintiff's act was so reckless as to withdraw it from the class of accidents covered by the policy.

3. **Same—Questions for Jury.**

Where the evidence is conflicting as to whether the plaintiff in an action to recover for an accidental injury on his policy of insurance, or had forfeited his right under its terms and conditions, the matter of such defense is a question for the jury.

CIVIL ACTION, to recover for loss of foot on a disease and accident policy held by plaintiff in defendant company, tried on appeal from a justice's court, before *McElroy, J.*, and a jury, at September Term, 1924, of FORSYTH.

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

John D. Slawter and Raymond G. Parker for plaintiff.

John C. Wallace and Richmond Rucker for defendant.

HOKE, C. J. The evidence on part of plaintiff tended to show that he held a policy in defendant company which guaranteed to plaintiff the payment of specified weekly sick and accident benefits, the payment guaranteed in case of accidental loss of foot being $125; that while said policy was alive and in force, all premiums having been fully paid, plaintiff, on 30 April, 1922, in endeavoring to alight from a railroad train, fell and was struck by the train and his leg broken, so that same had to be amputated.

There was also evidence from plaintiff himself permitting the inference that at the time of the injury he was or had been on a railroad freight train without permission of the conductor or other, and "with the intention of being transported free and without paying the usual fare," contrary to the provisions of C. S., ch. 67, sec. 3508, constituting such act a misdemeanor.

It appeared also that the policy sued on and introduced in evidence by plaintiff contained, among others, stipulation as follows: "No benefits will be paid for any disease contracted before the date of this policy, nor for sickness due to immorality or violation of law; and if the company has evidence that the insured is presenting a claim void under this provision, or is feigning sickness or disability, it reserves the right to refund the amount of premiums paid, less benefits drawn, if any, and take up and cancel policy and be discharged from further liability hereunder."

Defendant resists recovery and contends that the judgment of nonsuit should be upheld: First, by reason of the express stipulation of Clause F of the policy, exempting company from payment of benefits "for any disease contracted before the date of the policy, or for sickness due to immorality or violation of law." Second, because it appears that plaintiff at the time was engaged in an unlawful act, contributory to the injury. But, in our opinion, neither position can be maintained. Even if there were ambiguity in the clause of the policy relied upon, permitting construction, it is the accepted principle in such cases that the question should be resolved in favor of the insured. *Parker v. Ins. Co., ante,* 403; *Allgood v. Ins. Co.,* 186 N. C., p. 415; *Rayburn v. Casualty Co.,* 138 N. C., p. 379; *Kendrick v. Ins. Co.,* 124 N. C., p. 315. And, furthermore, it is very generally understood that the term "sickness or disease" does not extend to or include accidental injuries. 1 Cyc., pp. 248-262, etc.

On the second position the judgment of nonsuit is erroneous: First, because it does not appear as a conclusion of law that plaintiff was guilty of the crime imputed to him, and in any event the question should be submitted to the jury. *Ferrell v. R. R.,* 172 N. C., p. 682. Second, even if the unlawfulness of plaintiff's conduct at the time be

established by the evidence, or conceded, the policy in case of accidental injuries containing no exception in reference to it, and the contract of insurance being supported by a separate and independent consideration, to wit, the payment of the premiums charged, the right of recovery, in our opinion, should not be affected by any unlawful conduct of plaintiff, unless it be so reckless or under such circumstances as to remove the injury from the class of accidents, and so withdraw same from the effects of the policy. *Freeman's Ins. v. Huyley,* 129 Miss., p. 525, reported also in 23 A. L. R., p. 1470; *Ins. Co. v. Bennett,* 90 Tenn., p. 256; *London v. Travelers Protective Assn.,* 126 Mo., p. 104; *Phalen v. Clark,* 19 Conn., p. 421; 9 Cyc., p. 556; 1 Corpus Juris, p. 960.

A case to some extent in illustration of the position occurs in our own reports, in *Clay v. Ins. Co.,* 174 N. C., p. 642. And, applying the principles approved in these authorities, we are of opinion that the judgment of nonsuit should be set aside and the cause submitted to the jury on the question of whether plaintiff at the time of the injury was knowingly and willfully engaged in an act of a kind and under circumstances to render his injury so altogether probable as to remove same from the class of accidental injuries contemplated and provided for in his policy of insurance.

Reversed.

STATE v. LACEY MAY.

(Filed 29 October, 1924.)

Gaming—Slot Machines.

The State license issued for the operation of a slot machine is for one that is lawful, and does not permit the operation of one so devised as to give to the one who happens to strike certain mechanical combinations more of the merchandise than received at other times.

APPEAL by defendant from *Sinclair, J.,* at March Term, 1924, of ALAMANCE.

Criminal prosecution, tried upon an indictment charging the defendant with operating a slot machine, in violation of chapter 138, Public Laws 1923.

From an adverse verdict, and judgment pronounced thereon, the defendant appeals, assigning errors.

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

John J. Henderson for defendant.

STACY, J. There is evidence on the record tending to show that the defendant, who runs a filling station near Burlington in Alamance County, and keeps a small stock of groceries, candies, etc., for sale at retail, had in his place of business a slot machine, which was operated by depositing a nickel, or five-cent piece, in the slot provided for receiving same, and for each coin dropped in the machine the operator received five one-cent packages of chewing gum. The machine was so arranged that when certain combinations of designs upon three separately revolving wheels occurred, the operator would receive additional packages of chewing gum, varying from two to four in number and valued at five cents per package. When certain other combinations of designs upon said revolving wheels occurred, the operator would receive metal discs, varying from four to eight in number and each worth five cents in trade at the defendant's place of business. Every time the machine was operated, the person depositing the coin would receive five one-cent packages of chewing gum. The defendant held a license from the State Revenue Department, showing that he had paid a tax for the privilege of operating a slot machine in his place of business.

The trial court instructed the jury that, upon the foregoing facts, if established beyond a reasonable doubt, the defendant would be guilty. The appeal presents the correctness of this ruling.

Of course, the license issued by the State Department of Revenue was a permit to operate a lawful slot machine and not an unlawful one. The distinction between the two is clearly pointed out in section 1, chapter 138, Public Laws 1923, the law under which the defendant has been indicted: "That it shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine that shall not produce for or give to the person who places coin or money, or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin, or the representative of either, therein."

Under this section, a slot machine so operated that one putting into it a coin receives, in any event, the value of such coin in chewing gum, and stands to win by chance additional chewing gum or discs of commercial value without further payment, is condemned by the statute as being unlawful. *Lang v. Merwin,* 99 Me., 486. But if the slot machine were so operated that one who puts in a coin receives the same return in market value each and every time such machine is operated, it would not then fall within the condemnation of the statute. 20 Cyc., 883.

The case at bar clearly constitutes a violation of the statute, which is made a misdemeanor, and the court was correct in its charge.

No error.

STATE v. BUCK HORNER.

(Filed 29 October, 1924.)

Criminal Law—Assault with Deadly Weapon—Evidence—Instructions—Appeal and Error.

Where there is evidence on behalf of the State to convict the defendant of an assault with a deadly weapon, and to the contrary on defendant's behalf, a reasonable inference that the defendant had only acted in self-defense, it is reversible error for the trial judge to instruct the jury to convict upon all the evidence, if they believed it.

INDICTMENT for affray and assault with a deadly weapon, tried before *Cranmer, J.*, and a jury, at August Term, 1924, of ALAMANCE.

The witnesses examined being the prosecutor, Everett Boggs and defendant, Buck Horner, at the close of the evidence his Honor stated that, as a matter of law, if they believed defendant's testimony, defendant was guilty of an assault with a deadly weapon, and charged the jury that they should so find. Verdict, guilty. Judgment. Defendant excepted and appealed.

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

John J. Henderson for defendant.

HOKE, C. J. On the trial the prosecutor testified for the State that defendant approached the prosecutor, in front of Dorsett's store in Burlington, and, after a few words, commenced cutting witness with a knife, when witness retreated within the store and was pursued therein by defendant. There was other testimony tending to corroborate prosecutor's statement.

Defendant, a witness in his own behalf, testified as follows: "That he met the prosecuting witness, Boggs, in front of the store of Mr. Dorsett, in the city of Burlington, and asked Boggs what it was that he had told defendant's little brother; that thereupon witness Boggs called the defendant a 'damn son of a bitch,' and struck defendant on the head with an ale bottle; that defendant, upon the attempt of Boggs to strike him again, knocked witness Boggs down, and thereupon Boggs attacked the defendant with a chair; that the defendant then, in order to defend himself, he being a much smaller man than witness Boggs, took his knife out of his pocket and, as Boggs advanced upon him, cut witness Boggs; that thereupon witness Boggs ran to a crate of empty ale bottles and commenced throwing the bottles at defendant; that defendant, who was then within five or six feet of witness Boggs, was afraid to run

away, for fear of being stricken with the bottles that the witness Boggs was throwing, and advanced upon Boggs, who thereupon retreated within the store and secured full bottles of ale, and was throwing same at the defendant, who was only a distance of five or six feet removed from him; that the witness Boggs had access to a crate or two of full ale bottles, and continued to hurl same upon the defendant, the defendant fearing to retreat or turn his back upon Boggs while he was within reach of the bottles being thrown, advanced and closed with the witness Boggs, and, while Boggs was using a full bottle to club defendant over the head, defendant again cut the witness Boggs. Bystanders then separated the two men."

While the evidence on the part of the State, if accepted by the jury, would clearly establish defendant's guilt, from defendant's own testimony there is a permissible inference that defendant fought in his necessary self-defense, and there was error in his Honor's ruling that defendant was guilty, on his own statement. *S. v. Hill,* 141 N. C., p. 769; *S. v. Hough,* 138 N. C., p. 663; *S. v. Matthews,* 78 N. C., p. 523. And in no event, on the facts of this record, could the court direct the jury as to the verdict they should render. *S. v. Estes,* 185 N. C., p. 752; *S. v. Singleton,* 183 N. C., p. 738; *S. v. Alley,* 180 N. C., p. 663; *S. v. Boyd,* 175 N. C., p. 793; *S. v. Hill,* 141 N. C., p. 769; *S. v. Green,* 134 N. C., p. 658; *S. v. Riley,* 113 N. C., p. 651.

For the errors indicated, there must be a new trial of the cause, and it is so ordered.

New trial.

J. W. BURTON v. DURHAM REALTY & INSURANCE COMPANY AND C. A. MANGUM.

(Filed 29 October, 1924.)

Actions—Case Submitted—Statutes—Controversies—Appeal and Error—Dismissal.

For the courts to pass upon a controversy submitted under the provisions of C. S., 626, the interest of the parties must be antagonistic, and the case will be dismissed if it appears that the parties are one in interest, or desire the same relief.

APPEAL by plaintiff and defendants from *Cranmer, J.,* at September Term, 1924, of DURHAM.

Cause submitted under C. S., 626. The purpose of this proceeding is to ascertain whether or not good and valid titles have passed between the parties for two certain lots of land situate in Durham County, just

outside the limits of the city of Durham. The cause is submitted on an agreed statement of facts. There was a judgment of the Superior Court declaring the titles invalid, from which both sides appeal.

Brogden, Reade & Bryant for plaintiff.
W. S. Lockhart for defendant Mangum.
R. H. Sykes for defendant Durham Realty and Insurance Company.

STACY, J. The two adjacent lots in question, Nos. 1 and 2, were sold by the Durham Realty and Insurance Company to its codefendant, C. A. Mangum, who in turn sold them to the plaintiff. Later, the Durham Realty and Insurance Company repurchased lot No. 2, which it now owns, and lot No. 1 is owned by the plaintiff.

In the spring of the present year the plaintiff offered to sell his lot to one Joseph Simpson, not a party herein, who declined to purchase, because of an alleged defect in plaintiff's title. The court is asked to say that plaintiff has a good title to lot No. 1, and that the defendant, Durham Realty and Insurance Company, has a good title to lot No. 2.

It is apparent that there is no "question in difference" (C. S., 626) between the parties. Both sides are asking for the same thing, and everybody is interested in the same kind of judgment. The proceeding, in realty, is one to obtain the advice or opinion of the Court, and no more. We are only asked to say whether the titles are good or bad, upon the facts agreed, and there is no one present claiming adversely to any of the parties or questioning their titles. While, upon the facts presented, the titles would seem to be valid, we must dismiss the proceeding for want of a real controversy. *Kistler v. R. R.*, 164 N. C., 365; *Parker v. Bank*, 152 N. C., 253; *Board of Education v. Kenan*, 112 N. C., 567; *Millikan v. Fox*, 84 N. C., 107; *Blake v. Askew*, 76 N. C., 325; *Bates v. Lilly*, 65 N. C., 232.

Speaking to a similar situation, in *McKethan v. Ray*, 71 N. C., 165, *Pearson, C. J.*, said: "Our construction of section 315, C. C. P. (now C. S., 626), is that it does not confer upon certain parties, who differ as to their rights, to propound to the Court, on a case agreed, interrogatories in respect thereto, but that the purpose is simply to dispense with the formalities of a summons, complaint and answer, and, upon an agreed state of facts, to submit the case to the Court for decision, and thereupon the judge shall hear and determine the case and 'render judgment thereon as if an action were depending.'"

We dismiss the action, rather than the appeals, because of the adverse judgment entered in the Superior Court, which we consider erroneous. Each side will pay its own costs.

Action dismissed.

J. HARVEY STANCILL v. J. D. UNDERWOOD.

(Filed 29 October, 1924.)

1. Criminal Law—Statutes—Courts—Justices of the Peace—Jurisdiction.

In order for a lawful arrest of one charged with a criminal offense in a different county from the one in which the warrant was issued by a justice of the peace, it is required by C. S., 4526, that a justice of the peace within the county wherein the arrest was to be made, endorse the warrant upon the proof of the handwriting of the justice issuing it, etc.

2. Same—False Arrest—Evidence.

It is not required to constitute an arrest that the officer making it touch the defendant or take him physically; and it is sufficient if the defendant is aware of the warrant in the hands of the officer and submits under it, and upon evidence thereof in an action for damages for false arrest, an issue is raised for the determination of the jury.

3. Same—Malicious Prosecution—Evidence—Questions for Jury.

The legal definition of malice in an action for damages for malicious prosecution is a wrongful act intentionally done, not necessarily ill-will, anger or revenge, in the prosecution of a criminal action for any purpose other than that of bringing the offender to justice; and where upon the warrant of arrest there is a written statement that upon paying a money demand the warrant is not to be executed, it is sufficient evidence for the determination of the jury in an action for malicious prosecution.

APPEAL by the plaintiff from *Cranmer, J.*, at May Term, 1924, of ALAMANCE.

Action for false arrest and malicious prosecution. At the close of the plaintiff's evidence, the action was dismissed as in case of nonsuit.

The evidence considered favorably for the plaintiff tended to show the following facts: In 1920 the plaintiff was engaged in business in Selma under the name of "The Carolina Pharmacy." He had an account with the First National Bank of Selma and on 20 November, 1920, signed a check on said bank for $18 payable to the order of Cotter-Underwood Company, of which defendant was general manager. At the time the check was drawn the plaintiff had money in the bank to meet it. It was endorsed by the payees and was returned by the bank unpaid on account of insufficient funds. The plaintiff heard in January, 1921, that the check had not been paid. In that month he made an assignment for the benefit of creditors.

In July, 1921, the plaintiff bought the business of the City Drug Company in Burlington. Afterwards R. D. Bain, chief of police, went to the drug store and told the plaintiff he had a warrant for him. The result of this meeting as testified to by the plaintiff is stated in the opinion.

The warrant was issued by a justice of the peace of Johnston County upon an affidavit made by the defendant and was addressed "To any lawful officer of Johnston County." It was not endorsed by a justice of the peace in Alamance; but written upon it were the words "If defendant wishes to pay the bill and all costs, accept and send to me." (D. T. Lunceford), and the following return signed by R. D. Bain, chief of police in Burlington: "Received 15 December, 1921, executed 16 December, 1921, by collecting all the required amount."

At the December Term, 1921, of the Superior Court of Johnston a bill of indictment was duly found and returned, charging the plaintiff with false pretense, but a *nol. pros.* was entered and the prosecution was not pursued. The defendant was the only witness examined by the grand jury; but he had no conference with the solicitor in regard to sending the bill.

After he was arrested the plaintiff's business decreased 50 per cent and he suffered other losses.

The present action was brought on 2 September, 1922, after the *nol. pros.* had been taken.

Carroll & Carroll for plaintiff.
E. S. Abell and Parker & Long for defendant.

ADAMS, J. It is provided by statute that if the person against whom any warrant is issued by a justice of the peace shall be in a county beyond the jurisdiction of such justice it shall be the duty of any justice of the peace within the county where the offender shall be, upon proof of the handwriting of the magistrate issuing the warrant, to endorse his name on the same; and thereupon the officer to whom the warrant is directed may arrest the offender in that county. C. S., 4526.

On 10 December, 1921, the defendant caused a warrant to be issued in Johnston County, charging the plaintiff with unlawfully obtaining goods and merchandise by means of a worthless check. C. S., 4283. The warrant was addressed to any lawful officer of Johnston County, and was forwarded to R. D. Bain, chief of police, in Burlington, Alamance County, where the plaintiff was then engaged in business; but it was not given extraterritorial efficacy by the endorsement of a justice of the peace or other authorized officer in the latter county. *S. v. James,* 80 N. C., 370. Indeed, the defendant admitted in the course of the trial that the warrant without the required endorsement was void in Alamance, and this admission was duly entered of record.

An arrest consists in taking custody of another person under real or assumed authority for the purpose of detaining him to answer a criminal

charge or civil demand. The application of actual force or visible physical restraint is not essential. "To constitute a legal arrest it is not necessary that the officer should touch the person of the individual against whom the precept has issued. It is sufficient if, upon being in his presence, he tells him he has such a precept against him and the person says, 'I submit to your authority,' or uses language expressive of such submission." *Jones v. Jones,* 35 N. C., 448. In *Lawrence v. Buxton,* 102 N. C., 129, it is said: "The certain and most unequivocal method of making an arrest is by the actual seizure of the person to be arrested, but this is not essential; it is sufficient, if such person be within the control of the officer with power of actual seizure, if necessary. The officer need not touch the person of such party to make the arrest effectual, but he must have and intend to have control of the party's person. This seems to be necessary to constitute a valid arrest. If the officer has process, and intends presently to execute it, and the person against whom it is directed recognizes it and submits to the control of the officer, this would be a sufficient arrest, because thus the officer would get the custody and control of the person of the party." *Journey v. Sharpe,* 49 N. C., 165; *Hadley v. Tinnin,* 170 N. C., 84, 87.

The plaintiff testified to the circumstances attending his alleged arrest: "Mr. Bain came in and I was in the prescription room filling a prescription, and he waited until I had finished, and after I had finished he asked me if my name was J. H. Stancill and I told him it was, and he said, 'Mr. Stancill, I have a warrant for you.' I said, 'All right.' It was a great surprise to me, as I was not looking for anything of the kind. I told him to go ahead and read the warrant and I read it. At the time I was arrested, two of the clerks were there and while Mr. Bain was there, the president of the firm walked in and several people passed through. It was a public office. After he read the warrant, I asked him 'What must I do?' I had never had a warrant served on me before. Sheriff Bain asked me if I knew what a criminal warrant meant. I told him I did not and he said it means 'You are under arrest. You go to jail or get somebody to go on your bond, or go back to Johnston County and stay in prison until your trial.' I said, 'If that is the case, I can give a bond.' He said, 'Yes, go with me to the mayor's office and see what the bond is.' I said, 'Rather than go through that embarrassment, I happen to have that much money in my possession,' and I did not go with him back to the mayor's office to see what the bond was, but paid under protest. Bain said I would have to pay the $18.00 with the costs and that he would accept that and send it back to them. That was after I was under arrest. I was arrested in my office in the day time, but I do not remember the time. That

drug store was the most public place in Burlington. After I paid the money, the officer released me."

Omitting reference to his arrest under the *capias* the plaintiff adduced competent evidence tending to show his wrongful and illegal apprehension by virtue of the magistrate's warrant and it seems to be unquestionable that upon the cause of action first alleged in the complaint—that of false imprisonment—the evidence should have been submitted to the jury.

The second cause of action set out in the complaint is that of malicious prosecution. To sustain such action the plaintiff must show malice, want of probable cause, and the termination of the former proceeding. *Carpenter v. Hanes,* 167 N. C., 551. It is not denied that on the trial he offered evidence of the criminal prosecution and its termination by the entry of *nolle prosequi.* This entry and the discharge of the plaintiff (who was the defendant in the prosecution) was such conclusion of the criminal action as entitled the plaintiff to bring the present suit. *Hatch v. Cohen,* 84 N. C., 602; *Welch v. Cheek,* 115 N. C., 311; *Marcus v. Bernstein,* 117 N. C., 31; *Wilkinson v. Wilkinson,* 159 N. C., 265.

The word malice, as it is used in defining malicious prosecution, means a wrongful act intentionally done, not necessarily ill-will, anger or revenge; and the prosecution of an action for any purpose other than that of bringing the party to justice is evidence of a malicious motive. *Walker, J.,* in *Motsinger v. Sink,* 168 N. C., 548, 550, 555. Is there not evidence of such ulterior motive on the part of the defendant? The warrant was endorsed, "If defendant wishes to pay the bill and all costs accept and send to me," and it was executed "by collecting all the required amount." These entries certainly afforded some evidence that the object of the criminal prosecution was the collection of the defendant's claim and not the vindication of public justice.

We forbear entering upon a discussion of the meaning of probable cause and the inquiries embraced in the definition and simply refer to the clear and comprehensive statement of the law in *Motsinger v. Sink, supra,* and *Bowen v. Pollard,* 173 N. C., 129.

The judgment of nonsuit is set aside to the end that the matters set out in the pleadings and the evidence may be inquired of by the jury under proper instructions as to the law.

Reversed.

M. H. WILLIS AND WIFE v. W. F. ANDERSON, SPEAR OIL COMPANY, R. Q. FLOURNOY, M. G. HAYS AND THE MARINE BANK.

(Filed 29 October, 1924.)

1. Deeds and Conveyances—Seals—Void Deeds—Equity.

While a deed to lands executed without the seals affixed to the signature of the makers is void, equity will compel its proper execution when the writing itself is sufficient for the purpose and the consideration has been paid by the grantee.

2. Same—Equity—Nonresidence—Attachment—Sermons—Service.

Where nonresident grantors of a void deed to lands are required in equity to make a valid conveyance of lands situated in this State to resident grantees, the lands are not property owned in this State by the grantors, that are subject under our statutes to bring the nonresident grantors in the courts of this State as defendants in an action brought herein.

3. Same—Fraud—Notice.

One who has acquired by deed lands from the owner of the full equitable title, as under the facts of this case, cannot be affected, without further evidence of notice of fraud alleged between his vendor and his grantor.

APPEAL by plaintiffs from *Daniels, J.*, at June Term, 1924, of CARTERET.

All the defendants, except the Marine Bank, are nonresidents of this State. In July, 1921, the sheriff of Carteret County, by virtue of warrants of attachment directed to him, levied upon, seized and took into his possession all the right, title and interest of the nonresident defendants in and to a certain lot of land situate in Morehead City, Carteret County, North Carolina, described in certain paper-writings from M. H. Willis and wife to W. F. Anderson, recorded in Book 32, at pages 184 and 416, office of register of deeds of Carteret County, on which is located the building occupied by the Marine Bank.

In their complaint, plaintiffs allege that by means of false and fraudulent representations, set out in the complaint, made during the months of September and October, 1920, of and concerning the value of the capital stock of the Spear Oil Company, the nonresident defendants induced the plaintiffs in consideration of shares of stock in said company of the par value of $12,500, or thereabout, to execute, and that plaintiffs did execute, a paper-writing dated 2 October, 1920, and recorded in Book 32, at p. 184, office of register of deeds of Carteret County, purporting to convey to W. F. Anderson the property described therein for the recited consideration of $15,000; that thereafter by means of the said representations, the said nonresident defendants induced the plain-

tiffs to sign and that plaintiffs did sign a paper-writing dated 10 October, 1920, and recorded in Book 32, at page 416, office of the register of deeds of Carteret County purporting to convey to W. F. Anderson the property described therein; that plaintiffs signed said paper-writing but did not affix their seals thereto.

That thereafter W. F. Anderson and his wife signed a paper-writing dated 11 June, 1921 and recorded in Book 34, at page 342, office of register of deeds of Carteret County, purporting to convey in consideration of $7,000, paid in cash, the property described therein to defendant, the Marine Bank; that said W. F. Anderson and his wife signed the said paper-writing but did not affix their seals thereto.

That the representations set out in the complaint were made by the said nonresident defendants falsely and fraudulently with intent to mislead, deceive and cheat and that they did mislead, deceive and cheat the plaintiffs, causing them to sign the two paper-writings as alleged and that thereby the plaintiffs have been damaged in the sum of $15,000.

That defendant, the Marine Bank, at the time it took from W. F. Anderson and wife the paper-writing signed by them, had full notice and knowledge of the false and fraudulent representations made to the plaintiff by the nonresident defendants, and that plaintiffs were induced thereby to execute and sign the deed and paper-writing as set out in the complaint; that the consideration paid by said defendant to W. F. Anderson for the property described in said paper-writing was notoriously inadequate, and that defendant is not an innocent purchaser for value of the property described in the paper-writing executed by W. F. Anderson and wife to the defendant.

Plaintiffs demand judgment that they recover of the nonresident defendants the sum of $15,000 as damages, that same be adjudged a first lien on the lot of land described in the said paper-writings and that said lot of land be condemned to be sold to pay said debt and costs, and further that the two paper-writings from plaintiffs to defendant, W. F. Anderson, and the paper-writing from W. F. Anderson and wife to the Marine Bank, be adjudged void and the title to the said lot of land be adjudged in the plaintiffs, unencumbered.

The nonresident defendants did not file answer to the complaint or enter appearance either in person or by attorney in this action. Plaintiffs allege that the court acquired jurisdiction of said defendants by attachment of property owned by them in this State.

The Marine Bank in its answer denies that plaintiffs were induced by false and fraudulent representations, as alleged, to execute and sign the paper-writing set out in the complaint; it denies any notice or knowledge on its part of such false and fraudulent representations and alleges that it paid full value for the property conveyed to it by W. F.

Anderson and wife. Said defendant further alleges that plaintiffs are estopped to set up any claim to the lot conveyed to it by W. F. Anderson and wife by their conduct, as set out in the answer. Defendant further denies that the nonresident defendants have any interest whatever in the property upon which the sheriff levied under the warrants of attachment issued to him.

Plaintiffs offered evidence which they contend support the allegations of the complaint. At the conclusion of all the evidence, upon motion of the defendant, the Marine Bank, judgment as of nonsuit was rendered. To this judgment plaintiffs excepted and appealed to the Supreme Court. The only assignment of error is based upon this exception.

D. L. Ward, Ward & Ward and M. Leslie Davis for plaintiffs.
Luther Hamilton, C. R. Wheatley and J. F. Duncan for defendants.

CONNOR, J. The only assignment of error made by the plaintiffs on this appeal is based upon the exception to the judgment of nonsuit.

There was no personal service of summons on the nonresident defendants or on either of them; neither of said defendants entered appearance or filed answer; plaintiffs contend that the court acquired jurisdiction by attachment of property owned by said nonresident defendants in this State, and by publication of summons. Defendant, the Marine Bank, denies that the nonresident defendants have any right, title or interest in or to the lot of land levied upon by the sheriff, under the warrants of attachment issued in this action.

Notwithstanding the publication of summons, as required by the statute, C. S., 485, the court acquired no jurisdiction of the nonresident defendants, unless property in this State, subject to the process of the court, was brought under its control by attachment. *Everett v. Austin,* 169 N. C., 622; *Walton v. Walton,* 178 N. C., 75; *Bridger v. Mitchell,* 187 N. C., 375.

On 2 October, 1920, plaintiffs by deed duly recorded in Carteret County, conveyed to defendant, W. F. Anderson, his heirs and assigns "a certain tract or parcel of land in Carteret County, State of North Carolina, adjoining the lands of . . . and others, bounded as follows, viz.: One two-story brick building, known as the Marine Bank building, in square or block No. 9, part of the west half of lot No. 12, and part of the last half of lot No. 11, as known in the plan of Morehead City, the same being bounded on the north by Arendell Street, and on the west by J. J. Baker's stores and on the east by R. T. Willis' store."

This deed was recorded on 19 October, 1920. On 20 June, 1921, plaintiffs signed a paper-writing, without affixing their seals thereto, purport-

ing to convey to W. F. Anderson, his heirs and assigns, "a certain tract or parcel of land in Carteret County, State of North Carolina, adjoining the lands of.....and others, and bounded as follows, viz.:

"Part of lots Nos. 11 and 12 in square No. 9, according with the plan of the town of Morehead City, N. C., beginning at a point in south line of Arendell Street, 42 feet from the northeast corner of lot No. 11 in square No. 9 (eastwardly), and running eastwardly with the line of Arendell Street 25 feet; thence southwardly parallel with Eighth Street 90 feet; thence westwardly parallel with Arendell Street 25 feet; and thence northwardly parallel with Eighth Street 90 feet to the beginning, being the tract on which is located a brick building, the first floor of which is occupied by the Marine Bank. This deed is given in lieu of and for the purpose of correcting the description in deed recorded in Book 32, page 184, in the office of the register of deeds for Carteret County, North Carolina."

This paper is not effectual as a deed of conveyance, as it purports to be, for the reason that the signers thereof did not affix their seals thereto. It was offered in evidence by plaintiffs. It bears date 20 October, 1920, but was acknowledged by plaintiffs on 20 June, 1921, and recorded on 24 June, 1921. A comparison of the description in the deed dated 2 October, 1920, with the description contained in this paper, shows that the purpose of the plaintiffs was, as recited in the paper, to describe more accurately and with greater definiteness the lot of land sold and conveyed by plaintiffs to W. F. Anderson. The same lot of land is described in both the deed and this paper, and W. F. Anderson was, from and after the execution of the deed dated 20 October, 1920, the owner in fee of the lot of land in Morehead City on which is located the two-story brick building occupied by Marine Bank, said lot fronting on Arendell Street 25 feet and running parallel with Eighth Street 90 feet. There is no evidence that any of his codefendants, nonresidents of this State, owned during this or at any other time any interest in said lot of land.

In June, 1921, W. F. Anderson and his wife signed a paper-writing, which was duly recorded in Carteret County, on 24 June, 1921, purporting to convey to the Marine Bank, in consideration of $7,000 paid to them in cash, the lot of land described in the deed from plaintiffs, dated 2 October, 1920, and in the paper-writing signed by plaintiffs on 20 June, 1921. The original paper and the record of same were offered in evidence by plaintiffs. No seals appear on either the original or on the record of said paper-writing. An admission is entered in the record that the Marine Bank paid W. F. Anderson $7,000 in cash upon the execution of this paper, on 11 June, 1921.

This paper-writing was not effectual as a deed of conveyance, the grantors having failed to affix their seals thereto. Plaintiffs contend that said paper-writing was void and of no effect for any purpose, and that at the beginning of this action, in July, 1922, W. F. Anderson was the owner of the lot of land, notwithstanding he and his wife had signed the said paper-writing. Plaintiffs contend that, the sheriff having levied upon and seized this lot of land as the property of W. F. Anderson, the court acquired jurisdiction of the said Anderson for the purposes of this action.

The Marine Bank contends that the said paper-writing, although not effectual as a deed of conveyance, is valid as a contract to convey, and that by virtue of the admission that it has paid to Anderson $7,000 in cash for the land, it has an equity in the land which the court in the exercise of its equitable jurisdiction will protect. It therefore contends that at the beginning of this action, in July, 1922, W. F. Anderson had no right, title or interest in said lot, subject to attachment in this action, and that the court therefore had acquired no jurisdiction of Anderson.

This Court has held, in *Strain v. Fitzgerald,* 128 N. C., 396, that "a paper-writing, in form a deed, is *not a deed,* without a *seal*"; and *Clark, J.* (afterwards *Chief Justice* of this Court), dissenting from the holding of the Court in regard to the presumption arising from a recital in the deed as recorded, in his opinion, says: "If, in fact, the instrument has neither a seal nor a scroll, or pen flourish in lieu thereof, after the signature of the grantor, it is invalid." A paper-writing without a seal will not pass the legal and equitable title to land. No action in which plaintiff seeks to recover land, founded solely upon a paper-writing not under seal, and no defense based upon such paper-writing alone, can be maintained in a court of law. A court of equity, however, will afford its aid to one who asserts rights under an instrument defective in its execution, and who brings himself within the maxim that "Equity regards as done that which ought to be done." This has been declared to be equity's favorite maxim. 21 C. J., 200. It finds its most important application in the enforcement of contracts for the conveyance of real property. Equity calls to its aid this maxim to protect and enforce rights which the law is unable to enforce or protect, arising from or dependent upon instruments defectively executed. An instrument, in form a deed, which has been defectively executed, may operate as a contract to convey. *Robinson v. Daughtry,* 171 N. C., 200.

In *Vaught v. Williams,* 177 N. C., 78, an executrix, under a power conferred upon her in the will of her testator, sold land to a purchaser, who paid the purchase money to her; the executrix executed deed to the purchaser, which was duly registered. The executrix did not affix her

seal to this deed. The heirs of the testator brought suit to recover the land, alleging that the defendant, who claimed under the purchaser, acquired no title under the deed, which was without seal. This Court, affirming a judgment against the plaintiffs in that case, and quoting, with approval, Story Eq. Jur., 186, says: "So, if an instrument, whether it be a deed or will, is required to be signed and sealed, and it is without seal or signature, equity will relieve." "Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the court will operate upon the conscience of the heir (holder of legal title) to make him perfect this intention." *Chapman v. Gibson,* 21 Eng. Rul. Cas., 390. "It may be stated, as a general rule, that mere volunteers will not be assisted, but that aid will be given to purchasers for value, mortgagees, lessees, creditors, and persons who have a meritorious standing."

The evidence in this case shows a purpose and intent on the part of W. F. Anderson to convey the lot of land to defendant Marine Bank; the paper which they signed contains all the formal words and clauses of a deed—recites the consideration and acknowledges the receipt of same in cash, contains a full description of the property, the habendum clause, a full warranty clause, and concludes as follows: "In testimony whereof, the said W. F. Anderson and Libbie A. Anderson have hereunto set their hands and *seals,* the day and year first above written."

In addition to the paper-writing itself, the deposition of W. F. Anderson, offered by plaintiff, is evidence of the intent with which Anderson signed the paper. He testified that he sold the property to the Marine Bank, and considered the sum paid by the bank a fair and reasonable price for the property.

Defendant is not a mere volunteer; it has paid $7,000 cash for the property, the highest offer which the agent of Anderson could secure in June, 1921. Certainly, the Marine Bank has a meritorious standing in a court of equity when its title to and rights in the property are attacked solely on the ground that its grantors failed to affix seals to the paper by which they *intended,* in consideration of the payment of what they admit was a fair and reasonable price, to *convey* the property to the bank. If the grantors, upon demand of the bank, should hesitate to correct the defect in the deed when called upon so to do, a court of equity would be prompt, upon the facts established by this evidence, to decree that they should do now what they ought to have done, and what they manifestly intended to do.

At the date of the attachment W. F. Anderson had nothing more than the bare legal title to this lot. He had no beneficial interest in the land, and certainly stood in no better relation to the land than a

vendor who had received payment, in full or in part, of the purchase price from his vendee, in accordance with the contract of sale, or of a mortgagee who holds the legal title as against the mortgagor.

This Court has held that the interest of a vendor of land who has received a part of the purchase price from his vendee cannot be sold under an execution issued upon a judgment against him. *Tally v. Reid,* 72 N. C., 336; *Mayo v. Staton,* 137 N. C., 670.

This Court has further held, in the language of *Justice Stacy,* that "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 the owner of the land"; and, further, "that a mortgagee has no interest in the mortgaged premises which can be taken at law under attachment or general execution." *Stevens v. Turlington,* 186 N. C., 191.

"At common law, an attachment, like an execution, would not run against land; but as the lands of a debtor being now as a rule liable to be taken on execution for his debts, it follows by analogy that the real property of a defendant in attachment proceedings is liable to seizure under the process, unless by the terms of the statute it clearly appears that the intention of the Legislature is otherwise." 6 C. J., 201; C. S., 807.

The interest of a mortgagee in land is not of such a nature as to be liable to attachment." 6 C. J., 203, and cases cited to support text.

"In order for realty to be attachable, it is essential that the debtor have some beneficial interest in the land. The bare legal title or instantaneous seisin would be insufficient, at least as against the equitable owners, where the attaching party has or is bound by law to take notice of the paramount outstanding equitable title." 6 C. J., 202.

W. F. Anderson, at date of the levy of the attachment in this action, had a mere naked legal title to the land, the equitable title and estate being in the Marine Bank by virtue of the paper-writing, valid as a contract to convey, and of the admission in the record that the Marine Bank had at that date paid the full purchase price for the land. The court therefore acquired no jurisdiction of W. F. Anderson or of said land by virtue of the attachment.

We are not inadvertent to the allegation in the complaint that W. F. Anderson acquired title to this land from the plaintiffs by false and fraudulent representations, and that the Marine Bank had full notice and knowledge of said representations and was not an innocent owner, for value, of the land. It is not alleged that W. F. Anderson conveyed or contracted to convey the land to the Marine Bank with intent to defraud plaintiffs, or with any other fraudulent intent. The law upon this aspect of the case is clearly stated in 6 C. J., at p. 205.

"Inasmuch as a conveyance of property with intent to defraud one's creditors may be treated as a nullity by them, it follows that property which has thus been conveyed may be attached as the property of the grantor by his creditors, the same as if no conveyance had been made. To sustain his attachment, however, the creditor must show fraud upon the part of the transferee, or that the deed to him was without consideration and wholly void."

The following facts clearly appear from the evidence: Plaintiffs conveyed the land levied upon by the sheriff to Anderson by deed, dated 2 October and recorded 19 October, 1920. Plaintiff, M. H. Willis, received as consideration for such deed certificates for shares of the capital stock of the Spear Oil Company of the par value of $12,500; Anderson, also, in accordance with the understanding, paid off and discharged plaintiff's note for $2,750 held by the Jefferson Standard Life Insurance Company, and secured by a mortgage on the land conveyed. Plaintiff thereafter stated to several persons, including officers of the bank, on several occasions, that he was satisfied with the transaction. No complaint by the plaintiffs was brought to the attention of the bank or of Anderson until some time after Anderson had sold the property to the bank. Plaintiff surrendered possession of the property to Anderson after the execution of his deed, and the Marine Bank, lessee of the plaintiff at date of said deed, thereafter paid rent to Gilliken, agent of Anderson. No demand by the plaintiffs for rent has been made upon the bank since the execution of the deed to Anderson.

When negotiations were begun, in June, 1921, for the sale of the property to the bank by Gilliken, agent for Anderson, the bank suggested that the description of the property in the deed dated 2 October, 1920, should be more definite; and, thereafter, at Anderson's request, plaintiffs freely and voluntarily signed the paper offered in evidence, dated 10 October, 1920, and acknowledged by the plaintiffs on 20 June, 1921; plaintiffs signed this paper with full understanding that the paper was a duplicate of the old one, and was requested only for the purpose of making the description "more full and complete" (testimony of M. H. Willis). This paper-writing, signed by the plaintiffs, was presented to the bank at the time it closed the negotiations for the purchase of the property from Anderson, and paid him $7,000 in cash. This paper was signed and the sale was made to the bank more than eight months after the conveyance by plaintiffs to Anderson. After said conveyance, and as late as May, 1922, M. H. Willis urged the bank to buy from him a lot adjoining the bank lot, saying to officers of the bank, "You people own this property; let me sell this adjoining lot to you."

Anderson first authorized Gilliken, as his agent, to sell the property for $12,000, and agreed to accept $7,000 in cash only after Gilliken had

reported to him that this was the best bid which he had been able to secure for the property.

Anderson and the bank were at arms-length during the negotiations leading up to the sale of the property to the bank. Neither had notice of any contention on the part of plaintiffs that they had more than eight months prior thereto been induced by false and fraudulent representations to convey the property to Anderson. Both knew that plaintiffs had freely and voluntarily, on 20 June, 1921, signed a paper which was in effect a ratification of the conveyance made in October, 1920. There is no allegation or evidence tending to prove that there was a purpose or intent on the part of either Anderson or the bank to defraud plaintiffs by the conveyance of the property to the bank. The lot of land was not subject to attachment in July, 1922, as the property of W. F. Anderson or of any one of the nonresident defendants.

The exception to the judgment of nonsuit is not sustained, and the judgment is

Affirmed.

ANNIE COBIA, ADMX., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 29 October, 1924.)

1. Employer and Employee—Master and Servant—Assumption of Risks.

The defense of a railroad company of assumption of risks rests in the actual or imputed knowledge of the employee of the dangers incident to the employment.

2. Same—Independent Negligence.

An injury independently caused to an employee by the negligent act of another, for which the employer is responsible, does not come within the principle of assumption of risks.

3. Same—Burden of Proof.

The fact of assumption of risks is one which the defendant must plead and prove; and upon evidence of the defendant's negligence the issue is for the jury.

4. Same—Contributory Negligence.

The doctrine of assumption of risks differs from that of contributory negligence, the former resting by contract and the latter consisting of a negligent act of the employee in respect to the cause of the damage, which he should not have committed in the exercise of ordinary care, under the circumstances, for his own safety.

5. Same—Defenses—Comparative Negligence—Statutes.

Contributory negligence is not a complete bar to the recovery of damages by an employee of a railroad company caused by the latter in inter-

state commerce, in an action brought under the Federal Employers' Liability Act, the admeasurement being that of comparative negligence by which the jury, under conflicting evidence, reduces the recovery in accordance with the relative negligence of the employee. Also, see C. S., 3467.

6. Same—Measure of Damages—Federal Employers' Liability Act—Statutes.

Where the plaintiff has brought an action against a railroad company for the negligent killing of her intestate, leaving a widow and children, under the Federal Employers' Liability Act, while engaged in interstate commerce, the measure of damages recoverable is limited to the present cash value, or present worth, or such loss as results to the beneficiaries, occasioned by their being deprived of a reasonable expectation of pecuniary benefit by the wrongful death of the employee; and while the statutory mortuary tables afford evidence of the expectancy of life of the deceased, the jury is not excluded from considering other evidence bearing thereon. The damages recoverable by the injured employee who survives, allowed by the Federal act, discussed by STACY, J.

7. Appeal and Error—Instructions.

An instruction to the jury will be construed contextually as a whole, on appeal, and if when so construed it is a correct exposition of the law upon the evidence, no error will be found because of disjointed parts thereof, which may have been erroneous when considered disconnectedly.

8. Appeal and Error—Objections and Exceptions—Brief.

Under the rule regulating appeals, errors assigned in the record will be deemed as abandoned if not mentioned in the brief of appellant.

APPEAL by defendant from *Calvert, J.*, at March Term, 1924, of NEW HANOVER.

Civil action, to recover damages for an alleged negligent injury, caused by defendant's wrongful act, and resulting in the death of plaintiff's intestate.

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

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

2. Did plaintiff's intestate voluntarily assume the risks incident to performing the work which he was told to do, in the manner in which he undertook to do it? Answer: No.

3. Did plaintiff's intestate, by his own negligence, contribute to his injury? Answer: Yes.

4. What damages, if any, is plaintiff entitled to recover? Answer: $4,000."

Judgment on the verdict for plaintiff. Defendant appeals, assigning errors.

Rodgers & Rodgers for plaintiff.
Rountree & Carr, Thomas W. Davis, and V. E. Phelps for defendant.

STACY, J. It was conceded on the trial that the defendant is a common carrier by railroad, engaged in interstate commerce, and that plaintiff's intestate was employed by the defendant in such commerce at the time of his injury and death. The case, therefore, is one arising under the Federal Employers' Liability Act, and it has been properly tried under that act. *Shanks v. Del. R. Co.*, 239 U. S., 556; *Capps v. R. R.*, 183 N. C., 181; *Renn v. R. R.*, 170 N. C., 128. The deceased employee left a widow and three small children him surviving, and his administratrix, or personal representative, is prosecuting this suit on behalf of these persons, who fall in the first class of beneficiaries under the statute. *Horton v. R. R.*, 175 N. C., 472; *Dooley v. R. R.*, 163 N. C., p. 463.

Plaintiff's intestate, Gus Cobia, was employed by the defendant as a hostler's assistant, to work around and about the engines in one of the railroad yards at Wilmington, N. C. While in the discharge of his duties as such laborer he was killed, on 14 December, 1922, by falling or being precipitated into an ash-pit, just as he was preparing to open the ash-pan of engine No. 900, at the direction of John E. Eichorn, his immediate superior. The injury occurred about 6:45 p. m., or fifteen minutes before the deceased would have quit work for the day. It was dark at this time. The pit was 50 feet long, 11 feet wide, and 13 feet deep. It was filled with water, which may have been warm or hot, as the ash-pans of the engines were constantly being emptied into it. There was no covering or railing around the pit; and in the dim light and shadows, with ashes and coal dust floating upon the top of the water, it had the appearance of solid ground.

Eichorn, the hostler, told plaintiff's intestate to open the ash-pan on engine No. 900 before he pulled it over the pit with engine No. 339, to which it was attached. The ash-pan is opened by a dump lever, which is on hinges and extends about 12 inches from the side of the pan. It is necessary that this be opened before the engine is pulled over the pit. Cobia was on the opposite side of the engine from the pit when this instruction was given. As the engine was headed north, it was necessary for him to cross over the track and get on the side of the engine next to the pit, in order to carry out the instruction of his hostler. Eichorn backed the engine (No. 900), so that Cobia could stand on the ground and open the pan, but in the darkness he apparently mistook the distance and did not have the engine as far from the pit as he thought. Hence, when Cobia crossed over the track, climbing between the two engines, he stepped off into the pit and was drowned.

The negligence of the defendant is not seriously disputed, but it is earnestly contended that Cobia assumed the risk of his injury, being familiar with the situation, as he was, and having worked around the pit in question for some time—at least for a period of thirty days prior thereto. Defendant, therefore, insists that the action should be dismissed, as in case of nonsuit, and it should be held, as a matter of law, that plaintiff's intestate assumed the risk of his injury. In support of this position defendant relies chiefly upon the decision in *Glenn v. C. N. O. & P. T. R. Co.*, 163 S. W. (Ky.), 461, a case in many respects similar to the one at bar, but with this vital distinction or difference, namely, in the instant case Cobia did not know that Eichorn had failed to back the engine far enough for him to cross over the track in safety, while in the *Glenn case* no such circumstance or evidence appeared.

Knowledge is the watchword of the defense of assumption of risk—knowledge of the dangers and hazards to be encountered. *C. N. O. & T. P. Ry. Co. v. Thompson*, 236 Fed., p. 9. In *Chicago & E. R. Co. v. Ponn*, 191 Fed., 687, *Judge Hollister* says: "The only kind of knowledge which, on the ground of assumption of risk, will bar a recovery is actual (or constructive) knowledge."

Speaking to a similar question, in *Jones v. R. R.*, 176 N. C., p. 264, the present *Chief Justice* makes the following observation: "While the law in question (Federal Employers' Liability Act) clearly recognizes assumption of risk as a defense in certain instances, under section 4 such a position is absolutely inhibited in cases where the violation of a Federal statute, enacted for the protection of the employees, contributed to the injury or death of employee; and by correct deduction from the terms and meaning of section 1, making railroads engaged as common carriers of interstate commerce liable in damages for injuries or death caused by the negligence of their officers, agents, or employees, the negligence of fellow-servants is withdrawn from the class of assumed risks in cases of unusual and instant negligence, and under circumstances which afforded the injured employee no opportunity to know of the conditions or appreciate the attendant dangers. This doctrine of assumption of risk is based upon knowledge or a fair and reasonable opportunity to know, and usually this knowledge and opportunity must 'come in time to be of use.' 26 Cyc., p. 1202, citing 160 Ind., p. 583."

Again, in *Chesapeake & Ohio Ry. v. De Atly*, 241 U. S., 311, it is said: "An employee is not bound to exercise care to discover extraordinary dangers arising from the negligence of the employer or of those for whose conduct the employer is responsible, but may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the

danger are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

By the common law, the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks, and those due to the employer's negligence, he does not assume until made aware of them, or until they become so obvious and immediately dangerous that an ordinarily prudent man would observe and appreciate them; in either or both of which cases he does assume them if he continue in the employment, without objection or without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance (the dangers being both obvious and imminent), then, pending the performance of the promise, the employee, in ordinary cases, does not assume the special risk. Of course, if the dangers be so *imminent* that no ordinarily prudent man, under the circumstances, would rely upon such promise, then he would assume the risk, even pending the performance of such promise. *N. Y. C. R. Co. v. White,* 238 U. S., 507; *Seaboard v. Horton,* 233 U. S., 492; *Gila Valley, etc., Ry. v. Hall,* 232 U. S., 94; *Gaddy v. R. R.,* 175 N. C., 515.

In *Horton v. R. R.,* 175 N. C., 472, the difference in principle between assumption of risk, which arises out of contract, and contributory negligence, which arises out of tort, is stated as follows: "Assumed risk is founded upon the knowledge of the employee, either actual or constructive, of the risks to be encountered, and his consent to take the chance of injury therefrom. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper precaution for his personal safety. The doctrine of assumed risk is founded upon contract, while contributory negligence is solely a matter of conduct." See, also, upon this subject, *Cincinnati N. O. & T. P. Ry. Co. v. Thompson,* 236 Fed., 1 (opinion by *Judge Cochran*); *Chicago & E. R. Co. v. Ponn,* 191 Fed., 682 (opinion by *Judge Hollister*); *Narramore v. Cleveland C. C. & St. L. Ry. Co.,* 96 Fed., 298 (opinion by *Judge Taft*); *St. Louis Cordage Co. v. Miller,* 126 Fed., 495 (opinion by *Judge Sanborn*).

Under the facts of the present case, we think the question of assumption of risk was properly left to the jury, as this is a matter which the defendant must plead and prove. *Lloyd v. R. R.,* 166 N. C., 24; *Dorsett v. Mfg. Co.,* 131 N. C., p. 261.

"In a clear case the question of assumption of risk by the employee is one of law for the court, but where there is doubt as to the facts or as to the inferences to be drawn from them, it becomes a question for the jury. To preclude a recovery on that ground, it must appear that the employee knew and appreciated, or should have known and appreciated,

the danger to which he was exposed, and in case of doubt that is for the jury. . . . The burden of proof as to the assumption of risk is upon the defendant; and where there is any doubt as to the facts, or inferences to be drawn from them, the question is for the jury." *Walling, J.*, in *Falyk v. Penn. R. R. Co.*, 100 Atl. (Pa.), 961.

In *Kanawha & M. R. Co. v. Kerse*, 239 U. S., 581 (60 L. Ed., 448), it was held that the trial court should not be charged with error in refusing to take the question of assumption of risk from the jury in an action under the Federal Employers' Liability Act, unless the evidence, tending to show such assumption of risk came from unimpeached witnesses, was clear and free from contradiction.

The next assignment of error, strongly relied upon by the defendant, and which we have experienced some difficulty in arriving at a satisfactory conclusion as to what disposition should be made of it, is the exception directed to the following portion of the charge:

"The measure of damage is the present cash value of the future benefits of which the beneficiaries, widow and children of the deceased, were deprived by his death, making adequate allowance, according to the circumstances, for the earning power of money. The measure of damages, then, is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make their estimate, it is competent to show, and for you to consider, the age of the deceased, his prospects in life, his character, his industry and skill, the ability he had of making money, the business in which he was employed—the end of it all being to enable the jury to fix upon that net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family. In arriving at his life expectancy, you will consider the mortuary tables that have been called to your attention, but you are not bound by them."

This instruction, standing alone, would seem to fall under the objection pointed out in *Gerow v. R. R., ante*, 76. But in at least two other places in the charge, just before and after the above excerpt, his Honor instructed the jury, and reiterated the statement, that the action was brought for the benefit of the widow and children, and that the damages should be limited to the present cash value of such benefits as the widow and children had lost, or might reasonably expect to lose, on account of the death of the deceased. Taking the charge in its entirety, we are constrained to believe that the above excerpt, which forms the basis of one of defendant's exceptions, should not be held for reversible error on the present record. It is now settled law that the charge of

the court must be considered and examined by us, not disconnectedly, but as a whole, or at least the whole of what was said regarding any special phase of the case or the law. The losing party will not be permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with other portions, they are readily explained and the charge in its entirety appears to be correct. Each portion of the charge must be considered with reference to what precedes and follows it. In other words, it must be taken in its setting. The charge should be viewed contextually and not disjointedly. Any other rule would be unjust, both to the trial judge and to the parties. *Exum v. Lynch, ante,* 392.

The rule for the admeasurement of damages for wrongful death, in cases arising under the Federal Employers' Liability Act, differs according to the relation between the parties for whose benefit the action is brought and the deceased employee, "according as the action is brought for the benefit of the husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled." *Michigan Central R. Co. v. Vreeland,* 227 U. S., 59.

Under our statute (C. S., 160), giving a right of action for wrongful death, the damages are based upon the present worth of the net pecuniary value of the life of the deceased (*Horton v. R. R.,* 175 N. C., 477), while under the Federal Employers' Liability Act the damages recoverable are based upon the pecuniary loss sustained by the beneficiaries. The measure of such damages, under the Federal statute, is what the beneficiaries named in the statute, or any of them, and no one else, necessarily lose, in or by the death of the plaintiff's intestate; and in ascertaining these damages the jury is at liberty to take into consideration the age, health, and expectancy of life of the deceased, his earning capacity, his mode of treatment to his family, and the amount contributed out of his wages to their support, and calculate from these facts the amount the beneficiaries have lost, or may reasonably expect to lose, on account of the death of the deceased. *Irvin v. R. R.,* 164 N. C., 5.

The damages recoverable are limited to the present cash value, or present worth, of such loss as results to the beneficiaries, occasioned by their being deprived of a reasonable expectation of pecuniary benefit by the wrongful death of the injured employee. The amount is limited to the financial loss thus sustained. *Chesapeake & Ohio Ry. v. Kelly,* 241 U. S., 485; *Dooley v. R. R.,* 163 N. C., 463.

In *Nashville, etc., R. Co. v. Anderson,* 134 Tenn., 666, a case arising under the Federal Employers' Liability Act, it was held that the dam-

ages to be awarded in favor of a widow and minor children should include such sum as the widow might reasonably expect to receive from her husband for support, and such a sum as the children might reasonably expect to receive from their father for support during their minority.

On 5 April, 1910, Congress amended the act in question by adding the following section:

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury."

No change was made in section 1, which is, in part, as follows:

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

It will be observed that this first section provides for two distinct rights of action—one arising to the injured employee to compensate him for his personal loss and suffering, where the injuries are not immediately fatal; and the other to his personal representative for the pecuniary loss sustained by the designated relatives, where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right of action, the new section (9) provides in terms that the right given to the injured person "shall survive" to his personal representative "for the benefit of" the same relatives in whose behalf the other right of action is given in section 1. *St. Louis & Iron Mt. Ry. v. Craft,* 237 U. S., 648.

In the last case just cited it was held that, under the Federal Employers' Liability Act, as amended in 1910, the personal representative of a fatally injured employee might recover the pecuniary loss resulting to the beneficiaries, and also for the pain and suffering endured by the deceased from the time of receiving the fatal injuries to the moment of final dissolution. "But, to avoid any misapprehension," the Court was

careful to say, "it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death, or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." And, further referring to the two separate grounds of recovery: "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

This matter is of no special moment here, but it may be well not to overlook it in dealing with some of our former decisions on the subject. For this reason, attention is called to the amendment, because, in this respect, as in others, the Federal law is different from the State law. *Bolick v. R. R.*, 138 N. C., 370. In the present case plaintiff's intestate was killed almost instantly, and the circumstances here disclosed afford no basis for an estimation or award of damages in addition to the pecuniary loss resulting to the beneficiaries through the death of the deceased. *Great Northern Ry. Co. v. Capitol Trust Co.*, 242 U. S., 144.

Where the issue of contributory negligence is answered in favor of the defendant and against the plaintiff, as it is here, and the negligence of the defendant does not consist in the violation of any law of Congress enacted for the safety of employees, the doctrine of comparative negligence is to be applied in the assessment of damages. *Davis v. R. R.*, 175 N. C., 648. The Federal statute expressly provides: "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," etc.

In identical language, our State statute (C. S., 3467) also provides: "In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided, however,* that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by

such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

So, under both statutes, Federal and State, in actions brought by employees or their personal representatives against common carriers by railroad, to recover damages for personal injuries to the employee, or where such injuries have resulted in death, the negligence of the plaintiff or of the deceased employee is not a bar to a recovery, but it goes by way of diminution of damages in proportion to the negligence of the employee, as compared with the combined negligence of himself and the defendant; or, in other words, the carrier is to be exonerated to the amount of the causal negligence attributable to the employee. That is to say, if the carrier and the employee should both be found guilty of negligence in an equal degree, which contributed to the injury—the negligences being equal—the jury should reduce the damages one-half. If it should be found that the employee was guilty of more negligence than the railroad company, then the damages should be diminished more than one-half. If it should be found that the employee was guilty of less negligence than the defendant company, then the damages should not be reduced as much as one-half. *Irvin v. R. R.*, 164 N. C., 14. Or, to state it differently: When the causal negligence is partly attributable to the injured employee and partly attributable to the defendant carrier, the plaintiff cannot recover full damages, or all the damages sustained by the employee or his beneficiaries, but only a proportional or fractional part thereof. The amount which the plaintiff may recover is to bear the same ratio, or proportion, to the full amount of damages sustained as the negligence attributable to the defendant bears to the entire negligence, or combined negligences, attributable to both. It is the purpose of both statutes to abrogate the common-law rule, completely exonerating the defendant from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee. *Mondou v. N. Y. R. Co.*, 223 U. S., 1; *Tilghman v. R. R.*, 167 N. C., 171; *Renn v. R. R.*, 170 N. C., 128; *Kenney v. R. R.*, 165 N. C., 99.

A careful examination of the remaining exceptions leaves us with the impression that they should be resolved in favor of the validity of the trial and that such can be done without violating any legal principle.

The record presents no prejudicial or reversible error, hence the verdict and judgment will be upheld.

No error.

STATE v. JOHN GODETTE.

(Filed 29 October, 1924.)

1. Appeal and Error—Objections and Exceptions—Briefs.

Exceptions not mentioned in the appellant's brief are deemed abandoned on appeal to the Supreme Court, under the rule.

2. Constitutional Law—Criminal Law—Arrests—Warrants.

The first ten amendments to the Constitution of the United States are in recognition of the principles of the organic law as previously existing in England, the fourth amendment requiring warrants to be issued upon probable cause applying only to criminal actions in the Federal Courts, and the due-process clause, etc., of the Fifth Amendment, relating to the orderly procedure in the State courts. The first ten amendments apply only to the Federal Government.

3. Same—Statutes—Turlington Act.

The provisions of the Turlington Act, Public Laws of 1923, permitting the seizure of intoxicating liquor being unlawfully transported and of the conveyance in which it is being done, when the officer sees or has absolute knowledge that there is intoxicating liquor in such vehicle, do not controvene the provisions of the State Constitution, Art. I, secs. 11 and 15.

4. Same—Evidence—Questions for Jury.

Where there is evidence that acting upon information previously received that intoxicating liquors are being unlawfully transported, the proper officers of the law lie in wait for and follow automobiles, and can see containers and smell the liquor, they have a right to arrest without warrant and seize the vehicle.

5. Same—Officers—Unlawful Acts.

The arrest by the officer of the law of the defendant without a warrant, while unlawfully transporting intoxicating liquor, being valid under the provisions of our statute, it may not successfully be maintained that evidence thereof should have been excluded, and that upon a trial for unlawfully transporting liquors under the Turlington Act, his motion for nonsuit upon the evidence found therein should have been granted.

APPEAL by defendant from *Daniels, J.*, and a jury, at June Term, 1924, of CRAVEN.

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

Ernest M. Green and W. B. R. Guion for defendant.

CLARKSON, J. The defendant was convicted in the court below of aiding and abetting in the transportation of intoxicating liquors and sentenced to be confined in the common jail of Craven County for a period of 18 months, to be assigned to the county roads.

There are thirty exceptions and assignments of error made by defendant in the case on appeal. The brief is confined to a discussion of the validity of the evidence obtained from an examination of an automobile which contained liquor without a search warrant. The other exceptions are deemed to be abandoned. Rules of Practice in the Supreme Court, part of Rule 28 (185 N. C., p. 798), is as follows: "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." *Bank v. Smith*, 186 N. C., p. 640.

At the close of the State's evidence, "the defendant again renewed his objection to the testimony of the officers acquired through the unlawful search and especially plead the protection of the Federal Constitution in particular the 4th and 5th amendments; the Constitution of the State of North Carolina, Art. I, secs. 11 and 15, and chapter 1 of the Public Laws of 1923; moved to strike out all such questions and answers and moved that the action be dismissed; that the jury be instructed that if they found from the evidence the facts to be as testified by the witnesses they should return a verdict of not guilty."

The court below overruled the motion and the defendant excepted. At the close of all the evidence, the defendant renewed his motion and all of his objections, which were overruled, and defendant excepted. There was a verdict of guilty and from the judgment pronounced the defendant excepted and assigned error, in accordance with the exceptions taken, and appealed to the Supreme Court.

This brings us to consider the law and the evidence in the case.

Const., of U. S., 4th Amendment, is as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The 5th Amendment to the Constitution of United States, is as follows: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

Article I, sec. 11 of the Constitution of North Carolina, is as follows: "In all criminal prosecutions every man has the right to be

informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense and not be compelled to give evidence against himself or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

Article I, sec. 15, *supra,* is as follows: "General warrants, whereby any officer or messenger may be commanded to search places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted."

The Legislature of this State, Public Laws 1923, ch. 1, sec. 6 (passed what is known as the Turlington or Conformity Act) in part, is as follows: "When any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquor in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquor transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof." Provision is made for the owner to give bond with sureties for return of property on day of trial to abide judgment of court, etc., and the following *proviso* is in the section: *"Provided,* that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage."

The Constitutions of the United States and North Carolina are the fundamental and organic laws of our land. The courts should be careful to uphold the provisions.

The defendant in his brief says: "The General Assembly of North Carolina, still true to the ideals of the fathers, inserted the above *proviso"* in what is known as the Turlington or Conformity Act, *supra.*

The question presented: Was the testimony of the officers and the intoxicating liquor seized admissible without a search warrant? We are of the opinion that both were admissible.

We must consider the evidence. The solicitor of the Fifth Judicial District, Jesse H. Davis, employed a detective, E. H. Gattis, to work in Craven and Carteret counties, and obtain evidence looking towards the breaking up of the unlawful manufacture and sale of liquor. The detective was coöperating with the Federal prohibition agents. Prior to the day Godette, the defendant, was arrested the detective saw the defendant and one Ward at a still. In a conversation he heard Godette say he was to deliver a load the next night at 9 o'clock in New Bern.

On this and other information he had as to who was going to bring it, he informed the solicitor, the morning before the night the defendant was arrested, and notified the solicitor to get his men ready and look out. Gattis testified that there was not only Godette, but five cars from Raleigh down there. "I knew I could clean up the whole gang." He told Solicitor Davis about the five cars from Raleigh and that they would buy it at wholesale in 100 gallon lots.

That night, 20 September, 1923, the Solicitor Jesse H. Davis, E. H. Gattis, Capt. Ed. Belangia, chief of police of New Bern; Lt. Gus Ipock, a policeman; Deputy Sheriff Bill Whitford and Roy Manning, District U. S. marshal, went to the Neuse River bridge about 7 o'clock and waited. About 9 o'clock, two cars came upon the bridge, one behind the other. John Godette, the defendant, came along in his Cadillac car driving slow, and close behind him, about 25 yards was a Buick car. Captain Belangia, Marshal Manning and Lieutenant Ipock were in Manning's car. It was turned around and came across the bridge and went up South Front Street and followed behind the two cars (the Buick and Cadillac). They went up South Front Street to Spring Street and turned into Spring Street, then up to New South, then into German Street. When they came up about midway German Street, the Buick was parked on the left-hand side. Two people were in the car trying to start it, and as Captain Belangia and Deputy Manning got close to the car, they jumped out and ran. The Cadillac had also stopped about 30 feet away, just across the street. By the time the officers got to the Buick, the two people had made their escape. Some one remarked "Stop the Cadillac." Ipock hollered to the driver to stop and fired on the ground, and the Cadillac left at a rapid speed, but returned in 5 or 10 minutes. Captain Belangia said he did not have personal knowledge that liquor was in the Buick car, he could not tell as it passed him, but it looked like it was loaded. When defendant returned he stopped his car opposite, and Captain Belangia "told him to consider himself under arrest, and he said 'all right.'" Captain Belangia testified: "I asked him if the Buick was his car and he said 'I don't know, I will have to go see.' He got out of the Cadillac went over to the Buick and behind it looking at it and said, 'Yes, sir, that is my car.' He said that it had been missing two or three days." Captain Belangia was asked:

"Q. Was there anything in the Buick car to your knowledge? Answer: 'Well, it smelt like whiskey.'

"Q. Do you know how much there was in it? Answer: 'Eighty-nine gallons.' "

Lieutenant Ipock testified, in part: "I was with the party on the bridge. We were there waiting for some cars. We had been talking

about whiskey haulers. I was standing by the automobile when John (the defendant) came along with his car, and right behind it, as near as it could follow, was this Buick car. It was loaded with something and there was a few of the containers that were not covered that I could see. . . . We saw the Buick stop in front of George Carter's house. We drove up beside this car and I told them to halt, but they rolled right out from under the wheel and left. This was a short distance from the defendant's car. I fired on the ground, but these two men kept going. Godette left at a rapid rate of speed, but later returned. . . . I was in uniform which had bright brass buttons on it. . . . The moon was shining brightly and the defendant was approaching with full lights in front of me. He could have recognized me. I did not undertake to stop it nor did I undertake to stop the second car. Both cars were running very slowly about as slow as they generally go at any time. I did not see nor did I have absolute personal knowledge that the second car contained liquor. I know that it contained kegs, but I did not know what was in the kegs. I did not smell it. I did not smell it when it passed. I have never examined the kegs to see what they contained, but when we searched the Buick the odor proved that the kegs contained whiskey. I did not shoot at the defendant. I shot at the ground. I was trying to hold the two men that ran from the Buick car. Solicitor Davis was standing by our Ford car when the defendant passed us on the bridge. No one commanded the defendant to stop, and none of us had a search warrant or any other kind of warrant for the defendant."

All the officers there knew the defendant and the defendant knew all of them.

Deputy Will Whitford, testified: "I could see the top of the kegs, but I could not smell anything."

For the purposes of trial, defendant's counsel admitted that the Buick car contained whiskey. It was admitted by the State that no search warrant had been sworn out for searching said car.

S. H. Fowler, a witness for defendant, testified: "The Buick car was in very poor condition. It was an old $1,700 car that had been sold to Godette for $350."

It will be noted that defendant calls to his aid the 4th and 5th amendments to the Constitution of the United States, and cites the cases of *Gouled v. U. S.*, 255 U. S., p. 296 and *Amos v. U. S.*, 255 U. S., p. 313. We do not think those cases are applicable to the facts in this case. These amendments apply only to the *Federal Government.* They are persuasive, and should be, but not binding.

"All of the amendments proposed by the first session of Congress, consisting of the first ten, were intended to apply only to the Federal

Government, and not as restrictions on the State governments. They were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities inherited from our English ancestors and from time immemorial." Const. of U. S., Anno. (1923), p. 521, citing numerous authorities.

The U. S. Court, in *Brown v. New Jersey,* 175 U. S., 175, citing numerous authorities, says: "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government." *Ensign v. Pennsylvania,* 227 U. S., p. 592. *S. v. Campbell,* 182 N. C., p. 911. This case was taken to the Supreme Court of the United States on writ of error and affirmed. 262 U. S., p. 728; *S. v. Simmons,* 183 N. C., p. 684.

"It is however, necessary, to observe the substantial distinction between the Fifth Amendment, which is obligatory only on the United States, and the Fourteenth Amendment, which is obligatory only on the states. The limitation in the former is 'without due process of law.' In the Fourteenth Amendment this limitation is accompanied with a prohibition of the denial of the 'equal protection of the laws.'" *U. S. v. New York, etc. R. Co.,* 165 Fed., 742. "This amendment only announces and reaffirms the ancient principles of the common law, and prevents them from being unjustly invaded by the power of the Federal Government." *North Carolina v. Vanderford,* 35 Fed., 282.

In *Traux v. Corrigan* (257 U. S., 312) the Court, considering the relations of this and the equal-protection clauses, says, in general: "The phrase, 'due process of law,' is, in terms, extended to the States by this amendment. As applied to the States the guaranty adds nothing to the right of one citizen against another, but simply prevents any encroachment by the State upon the fundamental rights which belong to every citizen. 'Due process of law,' as here used, refers to the law of the land in each State, deriving its authority from the inherent and reserved powers of the State, exerted within the limits of the fundamental principles of liberty and justice underlying our civil and political institutions. What is due process of law in the respective State is regulated and determined by the law of each State, and this amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided. The courts will interfere with State action on the ground that it is repugnant to this clause only where fundamental rights have been denied." Const. of U. S., Anno. (1923), pp. 633, 634, citing numerous authorities.

In North Carolina it has long been the law that a physical fact or condition which was brought out by the illegal action of an officer may be given in evidence against the defendant. *S. v. Graham,* 74 N. C., 646 (prisoner compelled by officer to put shoe in track). This case has been approved in many decisions since, including *S. v. Mallette,* 125 N. C., 725, which case was affirmed in the United States Supreme Court on writ of error in *Mallett v. North Carolina,* 181 U. S., 589; *S. v. Thompson* 161 N. C., 238 and *S. v. Neville,* 175 N. C., 731. There are quite a number of courts that disagree with the principle established by *S. v. Graham, supra.* Some of these decisions are cited by the defendant in his brief. We do not think the action of the officers illegal in the present case.

The language of the Conformity Act of this State, *supra,* is plain: that when any officer of the law shall discover any person transporting or possessing liquor in violation of law, that is when he sees or has absolute personal knowledge, the liquor and vehicle shall be seized and the person in charge arrested.

The officer can arrest (1) when he sees the liquor; (2) when he has absolute personal knowledge. The latter is defined in the law. In 9 Gray Mass., 271, "Knowledge, being a firm belief." In *West v. Home Ins. Co.* (C. C.) 18 Fed., 6, it was held: "Personal knowledge—knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay."

This absolute personal knowledge can be acquired through the sense of seeing, hearing, smelling, tasting or touching. In Blakemore on Prohibition (1923) p. 332, it is said: "Under the Federal as well as the State statutes, to justify search and seizure or arrest without warrant the officer must have direct personal knowledge, through his hearing, sight or other sense of the commission of the crime by the accused. But it is not necessary that he should actually see the contraband liquor. . . . (*supra,* p. 334.) If an officer sees intoxicating liquor being loaded on an automobile he can thereupon seize the vehicle and arrest the person who has put liquor on it, and other palpable conditions might authorize similar action, as plainly seeing the liquor leaking from a vehicle in which it is being transported, such a leak extending itself upon the public highway and the spirits spreading themselves and their odor along the road. . . . (*supra,* p. 335.) Where the prohibition enforcement officers believe on account of the conduct of the defendant that he is engaged in transporting liquor illegally, they may act without a search warrant. So where the officers are informed by a witness that the defendant had placed in his automobile a bottle containing a fluid that looked like whiskey, and stopped in front of a hotel and went to the proprietor and tried to sell it, and had a large box in the car covered

up, and the officers on receipt of this information go to the car and uncover the box and find whiskey there, they are justified in arresting the defendant and seizing the car and the whiskey. The court in this case points out that the prohibition of the Fourth Amendment is against all unreasonable searches and seizures, and whether such search and seizure is or is not unreasonable must be determined according to the facts of the particular case, and in this case the actions of the defendant were of themselves enough to justify the officers in believing that the defendant was at the time actually engaged in transporting liquor illegally. *Lambert v. U. S.*, 282 Fed., 413." In that case it was said: "They were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant." *Ash v. U. S.*, Fed. Rep., vol. 299, p. 277 (20 May, 1924).

In Blakemore on Prohibition, *supra,* p. 337, it is said: "Where the Federal officers saw a truck loaded with barrels about to start from a brewery and suspected that the truck contained real beer and stopped it and tested it and found that it was beer and seized it, the court holds that the action was legal although without any search warrant. The court lays down the rule that if the Federal officers, from the exercise of their own senses, coupled with information from sources so reliable that a prudent and careful person having due regard for the rights of others would act thereon, have reasonable and probable cause to believe that an offense of unlawful transportation is being committed in their presence and have no opportunity to obtain a warrant, they may arrest, search and seize. The Court distinguishes this case from the *Gouled case,* as here the seizure was not merely of evidence but the *seizure here is of contraband.* (Italics ours.) *U. S. v. Hilsinger,* 284 Fed., 585." In distinguishing the *Gouled case, supra,* the late lamented *Clark, C. J.,* in *S. v. Simmons, supra,* p. 686, takes the same view.

It is imperative that officers of the law should obey the law, but nothing does more to undermine orderly government than that those in authority, being unmindful of their duty to society, fail to enforce the law. We have a contention here, made by defendant, that the officers of the law failed to observe the law. We think the position taken is not borne out or justified by the record.

The most responsible law officer of the district, the solicitor, finds that there is a "gang" (the language of the witness) handling *contraband liquor.* He employed a detective and the detective informs him that at a still they are hauling the liquor out in 100 gallon loads—five cars

from Raleigh. That from what he heard and on information obtained, Godette, the defendant, was to deliver a load at 9 o'clock in New Bern on a certain night. The solicitor had the officers of the law to be in waiting at the Neuse River bridge. True to the information given, Godette, leading the way in a Cadillac, had trailing him in his Buick car two negroes with 89 gallons of liquor. The officers let the two machines pass and followed. When they got midway of German Street in New Bern these bold violators of the law had parked the Buick in the heart of the city and were trying to start it, and, as the officers came near the car, they jumped out and ran. The chief of police said: "Well, it smelt like whiskey." As the Buick car passed him it looked like it was loaded. Lieutenant Ipock, as the Buick passed, said he could see it was loaded with something and he could see a few of the containers that were not covered. The officers could see the load and containers and smell the liquor. What more absolute personal knowledge, under the law, could they have? The Buick occupants fled, so did the defendant. He returned and admitted that it was his Buick. It had 89 gallons of liquor in it, that was trailing his Cadillac, and the chief of police arrested him without warrant for aiding and abetting in transporting liquor. The officials had a right under the law to seize the contraband liquor and arrest the defendant without warrant under the facts and circumstances of this case. Godette, in violation of the laws of his country, and the jury found, was aiding and abetting in the transportation of contraband liquor, that by common knowledge is impure, poisonous and deadly, destructive of home, health and happiness.

As this case is of some importance, we have discussed the law fully. It is to be noted, however, that the two occupants of the Buick car, that had the contraband liquor in it, fled and abandoned it. The officers' search then of the car, under such conditions, could, we think, in no sense offend against the Constitution or statutes of North Carolina.

From the record there was abundant evidence to go to the jury as to the guilt of the defendant. We can find

No error.

EMMA J. WOODWARD v. JESSE G. BALL ET AL.

(Filed 5 November, 1924.)

Wills—Equity—Conversion—Descent and Distribution.

Whether lands directed by the testator to be sold shall be regarded as personalty in whole or in part, under the doctrine of equitable conversion, depends upon his intent as gathered from his will; and a direction that his executor sell certain of his lands to pay his debts, and should a sur-

plus remain to pay it in certain amounts to designated beneficiaries, evidences his intent that the full proceeds of the sale should be regarded as personalty, and after satisfying the bequests, the remainder, as personalty, is subject to the appropriate canon of distribution.

APPEAL by plaintiff from *Grady, J.*, at March Term, 1924, of WAKE.

John Parish made a will devising a lot on West Edenton Street in the city of Raleigh to his wife for her natural life and at her death to his daughter Mary Parish. On the death of her mother Mary Parish became the sole owner; and on 18 December, 1920, she died leaving a will, the third item of which is as follows:

"My will and desire is that the house and lot I inherited from my father John Henry Parish, 316 West Edenton Street, shall be sold by my executor or his successor and the debts owing to me collected, and if there should be any surplus over and above the payment of debts that such surplus shall be divided as follows: To my beloved cousin Miss Mollie J. Parish of Santa Ana, California, one hundred dollars. To my beloved cousin James H. Ashford of Portageville, New Madrid County, Missouri, one hundred dollars. To my beloved cousin Vally B. Watson of Portageville, New Madrid County, Missouri, one hundred dollars. To my beloved cousin Percy Watson of Portageville, New Madrid County, Missouri, now deceased, one hundred dollars to be equally divided among his heirs. To my beloved cousin Mrs. Emma J. Woodward, twenty-five dollars. To my beloved cousin Iowa S. Parish, twenty-five dollars all both of Raleigh, N. C. To my beloved cousin Sam M. Parish of Portsmouth, Va., twenty-five dollars. To the First Baptist Church one hundred dollars. To my beloved friend Mrs. G. F. Kennedy, twenty-five dollars. To my beloved friend Alice Ball, fifty dollars, each of Raleigh, N. C."

Six of the defendants are heirs at law of the testatrix on her mother's side; the petitioner and all the other defendants are heirs at law on her father's side. The property on West Edenton Street was sold and there remains in the hands of the executors $3,565.01 after deducting the legacies set out in the third item of the will. The testatrix was never married. She died leaving neither father nor mother, brother nor sister, uncle nor aunt. The fourth canon of descents is as follows: "On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules." C. S., 1654, Rule 4.

The judgment directs the clerk, after deducting costs and an attorney's fee, to pay the fund ($3,565.01) to the next of kin of the testatrix both on the father's side and on the mother's side in the proportions therein set out. The plaintiff excepted and appealed.

John W. Hinsdale for plaintiff.
Manning & Manning for relators on mother's side.

ADAMS, J. By equitable conversion is meant a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity. Bispham's Prin. Eq., sec. 307; *Duckworth v. Jordan,* 138 N. C., 521; *McIver v. McKinney,* 184 N. C., 393. The appellant does not deny that the testatrix directed an equitable conversion into personalty of the house and lot on West Edenton Street; but she contends that the conversion was limited to the purpose of paying the specific bequests set forth in the third item of the will and that the portion of the fund remaining after satisfying these legacies should be treated as real estate subject to devolution as prescribed by the fourth canon of descents. She insists that as the conversion was intended for a specific purpose and this purpose was fulfilled there was a resulting trust in the surplus of the fund which passed to the heir as realty. But this principle does not apply when a contrary purpose is clearly indicated by the devise. After discussing the English doctrine Bispham says: "In the United States the rule under consideration has not received a construction so favorable to the heir. In *Craig v. Leslie* it was said to be settled, 'that, if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal.' It was accordingly held that the blending of the proceeds of the realty with the personalty, so as to form a common fund, for all the purposes of the will, though it should happen that some of them fail, will render the conversion absolute." Prin. of Eq., sec. 318.

This Court applied the principle in *Phifer v. Giles,* 159 N. C., 143, in which *Allen, J.,* said: "The will of Mrs. Phifer bequeaths and devises personal and real property, in trust, with power to sell, without making any distinction between the two kinds of property, which is evidence of an intention to convert the whole to personalty (*Burr v. Sim,* 29 A. D., 52), and it directs the application of the proceeds, which indicates a purpose for all to be sold. The general scope of the will, examined by itself and without reference to the facts now alleged, suggests that the testatrix thought it would be necessary to sell the whole, and that she

disposed of it for that purpose, which would be a conversion. *Ford v. Ford,* 2 Am. St., 124; *Lent v. Howard,* 89 N. Y., 169."

A careful consideration of the devise in question convinces us that the testatrix intended to effect a conversion of the property for the purpose of distributing the proceeds among her next of kin both on her father's side and on her mother's. She directed that her debts be collected, that the lot be sold and if a surplus should remain over and above the payment of debts such surplus should be distributed among her legatees. It was her obvious purpose to dispose of the entire proceeds of the sale as personal property; for she manifestly did not contemplate the disposition of any part of the surplus as real estate.

The judgment is

Affirmed.

MERCHANTS NATIONAL BANK v. CAROLINA BROOM COMPANY ET AL.

(Filed 5 November, 1924.)

1. Judgments—Verdict—Appeal and Error.

A judgment upon the verdict of the jury upon issues raised by the pleadings which are not determinative of the controversy between the parties, is erroneously entered.

2. Same—Bills and Notes—Mortgages.

A bank sued upon a note it had received for borrowed money secured with a chattel mortgage given to the maker by another as collateral, and one of the defendants pleaded and offered evidence tending to show that he was an innocent purchaser of the mortgaged property: *Held,* a verdict in favor of plaintiff bank on the issues of the indebtedness of its borrower, the value of the mortgaged property, and whether the plaintiff was a holder of the chattel mortgage in due course, was insufficient to sustain the judgment in plaintiff's favor.

3. Same—Instructions—Directing Verdict.

Where a bank in its action against the maker of a note seeks to have the property described in a chattel mortgage made by another and received by it as collateral, sold, and the proceeds applied to the payment of its note, and one of the defendants in possession pleads and offers evidence to show that he is the owner of the property by purchase, it is reversible error for the trial judge to instruct the jury that upon the evidence, if believed, the bank was the holder of the mortgage in due course, when it is conflicting as to whether the bank acquired the mortgage before it was due.

4. Pleadings—Issues—Instructions—Appeal and Error.

Issues not raised by the pleadings should not be submitted to the jury, but if the issue is submitted, reversible error in the instructions thereon will warrant a new trial.

BANK *v.* BROOM CO.

APPEAL by defendant, Howell, from *Grady, J.*, at April Term, 1924, of WAKE.

Plaintiff alleges that on 17 July, 1922, defendant, Carolina Broom Company, a North Carolina corporation, executed, and defendants, George W. Byars, W. F. Brower and W. H. Crisco, endorsed a note, payable to the order of the Merchants National Bank, for $1,500, due and payable on 1 September, 1922; that said note has not been paid.

Plaintiff further alleges that at the date of the execution of said note, defendant, Carolina Broom Company, deposited with plaintiff, as security for the payment of same, a chattel mortgage on all the personal property of said company, which had been duly recorded; that by virtue of said chattel mortgage it is now the owner and entitled to the possession of the property described in said mortgage; that said property is now in the possession of defendant, I. L. Howell, who has refused to surrender the same upon demand of plaintiff.

Defendants, other than I. L. Howell, filed no answer; defendant Howell, in his answer, admitted that the property was in his possession, alleging that he bought the same from the endorsers of the note set out in the complaint, without notice of the claim of the plaintiff; he denied that plaintiff was the owner or entitled to possession of the property.

The issues submitted to the jury, with answers thereto are as follows:

"1. In what amount, if anything, are defendants, Geo. W. Byars, W. H. Crisco, W. F. Brower and Carolina Broom Company indebted to plaintiff on the note sued on? Answer: '$1,500, with interest from 1 September, 1922.'

"2. What was the value of the personal property described in the chattel mortgage on the date of seizure under claim and delivery? Answer: '$3,000.'

"3. Is the plaintiff the holder in due course of the chattel mortgage referred to in the complaint? Answer: 'Yes.'"

No exception appears in the case on appeal to these issues, nor does it appear that any other issue was tendered by defendant.

Judgment was rendered upon this verdict that plaintiff recover of defendants, Carolina Broom Company, Geo. W. Byars and W. F. Brower (defendant Crisco not having been served with summons) primarily the sum of $1,500, interest and costs, and of defendants, I. L. Howell and S. M. Powell, surety on his undertaking for the replevy of the personal property, seized by the sheriff under a writ of claim and delivery issued in this action, the sum of three thousand dollars, to be discharged upon the payment of $1,500, interest and costs, their liability for said sum being declared secondary.

From this judgment defendant, I. L. Howell, appealed.

Albert L. Cox and Carroll W. Weathers for plaintiff.
B. Ray Olive and S. Brown Shepherd for defendant.

CONNOR, J. The court instructed the jury that if they found the facts to be as testified by all the witnesses they should answer the first issue, "$1,500, with interest from 1 September, 1922"; the second issue, "$3,000"; and the third issue "Yes." Defendant excepted to this instruction and assigns same as error. Defendant also excepted to the judgment signed, and assigns same as error.

The vital issue between plaintiff and defendant, I. L. Howell, was not submitted to the jury. There is no admission in the pleadings or in the record which determines the issue raised by the allegation in the complaint that plaintiff is the owner and entitled to possession of the property, and the denial in the answer of defendant Howell. With this material allegation denied by the answer, and not passed upon by the jury, no judgment can be entered in this action. The controversy between the parties with respect to this issue has not been and could not be determined by the answers to the issues submitted. The verdict is insufficient to support a judgment, for no facts are found determinative of this controversy. This is a defect upon the record which is presented to this Court for review by the appeal, and although no exception appears to have been taken to the issues as submitted and no other issue tendered by appellant, a new trial must be ordered. Upon the pleadings, an issue must be submitted to and answered by the jury, substantially as follows:

"Is plaintiff the owner and entitled to possession of the personal property described in the chattel mortgage, as alleged in the complaint?" *Strauss v. Wilmington,* 129 N. C., 99; *Hatcher v. Dabbs,* 133 N. C., 241; *Pearce v. Fisher,* 133 N. C., 335; *Spruill v. Davenport,* 178 N. C., 366.

As there must be a new trial of this action, it may be needless to discuss or pass upon the assignments of error made by defendant. However, we deem it proper to consider the exception to the instruction of the court that if the jury finds the facts to be as testified to by all the witnesses they should answer the third issue "Yes."

The chattel mortgage relied upon by plaintiff to support its allegation of ownership of the property described in the complaint, was executed by the Carolina Broom Company, a corporation, on 2 March 1920, to M. A. Griffin, J. G. Jacobs and M. R. Medlin to secure a note payable to them for $2,500, due 1 June, 1920; this mortgage was transferred without recourse by the payees to George W. Byars, president of the corporation on 7 July, 1921 and on that date credits aggregating $2,669.30, dated 24 July, 1920, 8 September, 1920, 12 September, 1920 and 7 July,

1921 were endorsed thereon; on 4 October, 1921 the Carolina Broom Company was dissolved; the note upon which this action was brought was executed on 17 July, 1922, and when the chattel mortgage was deposited with plaintiff, as now appears from the evidence, the debt secured thereby was long past due and the mortgage itself showed that payments had been made thereon aggregating $2,669.30. There is evidence that the $1,500 note, dated 17 July, 1922, was in renewal of a note theretofore executed by the makers payable to the plaintiff but there is no evidence of the date on which the original indebtedness to the plaintiff was contracted.

There was error in the instruction of the court with respect to the third issue. This issue, however, is not raised by the pleadings and should not be submitted upon the new trial.

New trial.

GUY F. BASSETT, TRADING AS THE INDEPENDENT COOPERAGE COMPANY, v. THE PAMLICO COOPERAGE COMPANY, A CORPORATION, A. M. DUMAY, AND OTHERS, OFFICERS AND DIRECTORS OF SAID COMPANY, THE NATIONAL VENEER COMPANY, ET AL.

(Filed 5 November, 1924.)

Corporations — Deeds and Conveyances — Debtor and Creditor — Distribution of Funds—Judgments.

The sale of an insolvent corporation or manufacturing concern of practically its entire property for the payment of debts, and with the view of presently going out of business, amounts practically to a dissolution, and in such case the proper rule for distribution of the assets among creditors is that of equality of payments: and where the directors distribute the proceeds of sale for the payment of notes of the corporation upon which they were individually bound without recognition in the distribution of a judgment creditor, they take with notice of this unpaid debt and are individually liable.

CIVIL ACTION, tried before *Devin, J.*, and a jury, at May Term, 1924, of BEAUFORT.

The action is principally for the purpose of recovering of defendants, the officers and directors of the Pamlico Cooperage Company, the proportionate part of a judgment held by plaintiff against said defendant company by reason of the alleged wrongful distribution of the assets of defendant corporation to plaintiff's prejudice. At the close of the evidence, on motion, there was judgment of nonsuit and plaintiff, having duly excepted, appealed.

Ward & Grimes for plaintiff.

S. C. Bragaw for Pamlico Cooperage Co.; Small, MacLean & Rodman for National Veneer Co., defendants.

HOKE, C. J. It appears from the allegations and admissions in the pleadings and from the evidence offered on the trial that in 1919, plaintiff, having a claim against the Pamlico Cooperage Company, instituted suit to recover same in the District Court of the United States in the Eastern District of North Carolina, and in April, 1922, recovered a judgment thereon, which said judgment is still due and unpaid. That in 1920, the defendant, the Pamlico Cooperage Company, sold and conveyed its entire interests and property for $109,000.00, the conveyance being made first to defendant, W. B. Simmons, acting in the matter for defendant, the National Veneer Company, and who later conveyed same to the Veneer Company, which said company has paid the purchase price in full. That the said Pamlico Company, was practically insolvent, the sale being made with a view of paying off its indebtedness and going out of business, and the defendants, its officers and directors, in the management and control of its affairs, having received said purchase money, and with full knowledge or notice of plaintiff's claim, applied and distributed the entire purchase price to the payment and satisfaction of said company's existent indebtedness other than plaintiff's claim, and for the greater part of which said officers and directors were liable as endorsers on the company's notes.

On these the facts chiefly pertinent, and undisputed so far as we can discover, there is, in our opinion, nothing to justify or uphold further recovery against the Veneer Company, the purchaser. The Pamlico Company, being at the time a going concern, the defendant, the Veneer Company, having bought and paid the purchase price, so far as appears the full value of the property, and there being no evidence tending to show any fraudulent or ulterior purpose on its part, the title acquired is valid and it should be quit of further obligation by reason of the transaction. *Bank v. Hollingsworth,* 143 N. C., p. 520; *Bank v. Cotton Mills,* 115 N. C., p. 507; *Hancock v. Holbrook,* 40 La. Anno., p. 53; 14 Corpus Juris, sec. 3069.

With regard to the disposition of the purchase price, however, a different principle must prevail. For, the corporation being insolvent or nearly so, this conveyance of its entire property with a view of going out of business amounted practically to a dissolution, and in such case the rule of distribution encumbent upon its directors and managers is that of equality among all of its creditors, and they acted in their own wrong when they distributed the entire assets among the other creditors, having full knowledge and notice of plaintiff's claim, assuredly so when

this was done for their own relief, and by paying off debts for which they were personally liable. *Steel Co. v. Hardware Co.*, 175 N. C., p. 450; *Drug Co. v. Drug Co.*, 173 N. C., p. 502; *Wall v. Rothrock*, 171 N. C., p. 388; *McIver v. Hardware Co.*, 144 N. C., p. 479; *Whitlock v. Alexander*, 160 N. C., p. 479; *Pender v. Speight*, 159 N. C., p. 612; *Graham v. Carr*, 130 N. C., p. 271; *Townsend v. Williams*, 117 N. C., p. 330; *Hill v. Lumber Co.*, 113 N. C., pp. 173-177; *Darcy v. Ferry Co.*, 196 N. Y., p. 99; *Tatum v. Leigh*, 136 Ga., p. 791.

In the *Steel case, supra*, the Court, in speaking to the question, said: "It further appeared that the individual defendants, Dermot Shemwell and B. C. Young, were at that time in active charge of the affairs of defendant company and took personal part in directing the distribution of the assets and making the payment as specified, and on these facts as accepted by the jury and under the principles heretofore stated, we think that equality among all the creditors was the correct rule of distribution, and said defendants, in active management and control of the assets of an insolvent corporation, committed a breach of legal duty in paying 83 1-3 per cent on a debt of $15,000 in which defendant Shemwell was already obligated as endorser, and they have been properly charged with the sum required to bring the payments on plaintiff's claim to an amount equalling 75 cents on the dollar, the dividend that the assets justified."

And in *Graham v. Carr, supra*, it was said among other things: "But creditors, whether they are stockholders or not, sustain a different relation to the assets of the corporation and the corporation sustains a different relation to them, and they have rights, with regard to the payment of debts that stockholders as such do not have. As they have no lien on the assets of the corporation for the payment of their debts, and no right to have their debts preferred to those of other creditors, nor to object to the payment of other creditors in preference to the payment of their debts (if they are just debts), if such payments are made in good faith and without fraud, unless the debts so paid are due to a stockholder or officer of the corporation. When this is the case, the law will not allow the stockholders and officers of the corporation to take advantage of their knowledge of the insolvent condition of the concern, and their power to use and control the assets, to pay their own debts or to relieve them from special liabilities to the injury of other creditors. *Bank v. Cotton Mills*, 115 N. C., p. 507; *Hill v. Lumber Co.*, 113 N. C., p. 173, 21 L. R. A., p. 560, 37 Am. St. Rep., p. 621, as explained in *Bank v. Cotton Mills, supra;* 5 Thompson on Corporations, sec. 6503; 7 Thompson, sec. 8497."

Applying these principles, the directors and managing officers in distributing the entire purchase money to debts for which they had become

personally liable, and leaving plaintiff's claim unpaid and with nothing available for its payment, acted in violation of plaintiff's legal rights as creditor of the company, and must be held liable for the proper proportionate part of plaintiff's claim.

The judgment of nonsuit will be set aside and the cause proceeded with in accord with this opinion.

Reversed.

McKINNIE BROTHERS COMPANY v. WILLIE F. WESTER.

(Filed 5 November, 1924.)

Limitation of Actions—Mutual Accounts—Directing Verdict—Evidence.

To bar an action to recover for goods sold and delivered under the provisions of C. S., 421, the two accounts must be mutual or reciprocal, open or continuous, and current, or no time limit fixed by agreement, express or implied, with the balance to be determined by an adjustment of credit and debit; and when there is conflicting evidence as to whether the item sued on was so related to other items upon which the defendant relied it is reversible error for the judge to direct a verdict thereon if the jury believe the evidence.

APPEAL by defendant from *Grady, J.*, at February Term, 1924, of FRANKLIN.

The jury answered the issues submitted to them as follows:

1. In what amount, if any, is defendant indebted to plaintiffs? Answer: $105 with interest.

2. Is plaintiff's cause of action barred by the statute of limitations? Answer: No.

From judgment in favor of plaintiff and against defendant for $105 with interest from 25 November, 1919, defendant appealed. Defendant's only exception is to the instruction of the Court upon the second issue.

S. A. Newell for plaintiffs.

Ben T. Holden and Edward F. Griffin for defendant.

CONNOR, J. The court instructed the jury as follows: "If you believe all the evidence you will answer the second issue 'No.'"

On 25 November, 1919, plaintiff and defendant exchanged wagons, defendant agreeing to pay "boot money." There was a controversy between the parties, at the trial, as to the amount to be paid, but the jury has found that defendant agreed to pay $105, as contended by plaintiffs. Defendant testified and contended that the jury should find, from the evidence, that he paid the "boot money," the next day after

the trade, in accordance with the agreement, but the jury has found that defendant has not paid this money and that he is still indebted to plaintiffs in the sum of $105, and judgment has been rendered against defendant for this sum, with interest from the date of the trade.

On 13 July, 1920, plaintiff sold to defendant two trucks and charged defendant, on their books, $30, the purchase price of the trucks. On 10 November, 1920, plaintiff credited defendant with $30, which defendant contends he paid by check, on which were written the words "for trucks." Defendant contends that this sum was paid for the trucks and not on an account.

On 15 March, 1921, defendant bought of plaintiffs four barrels of flour for $43, and on said date paid this sum to plaintiffs, who credited defendant on their books, with same. On 17 March, 1921, the flour was delivered to defendant, and a debit for $43 "to 4 bbls. flour" was entered on plaintiff's books, thus balancing the credit item for this sum, leaving a balance of $105, the sum charged defendant on 25 November, 1919, "difference in wagon trade." These were the only transactions between plaintiffs and defendant from 25 November, 1919, to the date of the summons in this action, to wit, 11 June, 1923.

Plaintiffs contend that these transactions, entered on their books, show a course of dealing which constitutes a mutual, open and current account, and that by C. S., 421, the cause of action upon the balance due accrued at the date of the last item, to wit, 17 March, 1921, and is therefore not barred by the statute of limitations: C. S., 441 (1).

Defendant contends that these transactions were separate and distinct, each being unrelated to and disconnected from the others; that the cause of action upon the amount due for "difference in the wagon trade," to wit, $105, accrued on 25 November, 1919, and was therefore barred by the three years statute of limitations on 11 June, 1923, the date of the summons.

Defendants testified that on the date of the wagon trade, he told Mr. McKinnie that he had the money at home, and would bring it to him the next day—that he did so—and that when he paid the money to Mr. McKinnie the latter told him that no receipt was necessary as it was a cash transaction. Defendant further testified that all his transactions with plaintiff were on a cash basis. Each credit in the statement offered in evidence by plaintiffs, which is a copy from their books, is for the exact amount of a debit item, and the balance due is the exact amount charged on 25 November, 1919, as amount due for "boot money."

There is evidence sustaining the contentions of plaintiffs; there is evidence sustaining the contention of defendant. There is error in the instruction to the jury that if they believed all the evidence, they should answer the second issue "No."

This Court has defined in *Hollingsworth v. Allen,* 176 N. C., 629, a "mutual, open and current account," within the meaning of C. S., 421. It is only where there is an understanding or agreement, express or implied, from the nature of the dealings between the parties, that the items of an account shall be applied as payments upon other items, arising out of transactions that are related to each other and not disconnected, that the cause of action, for the balance due, accrues at the date of the last item. The account must be *mutual*—that is, involving reciprocal rights and liabilities; *open*—that is, contemplate further dealings between the parties; and *current*—that is, running with no time limitations fixed by agreement, express or implied, with the balance to be determined by an adjustment of credit and debit items; C. S., 421, applies only to such an account.

There must be a

New trial.

STATE v. JEFF BURKE.

(Filed 5 November, 1924.)

1. Intoxicating Liquor—Spirituous Liquor—Testimony of Purchaser—Instructions—Evidence.

Upon conflicting evidence in this case as to the transportation and unlawful sale of intoxicating liquor, wherein the purchaser of the liquor has testified against the defendant without evidence of any promise or agreement, or of facts from which the same may be inferred, an instruction *held* correct to that effect, and that the jury should take in consideration all the evidence in the case in reaching their verdict.

2. Same—Orders—Sale of Vehicle Used in Unlawful Transportation—Appeal and Error.

In this case an exception to the order of court directing the sale of defendant's automobile used in the unlawful transportation of liquor, is not sustained, the order not appearing of record in the appealed case, and the verdict upon the evidence sustaining an order of this character.

APPEAL by defendant from *Sinclair, J.,* at June Term, 1924, of ALAMANCE.

Verdict of guilty upon indictment charging defendant with the sale, the transporting and the possession for sale, of intoxicating liquor. From judgment that defendant be confined in the jail of Alamance County for four months to be assigned to work on the roads, defendant appealed.

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

John J. Henderson for defendant.

CONNOR, J. Defendant excepted to portions of the judge's charge to the jury, and assigns same as error.

Defendant testified that on Saturday night before the Sunday morning on which he was arrested, he was running an automobile for hire at Burlington. He took Will Boswell, who had an armful of packages, to his home. The next morning Boswell 'phoned to him that he had left a package in the car the night before. At Boswell's request he took the package which he found in the car to Boswell's home and delivered it to him. It was lying on the floor of the car, wrapped in a newspaper and looked like a fruit jar. He did not know what was in the package, and he did not ask Boswell about its contents.

Boswell testified for the State that the package was a fruit jar and that it contained a half-gallon of liquor; that he paid defendant five dollars for the liquor. The fruit jar was wrapped in a newspaper when defendant delivered it to him. The officers saw defendant deliver the package to him and later came to his house and he showed them the liquor. They did not arrest him at the time, and did not tell him that they would not hurt him if he would testify that he got the liquor from defendant. The officers saw defendant in his car with the package and saw defendant deliver it to him and saw him take it into his house. He later went before the justice of the peace, plead guilty and gave bond in the sum of $250.

We have examined the charge of the court and do not find that the exceptions of defendant are sustained. The exception chiefly relied upon is to a portion of the charge as follows:

"There was something said in the argument about an attempt to let Boswell off. The court charges you there is no evidence in this case of any agreement or promise made to Boswell. It is the duty of the court to tell the jury that nobody has a right to show any clemency to Boswell, except the court himself. Neither the solicitor nor the policeman have any power to make terms with any man convicted of crime. This is a matter for the court.

"So, gentlemen of the jury, you will not consider any argument of this kind. You will take the evidence in this case, all the evidence, as it came from the witnesses, upon the witness stand. It is your duty under oath to give each and every part of the evidence of each and every witness such weight as you find it justly entitled to, after passing upon it, and considering the reasonableness or unreasonableness of the testimony."

A careful examination of all the evidence set out in the case on appeal fails to show any evidence of any promise or agreement, or of any facts from which the jury could infer such promise or agreement, by the officers or any one to or with Boswell to induce him to testify against

the defendant. Indeed, he is corroborated by other witnesses upon all the essential matters in his testimony, except as to the purchase from defendant of the liquor, and as to this he is corroborated by facts and circumstances clearly appearing from the evidence.

Defendant also excepts to the order of his Honor, directing that defendant's automobile be sold. The formal order is not set out in the record or in the case on appeal. We find nothing in the case on appeal to sustain this exception, and no errors for which defendant is entitled to a new trial.

No error.

F. M. FOY ET AL. v. ROBERT L. FOY ET AL.

(Filed 5 November, 1924.)

1. Pleadings—Demurrer.

Where a complaint liberally construed alleges facts sufficient to constitute a cause of action in any phase or aspect, it is good against a demurrer thereto.

2. Wills—Devise—Estates—Defeasible Fee Simple.

A devise of lands to testator's wife in fee simple, with limitation over should she die intestate, vests in her, surviving her husband, a fee-simple estate defeasible upon the happening of the contingency of her dying intestate.

3. Same—Residuary Clauses.

A wife took under the will of her husband his entire estate, including lands, with certain specific exceptions, defeasible upon her dying intestate, and left a will specifically disposing of the same among numerous beneficiaries, and by item VIII, gave all that she had not mentioned to R., the nephew of her husband and his wife, which included the land in dispute. *Held*, by a proper interpretation of the entire will, she died testate as to this land, and it did not go under a different item of the will to the heirs of both.

APPEAL by defendants from *Calvert, J.*, at March Term, 1924, of NEW HANOVER.

Plaintiffs are heirs at law of Joseph T. Foy and his wife, Nora D. Foy. They allege that they, together with Mrs. R. K. Bryan and Henry S. Foy, who have refused to join them as parties plaintiff in this action, are the owners and entitled to the possession of eight lots or parcels of land, situate in the city of Wilmington and described in the complaint; that defendants are in the wrongful possession of said land, claiming the same as their own, and appropriating to their use all the profits and income therefrom.

Plaintiffs set out in the complaint, fully and in detail, the facts upon which they base their claim to ownership of the said land. Defendants demurred to the complaint, for that same fails to state a good and sufficient cause of action against defendants, in that it appears from the complaint, and the will of Joseph T. Foy, copy of which is attached thereto, marked Exhibit A, that Nora D. Foy, wife of Joseph T. Foy, was given by said will an absolute fee-simple estate in said lots of land, subject to be defeated only in the event the said Nora D. Foy died intestate, and in that, further, it appears from said complaint and the will of Nora D. Foy, a copy of which is attached thereto, marked Exhibit B, that the said Nora D. Foy did not die intestate, but that she died testate, and by her said last will and testament devised the lots of land described in the complaint, to defendants, Robert L. Foy and his wife, Elizabeth A. Foy.

To the judgment overruling the demurrer, defendants duly excepted and appealed therefrom to the Supreme Court. The only assignment of error is based upon this exception.

Weeks & Cox and John D. Bellamy & Sons for plaintiff.
E. K. Bryan for defendants.

CONNOR, J. Defendants having demurred to the complaint for that same does not state facts sufficient to constitute a cause of action, thereby admit the facts to be as alleged in the complaint. "A complaint will be sustained as against a demurrer if any part presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it under a liberal construction of its terms." *Hartsfield v. Bryan*, 177 N. C., 166.

The facts alleged in the complaint and thus admitted by defendants, are as follows:

1. Joseph T. Foy, by items III and V of his last will and testament, probated 16 May, 1918, devised his "Home Place" in Pender County, and his store and lot in the city of Wilmington, known as No. 107 Market Street, to his wife, Nora D. Foy, for and during her natural life, and at her death, by item VI, to his nephew, R. L. Foy, one of the defendants herein, excepting, however, from the "Home Place," one acre known as the "Harrell Place," which by item IV, he devised, after the death of his wife, to Melia D. Harrell for life, remainder to such child or children of said Melia D. Harrell, as she may leave surviving her, and the issue of such as may be dead; by item VII, he directs that should he sell the store on Market Street, in the city of Wilmington, and should R. L. Foy survive his wife, the sum of five thousand dollars shall be paid to said R. L. Foy, in lieu of said store.

2. Joseph T. Foy, by item VIII of said will, gave, devised and bequeathed "all the rest and residue of his (my) estate of every nature, kind and description, to his (my) beloved wife, Nora D. Foy, in fee simple and absolutely," subject, however, to the limitations and directions contained in item IX, which is as follows:

"Item IX. Should my wife die intestate after my death, seized in fee simple, or absolutely, of any of the property herein devised to her, it is my wish and desire that all of the property herein devised and bequeathed to her and in which at the time of her death she has become vested by this will under the previous terms thereof, of an absolute or fee-simple estate, that the same shall be divided between her heirs and my heirs—that is to say, the heirs of my wife shall be given one-half of the same, and my heirs the remaining one-half, except R. L. Foy and as to him, he shall be excluded from any share if the remainder in the 'Home Place' and the Market Street store or the five thousand dollars shall become vested in him. The heirs of my wife shall take per stirpes and not per capita, and my heirs shall also take per stirpes and not per capita."

3. Nora D. Foy survived Joseph T. Foy and died on 12 January, 1923; at the date of her death she was possessed of a large amount of personal property, consisting of household and kitchen furniture, books, jewelry, wearing apparel, and money and was the owner of one lot of land in the city of Wilmington, known as No. 710 South Third Street, and eight lots of land, also situate in the city of Wilmington described in the complaint, the said eight lots of land having been devised to her by item VIII of the will of Joseph T. Foy, in fee, subject to the limitations and directions contained in item IX, as aforesaid.

4. Nora D. Foy, on 11 August, 1921, made and published her last will and testament, which was duly probated as a holograph will on 26 January, 1923; the first clause in said will is as follows: "Knowing the uncertainty of life, and being now in health and strong minded, I wish to make the following bequest of my worldly belongings"; the will consists of thirty items, and after appointing "my nephew, (by marriage) Robert L. Foy," as executor, she directs that her house and lot, known as No. 710 Third Street, shall be sold, and that the proceeds, together with money on deposit in the Wilmington Savings and Trust Company's Bank, shall be applied to the use of the "Old Ladies' Home," corner of Ninth and Princess streets, Wilmington, N. C., and that if said Old Ladies' Home shall ever be abolished, the money shall be given to Mary Josie Foy, daughter of F. M. and M. D. Foy.

She then directs the payment of certain sums of money to persons named in the several items of said will, and after bequeathing articles of furniture, pictures, silverware, crockery, jewelry, wearing apparel,

books and heirlooms to various relatives, friends and servants, each legacy or bequest being specific and given to a definite named person, she concludes the 30th and last item with these words: "All else that I have not mentioned I give to Robert L. Foy and his wife, Elizabeth A. Foy, for their kind attention to me during my lonely widowhood."

5. Plaintiffs, together with Mrs. R. K. Bryan and Henry S. Foy, who have refused to join as parties plaintiff in this action, are heirs at law of Joseph T. Foy and his wife, Nora D. Foy, and contend that Nora D. Foy, having died intestate as to the eight lots of land described in the complaint, they, together with Mrs. R. K. Bryan and Henry S. Foy, are now the owners and entitled to the possession of the said lots of land, under item IX of the last will and testament of Joseph T. Foy.

6. Defendants, Robert L. Foy and his wife, Elizabeth A. Foy, are now in possession of said lots of land and contend that Nora D. Foy, not having died intestate, the fee-simple estate devised to her in item VIII of the will of Joseph T. Foy, has not been defeated by the contingency as provided in item IX of said will, and that having devised the said land by the 30th item of her will to them, the plaintiffs are not the owners of or entitled to possession of the said lots of land.

By the residuary clause (item VIII) in his will, Joseph T. Foy devised the eight lots of land, described in the complaint, to Nora D. Foy, in fee simple; by the "limitations and directions" contained in item IX of said will, her estate in fee simple was defeasible, upon the happening of the contingency as stated therein, to wit: "Should she die intestate after my death, seized in fee simple or absolutely, of any of the property devised to her" in said item VIII. Nora D. Foy took an estate in fee simple in said lots of land, defeasible upon her dying, after the death of Joseph T. Foy, intestate. *Fellowes v. Durfey,* 163 N. C., 305. This event did not happen, for she did not die intestate.

Plaintiffs, as heirs of Joseph T. Foy and his wife, Nora D. Foy, took no part of or interest in the property devised and bequeathed to Nora D. Foy, absolutely and in fee simple by item VIII of the will of Joseph T. Foy, for it was the wish and desire of Joseph T. Foy, as expressed in item IX, that the property which he gave, devised and bequeathed, absolutely and in fee simple, to Nora D. Foy, should be divided between his heirs and her heirs *only* in the event that she died, after his death, intestate.

Plaintiffs contend that item IX should be construed to defeat the fee-simple estate in the land, which vested in Nora D. Foy, by item VIII of the will, if she died intestate *as to any of the property* so devised to her. The language in which the limitation is expressed is not susceptible of this construction. The words "of any of the property" as shown by the context and the punctuation, are to be construed as following

the words "seized in fee simple or absolutely" and not the words "intestate after my death." This construction is supported not only by the language of the item, but also by the intent of the testator as the same appears from the entire will.

The manifest purpose of Joseph T. Foy, as shown by the entire will, was to provide for and to secure, after his death, the support and comfort of his beloved wife. The will, in all its provisions, bears evidence of his affection and tender solicitude for her. He gives to her all his property—his "Home Place" in Pender County, which he had, in part, inherited from his father, and, in part, purchased from his mother and brothers, that she might continue to live there during her widowhood; his store building in the city of Wilmington, a few miles distant from his country home, and which, doubtless, yielded an assured monthly income, and would, in all probability, keep her supplied with ready money; these he gave to her for life; and then all the rest and residue of his estate, of every nature, kind and description, he gave to her in fee simple and absolutely, providing only that should she die intestate, thus showing no wish or desire to dispose of this property or any part thereof, after her death, it was his wish and desire that this property should be divided between her heirs and his heirs. He thus leaves to her, the ultimate disposition of this property. She could by dying intestate, defeat the absolute title to the personal property and the fee-simple estate in the land given to her by her husband, and thus effectuate the wish and desire of her husband, in that event, that the property be divided between her heirs and his heirs. She could, by her will, devise and bequeath the property to such person or persons as she chose, or she could by making a will, prevent the happening of the contingency upon which the wish and desire of her husband was to take effect, and, making no devise or bequest of this property, leave it to go to her heirs and distributees. Her absolute title to the personal property and her fee-simple estate in the land could be defeated only by her act.

Nora D. Foy did not die intestate; she left a will, written by her own hand, which was duly probated. As executrix of her husband, she knew the contents of his will, and knew the effect of her act in making a will upon her title to and estate in the property he had given her. Her husband's will bears internal evidence that it was prepared by a learned and skillful lawyer, whose name appears as one of the witnesses to its execution. It is a permissible inference that after her husband's death, she had sought and obtained the advice of her husband's attorney, in the discharge of her duties as executrix of this will, and was advised by him of the effect, in law, of her act in making a will, upon her title to and estate in the property, given to her by her husband in his last will and testatment.

The contingency upon which the fee-simple estate of Nora D. Foy in and to the eight lots of land was to be defeated, not having happened, at her death, these lots descended to her heirs at law unless she devised them in her last will and testament.

Plaintiffs, some of whom are heirs at law of Nora D. Foy, contend that she did not devise the said lots of land, but died intestate as to them, and that therefore such of the plaintiffs as are her heirs at law are now the owners and entitled to the possession of the said lots. Defendants contend that by the concluding words of her last will, she gave and devised these lots of land to Robert L. Foy and his wife, Elizabeth A. Foy.

A careful consideration of the facts involved in this contention lead us to the conclusion that these lots of land are included in the last clause of the will of Nora D. Foy, and are therefore given and devised to the defendants. Having decided not to die intestate, she knew that these lots were included in her "worldly belongings"; she had not mentioned them in any one of the preceding thirty items of her will, by which she had disposed of personal property and land. She had given to her "nephew by marriage," whom she had appointed executor, "without bond, to carry out my requests in this will," and whose kindly attentions and affectionate consideration during her lonely widowhood she remembered, only her automobile, her livestock and her iron safe. We may well presume that she wished to give to him and to his wife substantial and permanent evidence of her appreciation and that with this purpose, she gave to them all else of her worldly belongings which she had not mentioned.

The last will and testament of Nora D. Foy was written by her on 11 August, 1921, more than three years after the death of her husband. She declares therein that it is her wish to make "the following bequest of my worldly belongings." She bequeathes personal property and directs the sale of her lot of land in Wilmington and the disposition of the proceeds of the sale. She bequeathes various articles of personal property, evidently the accumulations of a lifetime by a family of culture and wealth. She disposes of nearly seven thousand dollars in money and bonds. She gives specific legacies to various relatives by name, stating their respective relationships to her, some of them by marriage. There are several references in the will to her deceased husband. She concludes her will, with the 30th item, and then uses these words: "All else that I have not mentioned I give to Robert L. Foy and his wife, Elizabeth A. Foy, for their kind attention to me during my lonely widowhood."

When, sitting at her desk, on an August day, three years and more after the death of her husband, in the home where she and he had

lived in the sweet companionship of a long and happy marriage, she wrote these words, she did not forget the property which he had given to her as an evidence of his affection and solicitude, and as she recalled the kindly attentions and gentle courtesies which had been rendered her during the long years of her lonely widowhood by the favorite nephew of her dead husband and his wife, as an evidence of her appreciation and gratitude, she gave all else of her worldly belongings to them;—including, as we may feel assured, the eight lots of land situate in the city of Wilmington.

Citations of authorities sustaining this opinion are needless. As said by *Chief Justice Clark,* in *Fellowes v. Durfey,* 163 N. C., 305, "It would be the merest affectation of learning to quote the almost infinite number of cases in which language differing more or less from that used in this will has been construed by the courts in an effort to arrive at the testator's meaning, and to point out at great length wherein the words in each approximate or differ from the language used in the will before us."

There was error in overruling the demurrer and the judgment is Reversed.

D. C. SPEAS ET UX. v. THE MERCHANTS BANK & TRUST COMPANY OF WINSTON-SALEM, NORTH CAROLINA.

(Filed 5 November, 1924.)

1. Usury—Banks and Banking—Principal and Agent.

Our statute on the subject of usury permits only one recovery, and that against the party receiving it; and where one bank acting as agent for another collects such charges only as such agent, receiving no benefits to the knowledge of the plaintiff, the collecting bank is not liable for such charges, but only the bank for which it was thus acting.

2. Same—Burden of Proof.

Upon the trial of an action to recover for usury the burden of proof is on the plaintiff throughout the trial to establish his cause of action, and while the defendant may not be required to sustain its defense to introduce evidence in its own behalf, it thereby takes the chances of an unfavorable verdict and its evidence is not required to convince the jury by its preponderance. This principle upon which the doctrine of the burden of proof rests in both civil and criminal cases, discussed by STACY, J.

3. Instructions—Appeal and Error.

The charge of the court will not be held for reversible error because of apparent error in its disjointed parts taken unconnectedly, if construed contextually as a whole it correctly instructs the jury upon the principles of law arising from the evidence in the case.

SPEAS *v.* BANK.

APPEAL by defendant from *Lane, J.,* at March Term, 1924, of FORSYTH.

Civil action to recover of defendant the penalties allowed by statute for knowingly charging and receiving a greater rate of interest than 6 per cent per annum on moneys alleged to have been loaned to the plaintiff by the defendant.

The case was originally tried in the Forsyth County Court and resulted in a verdict and judgment for the defendant. On appeal to the Superior Court, error was found in the charge, relating to the law of usury and the burden of proof, and the cause was thereupon remanded to the county court for another hearing. From this judgment and order of the Superior Court, the defendant appeals, contending that the case was correctly tried in the county court, and that therefore the judgment as originally entered should be affirmed.

Brown, Porter & Bennett for plaintiffs.
J. E. Alexander and L. M. Butler for defendant.

STACY, J. It was contended by the defendant that in making the loan, upon which plaintiff alleges he paid a greater rate of interest than 6 per cent per annum, it, the defendant bank, was acting as special agent for the Bank of Stem or as agent for both lender and borrower and that this fact was known to the plaintiff at the time the loan was negotiated and also at the time the alleged usurious interest was paid. The trial court instructed the jury that the plaintiff could not recover of the present defendant if the alleged usurious interest were charged and collected by it for the use of another, and not for its own benefit, and such was known to the plaintiff at the time the loan was negotiated and at the time the alleged usurious interest was paid. This instruction was held to be erroneous by the Superior Court, but we are unable to perceive any essential error in it. 39 Cyc., 1090. Clearly the principal would be liable who profited by the transaction, and there is no provision for holding the agent liable and the principal also. This would be to create a double liability in such a case; whereas, the statute imposes only one. *Brown v. Johnson,* 43 Utah, 1; Ann. Cas., 1916 C, 321, and note; 27 R. C. L., 238, *et seq.*

We are cited by plaintiff's counsel to several authorities which seem to hold or to intimate a contrary view of the law, but these cases were rendered under statutes making it a misdemeanor to receive or to charge a greater rate of interest than that allowed by law, and this upon the principle that in misdemeanors, all concerned and participating are principals in the crime. It is not necessary for us to take issue with these decisions, as they are doubtless correct, but our statute does not

go so far; it provides that the exaction of usury, knowingly made, shall destroy the interest-bearing quality of a note or other evidence of debt affected with usury, and authorizes the debtor to recover a penalty of twice the amount of usurious interest paid, and no more. *Waters v. Garris, ante,* 305; *Miller v. Dunn, ante,* 397.

We think the exception to the charge as it relates to the burden of proof, should not have been sustained, but should have been overruled on the principle that the court's charge is to be construed contextually, as a whole, and not disjointedly. *Cherry v. Hodges,* 187 N. C., 368. "It is to be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." *S. v. Exum,* 138 N. C., 599.

The trial court placed the burden of the issue upon the plaintiff and charged the jury in language almost identical with that of *Justice Walker* in the case of *Winslow v. Hardwood Co.,* 147 N. C., 275, where, quoting from Elliott on Evidence, the rule is stated as follows: "The burden of the issue—that is, the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence—never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a prima facie case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a prima facie case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if upon the whole evidence he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced."

In view of the number of recent cases which have come to this Court presenting the questions, it may be useful to say a word in regard to the burden of proof, the degree of proof required in some cases, the duty and extent of going forward with evidence, and when this duty or requirement shifts from one party to the other. The distinctions which separate these several propositions, one from another, are now very generally recognized and accepted, though they are sometimes blurred by careless speech, and not infrequently by inaccurate expressions.

In criminal prosecutions, where the defendant or prisoner pleads "not guilty" to the charge contained in the warrant or bill of indictment to which he is required to answer, such plea draws about him the common-law presumption of innocence. He enters upon the trial with this presumption in his favor. His plea of traverse casts upon the State the burden of establishing his guilt, not merely by a preponderance of the evidence, but to a moral certainty or beyond a reasonable doubt. *S. v. Singleton,* 183 N. C., 738.

In the absence of some admission or evidence establishing an opposite presumption, sufficient to overcome the presumption of innocence, the most that can be required of a defendant in a criminal prosecution, under our system of jurisprudence, is explanation, not exculpation. The defendant is not required to show his innocence. The State must prove his guilt beyond a reasonable doubt, and the burden of this ultimate issue never shifts. The laboring oar on the question of guilt is constantly with the prosecution. *S. v. Wilbourne,* 87 N. C., 529; *S. v. Falkner,* 182 N. C., 793.

True, it is sometimes said that the duty of producing evidence rests upon the party best able to sustain it, because of facts and circumstances peculiarly within his knowledge. Thus it was held in *Farrell v. State,* 32 Ala., 557, that the existence of a license being a fact peculiarly within the knowledge of the party accused, it was incumbent upon him to show the license, even though the nonexistence thereof was the gravamen of the offense charged. To like effect, and for the same reason, are our own decisions: *S. v. Morrison,* 14 N. C., 299; *S. v. Smith,* 117 N. C., 809; *S. v. Emery,* 98 N. C., 670; *S. v. Glenn,* 118 N. C., 1194; *S. v. Holmes,* 120 N. C., 576.

Speaking to this matter in *Shepard v. Tel. Co.,* 143 N. C., 244, it was said: "In criminal cases, when a homicide with a deadly weapon is proved or admitted, there is a presumption of law that the killing is murder, and the burden is on the prisoner to prove all matters in mitigation or excuse to the satisfaction of the jury, *S. v. Matthews,* 142 N. C., 621; and when a totally independent defense is set up, as insanity, which is really another issue, *S. v. Haywood,* 94 N. C., 847, the burden of that issue is on the prisoner. But the burden of the issue as to the guilt of the prisoner, except where the law raises a presumption of law as distinguished from a presumption of fact, remains on the State throughout, and when evidence is offered to rebut the presumption of fact raised by the evidence, the burden is still on the State to satisfy the jury of the guilt of the prisoner upon the whole evidence. Notably, when the prisoner offers proof of an *alibi,* for example, which goes to the proof of the act. *S. v. Josey,* 64 N. C., 56."

It is sufficient, in criminal prosecutions, to warrant an acquittal, where the defendant simply enters a denial to the charge, that the jury, upon the whole evidence, should entertain a reasonable doubt as to the defendant's guilt; for in such cases the burden is always on the State to establish his guilt beyond a reasonable doubt. *S. v. Schoolfield,* 184 N. C., 721. So where the State makes out a prima facie case and rests, the defendant is not required to offer evidence in reply; he may rely upon the weakness of the State's case, though he takes the chance of an adverse verdict in going before the jury on the State's prima facie case, without offering any evidence in explanation or reply. *S. v. Wilkerson,* 164 N. C., 431.

But where the prisoner sets up an independent defense, or enters a plea of confession and avoidance, he is required, in this jurisdiction, to show such matters in defense or mitigation, not beyond a reasonable doubt, but to the satisfaction of the jury. *S. v. Benson,* 183 N. C., 795; *S. v. Willis,* 63 N. C., 26.

The result of all the decisions on the subject seems to be that in criminal cases, where the burden rests with the prosecution, the State must establish the defendant's guilt beyond a reasonable doubt; and in those cases where the burden rests with the defendant, under a plea of confession and avoidance or independent defense, the degree of proof required of him is to establish the matters relied upon as a defense to the satisfaction of the jury. *S. v. Terry,* 173 N. C., p. 766; *S. v. Hancock,* 151 N. C., 699; *S. v. Clark,* 134 N. C., 706; *S. v. Barrett,* 132 N. C., 1005. "Reasonable doubt, in the humanity of our law, is exercised for the prisoner's sake, that he may be acquitted if his case will allow it, but it is never applied for his condemnation." *S. v. Starling,* 51 N. C., 366.

In civil actions, the rules relating to the *quantum* of proof are somewhat different from those applicable in criminal prosecutions. The intensity of proof "beyond a reasonable doubt" is seldom, if ever, required in civil cases; and even the formula "to the satisfaction of the jury" is used only in rare instances. *Land Co. v. Floyd,* 171 N. C., 543. Ordinarily, in civil matters, the burden of proof is carried by a preponderance of the evidence, or by its greater weight, though in some cases, as where, for example, it is proposed to correct a mistake in a deed or other writing, to restore a lost deed, to convert a deed absolute on its face into a mortgage, to engraft a parol trust upon a legal estate, to impeach the probate of a married woman's deed, to establish a special or local custom, and generally to obtain relief against the apparent force and effect of a written instrument upon the ground of mutual mistake, or other similar cause, the evidence must be clear,

strong and convincing. *Montgomery v. Lewis,* 187 N. C., 577; *Lamb v. Perry,* 169 N. C., 436; *Penland v. Ingle,* 138 N. C., 456.

Generally speaking, the burden of proof, as distinguished from the duty of going forward with evidence (which latter phrase is sometimes inaptly called burden of the evidence) is upon the party asserting the affirmative of an issue, using the term issue in its larger sense and including therein any negative proposition which the actor must show. *S. v. Connor,* 142 N. C., 700; 22 C. J., 67. This, of course, is not at variance with the well-established rule of evidence that where the subject matter of a negative averment lies peculiarly within the knowledge of the opposite party, the averment is taken as true unless disproved by that party. *Hosiery Co. v. Express Co.,* 184 N. C., 478; *Lloyd v. Poythress,* 185 N. C., 180; *Bradshaw v. Lumber Co.,* 172 N. C., p. 222; *Beck v. Wilkins,* 179 N. C., 231; *Tillotson v. Currin,* 176 N. C., 479; *Ange v. Woodmen of World,* 173 N. C., 33. The party alleging a material fact, necessary to be proved and which is denied, must establish it by a preponderance of the evidence, or by the greater weight of the evidence. Having alleged the truth of a matter in issue, he becomes the actor as to such matter, and necessarily has the burden of proving it. The party denying his allegations cannot have this burden at any time during the trial, for this would be to place the burden of the issue on both parties at the same time. *Tobacco Growers Asso. v. Moss,* 187 N. C., 421; *Leonard v. Rosenthal,* 123 Wis., 442.

The burden of the issue and the duty of going forward with evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change at any time throughout the trial. The latter may shift from side to side as the case progresses, according to the nature and strength of the proofs offered in support or denial of the main fact to be established. *Bridge Corp. v. Butler,* 2 Gray, 130. The burden of proof continues to rest upon the party who, either as plaintiff or as defendant, affirmatively alleges facts necessary to enable him to prevail in the cause. It is required of him who thus asserts such facts to establish them before he can become entitled to a verdict in his favor; and, as to these matters, he constantly has the burden of the issue, whatever may be the intervening effect of different kinds of evidence or evidence possessing under the law varying degrees of probative force. *Smith v. Hill,* 232 Mass., 188.

A prima facie case, or prima facie evidence, does not change the burden of proof. It only stands until its weight is met by evidence to the contrary. The opposing party, however, is not required as a matter of law to offer evidence in reply. He only takes the risk of an adverse verdict if he fail to do so. *White v. Hines,* 182 N. C., 275. The case

is carried to the jury on a prima facie showing and it is for them to say whether or not the crucial and necessary facts have been established. *Cox v. R. R.*, 149 N. C., 117. Hence, when such prima facie case is made out, the duty of going forward with evidence in reply, if the opposing party would not hazard the chance of an adverse verdict, is shifted or rather cast upon the opposite side. *Winslow v. Hardwood Co.*, 147 N. C., 275. But according to the best-considered authorities, a prima facie case so made out, need not be overcome by a preponderance of the evidence, or by evidence of greater weight, but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and if this be done, the burden of the evidence has been met and the duty of producing further evidence shifts back to the party having the burden of proof, who, if he would win, must not only begin by making out his case, but he must also end by keeping it good. *Bank v. Ford*, 216 Pac. (Wyo.), 691. He is required to begin by taking up and carrying the burden of proof, and to win, he must end with it carried. If upon all the evidence the case is left in equipoise, the party upon whom rests the burden of the issue must fail in his suit. *McDowell v. R. R.*, 186 N. C., 571. He who has the burden of proof, properly speaking, must establish the existence of the facts alleged by evidence at least sufficient to destroy the equilibrium thus produced and overcome the weight of the evidence offered by the other side.

Speaking to the subject in *Brock v. Ins. Co.*, 156 N. C., 112, *Walker, J.*, said: "The prima facie case is only evidence, stronger, to be sure, than ordinary proof, and the party against whom it is raised by the law is not bound to overthrow it and prove the contrary by the greater weight of evidence, but if he fails to introduce proof to overcome it, he merely takes the chance of an adverse verdict, and this is practically the full force and effect given by the law to this prima facie case. He is entitled to go to the jury upon it and to combat it, as being insufficient proof of the ultimate fact under the circumstances of the case, but he takes the risk in so doing, instead of introducing evidence."

The burden of the evidence, or the duty of going forward with evidence, strictly speaking, means no more than the meeting of a prima facie case or rebutting a presumption, by evidence of equal weight rather than by a preponderance of the evidence. It is sufficient if such evidence balance the scales and put the case in equipoise.

Ordinarily, the burden of proof is on the plaintiff, for he usually has the burden of the issue. Especially is this so where the defendant simply traverses the allegations of the complaint under a general denial, or where he undertakes to establish facts and circumstances, not by way of confession and avoidance, but in denial of the allegations upon which

plaintiff seeks to recover. Chamberlayne Ev., secs. 944 and 947. But in many cases the burden of proof is on the defendant, either as to the whole case, or on some of the issues properly joined. He has the burden of establishing all affirmative defenses, whether they relate to the whole case or only to certain issues in the case. As to such defenses, he is the actor, and hence he must establish his allegations in such matters by the same degree of proof as would be required if he were plaintiff in an independent action. This is not a shifting of the burden of proof; it simply means that each party must establish his own case. *Austin v. R. R.*, 187 N. C., 7; *Page v. Mfg. Co.*, 180 N. C., 330; *Shepard v. Tel. Co.*, 143 N. C., 244.

In passing, it may be well to observe that care should be exercised, and discrimination employed, in determining whether a defense be an independent and affirmative one or only in the nature of matters pleaded in bar under a general denial. *Cook v. Guirkin*, 119 N. C., 13; *Bank v. Andrews*, 179 N. C., 341. "Simply relying on a defense affirmative in form which, in reality, merely traverses the affirmative case of the actor does not necessarily shift the burden of proof." Chamberlayne Ev., sec. 947.

It is said in Wigmore on Evidence (2d ed.) sec. 2488, that as to who has the burden of proof "depends ultimately on broad considerations of policy." This, no doubt, is true, and it may be applied with equal propriety in undertaking to determine what is and what is not an affirmative defense. There seems to be no invariable test by which the question may be decided. At times it may be determined by the pleadings, and at others by presumptions arising from the evidence adduced on the hearing or from admissions made during the trial.

"The argument against the free application of the idea that under certain circumstances the defendant should be called upon to produce evidence rests in its final analysis upon the theory that, since the plaintiff makes a charge, he must prove it. But this general rule is not now, and never has been, carried to the extreme limit of its logic. Many defenses are treated as matters in confession and avoidance; and, when they are pleaded, the burden is put upon the defendant in both senses. He has the duty to go forward and produce evidence, and also the risk of nonpersuasion. If he is sued upon a promissory note, he must seasonably deny his signature, or his nonaction is taken as his admission of the signature. The logic of the general principle that the plaintiff should have the duty to go forward and the risk of nonpersuasion has always been modified by the application of what was at the time deemed to be the common sense of the situation. It may be that many of the cases have gone too far in this respect. It is undoubtedly true that the

authorities are not harmonious; yet the essential soundness of the principle which they have sought to apply cannot be doubted." *Peaslee, J.*, in *Spilene v. Mfg. Co.*, 79 N. H., 326.

On the record as presented, we have been unable to find any prejudicial or reversible error in the trial; hence, the judgment of the Superior Court, ordering another hearing, will be reversed and the judgment of the county court will be affirmed.

Reversed.

GREEN SEA LUMBER COMPANY v. W. S. PEMBERTON.

(Filed 12 November, 1924.)

1. Trial by Jury—Constitutional Law—Waiver—Statutes.

The constitutional right to a trial by jury, in civil actions, (Art. IV, sec. 13), may be waived by the parties as provided by our statutes, C. S., 568, 572.

2. Same—Reference—Pleas in Bar—Accounts.

By excepting to an order of court referring the taking and stating a long account between the parties involved in the controversy as determinative, a party may preserve his right to a trial by jury upon the evidence thus taken, unless he waives his right during the progress of the reference; and while an issue determinative of the action should first be tried before a reference is ordered, a party excepting to the order may not successfully insist thereon when the issue is to be determined solely by the reference provided for by C. S., 573.

APPEAL by defendant from an order of reference made by *Grady, J.*, at Fall Term, 1924, of COLUMBUS.

Defendant in his answer to the complaint admits the execution by him of note, dated 1 June, 1923, for $10,000, payable to plaintiff, and due 1 June, 1924; he also admits that, for the purpose of securing the payment of said note, he executed the chattel mortgage by which he conveyed to plaintiff the personal property described in the complaint. Defendant pleads in defense of plaintiff's cause of action upon said note and chattel mortgage that said note was fully paid before 1 June, 1924.

"For a further defense, and for the purpose of affimative relief and for a counterclaim against the plaintiff," defendant alleges that contemporaneously with the loan of the money by plaintiff to him, as evidenced by his note, plaintiff and defendant entered into a contract by which "defendant agreed to manufacture the timber then owned by him, including that held by virtue of leases, into merchantable lumber, according to order and specifications given by plaintiff, and to

ship the same when and where directed by plaintiff, and for this lumber so manufactured and shipped, plaintiff was to pay defendant therefor, as follows:

First. Retain ten per cent and two per cent commissions.

Second. Apply from all box grades and No. 3 grade, $5.00 per thousand feet to said mortgage indebtedness, and from all other grades, the sum of $7.50 per thousand feet to said mortgage indebtedness.

Third. Remit the surplus, if any, to this defendant."

Plaintiff, in its reply, admits that a contract was entered into as alleged by defendant, but alleges that the same is not fully or truly stated in defendant's answer, and thereupon sets out the contract in full, which was in writing.

Paragraph 10 of the answer is as follows:

"That under and pursuant to the terms of said contract, this defendant has manufactured and shipped, at and according to the direction of the plaintiff, lumber at various and sundry times, until the amount of the sale prices thereof, as reported by plaintiff to the defendant, exceeded greatly the amount, with such interest as was properly chargeable thereon, originally due under the said chattel mortgage, when the contract amounts of $5 per thousand on all box grades and No. 3 lumber and $7.50 per thousand on other grades, were credited on the said mortgage indebtedness and the said note, and by virtue thereof (the said note) became fully paid up and settled a long time prior to the institution of this action, but this defendant is unable to give the exact date at which the same became fully paid up, on account of his inability to obtain from plaintiff's settlements, on account of his lumber so shipped upon their orders, for which they had received from the purchasers the sale price, and for which from time to time they refused to account to this defendant promptly for the same, but from such information as this defendant was able to obtain from plaintiff, the said mortgage indebtedness had been fully paid up about the first of March, 1924, and was admitted to have been paid up on or before 15 March, 1924, expressly by plaintiff."

Replying to foregoing paragraph, plaintiff says:

"Article 10 of the said further answer is not true and is denied. No part of the mortgage debt has ever been paid and the whole of the same is still due and payable. The defendant, as rapidly as he manufactured and delivered lumber to the plaintiff, instead of applying or permitting the application of the $5.00 and $7.50, respectively, per thousand feet to his mortgage debt, consumed or took up every dollar thereof in advancements which he procured the plaintiff to make to him, either contemporaniously with or prior to deliveries. The contract expressly provides that there shall be accounted to by the plaintiff to the defend-

ant, as follows: 'On all box grades and No. 3 the sum of $5 per thousand and on other grades the sum of $7.50 per thousand, same to be credited on the amount due the second party by the first party.' The plaintiff alleges that the full amount of all deliveries of manufactured lumber was credited by the plaintiff to the defendant on the amount due to it by the defendant, and that at no time was there any sum of money or credit applicable to defendant's mortgage indebtedness for the reason that he invariably kept his debt account ahead of his credit account."

Defendant then alleges that by reason of dealings and transactions between plaintiff and defendant, all of which are set out particularly and in detail, plaintiff is indebted to defendant in the sum of $52,485.70 and demands judgment that the note and chattel mortgage be canceled, that the contract be declared ended and that he recover of plaintiff the sum of $52,485.70 with interest and costs.

Plaintiff denies each and all the allegations upon which defendant demands judgment, and renews its prayer for judgment as upon its complaint and prays judgment further that defendant recover nothing on its counterclaim, etc.

On motion of attorneys for plaintiff, it was ordered that "this cause be and the same is hereby referred to C. M. Fairclothe as referee, as provided by the Consolidated Statutes."

Defendant objected to the reference and excepted to the order as signed by Judge Grady. On his appeal to the Supreme Court, defendant assigns error as follows:

"For that the court erred in allowing plaintiff's motion to refer this case when the pleadings contain a general denial of plaintiff's cause of action, and sets up pleas in bar as well as counterclaim."

Spruill & Spruill, Homer L. Lyon and McIntyre, Lawrence & Proctor for plaintiff.

Schulken, Toon & Schulken, and Varser, McLean & Stacy for defendant.

CONNOR, J. "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." Const. of N. C., Art. I, sec. 19.

"In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of a judge upon the facts shall have the force and effect of a verdict by a jury." Const. of N. C., Art. IV, sec. 13.

"Trial by jury may be waived by the several parties to an issue of fact in actions on contract, and with the assent of the court in other

actions, (1) by failing to appear at trial, (2) by written consent, in person or by attorney, filed with the clerk, or (3) by oral consent entered in the minutes." C. S., 568.

"Any or all of the issues in an action, whether of fact or law, may be referred, upon the written consent of the parties, except in actions to annul a marriage or for divorce and separation." C. S., 572.

"Where the parties do not consent, the court may upon the application of either, or of its own motion, direct a reference, where the trial of an issue of fact requires the examination of a long account on either side. The compulsory reference under this section does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the referee." C. S., 573.

This action in which an issue of fact arises upon the pleadings has been referred to a referee, under C. S., 573, with direction that he take testimony and pass upon and find the facts as to all matters of account or accounting raised by the pleadings and report the same, with his conclusions of law arising upon the facts so found to the next term of the Superior Court of Columbus County. Defendant in apt time objected to the order of reference and is therefore not deprived of his right to trial by jury of the issue of facts which he has joined with the plaintiff.

Having duly excepted to the order, and upon appeal assigned same as error, defendant presents to this Court, for review, the decision of the court below as a matter of law, contending that it was error to order a compulsory reference, for that the answer contains a general denial and sets up a plea in bar of plaintiff's right to recover in this action. Defendant having objected to the reference, and excepted to the order signed by the judge, had the option to appeal at once, if he was so minded, or to await final judgment, having preserved his objection by exceptions noted in apt time. *Pritchett v. Supply Co.*, 153 N. C., 344; *Baker v. Edwards*, 176 N. C., 229.

It appears from the pleadings in this action that on or about 1 June, 1923, plaintiff and defendant entered into a contract by which plaintiff agreed to advance to defendant the sum of $10,000, to enable defendant to pay off and discharge a chattel mortgage then outstanding upon his property and to carry on his business as a manufacturer of lumber; defendant executed his note to plaintiff for the amount advanced, due 1 June, 1924, and secured payment of same by a chattel mortgage on his sawmill outfit and personal property; defendant agreed to manufacture and ship to plaintiff lumber, in accordance with orders and specifications to be given by plaintiff; plaintiff agreed to sell said lumber, and after deducting commissions as agreed upon, and applying

a portion of the proceeds to be determined as provided in the contract, to payment of defendant's indebtedness to plaintiff, to pay the surplus, if any, to defendant.

Pursuant to said contract, defendant has manufactured and shipped to plaintiff a large quantity of lumber, and plaintiff has sold same. There is a controversy between the parties as to a settlement of the account growing out of these dealings, plaintiff contending that there is a balance due it, exceeding the amount of the note, defendant contending that the amounts received by plaintiff from sale of lumber shipped under the contract are sufficient to more than pay defendant's indebtedness to plaintiff to which said amounts should be applied.

Defendant further alleges facts upon which he contends he is entitled to recover a large sum of money from plaintiff and prays for affirmative relief on account of plaintiff's liability to him growing out of these facts.

Defendant having admitted the execution of the note sued on, the first issue of fact arising upon the pleadings is whether said note has been paid; the trial of this issue will necessarily require the examination of a long account of the dealings between the parties growing out of the contract, and extending over a year. The statement of account, attached to plaintiff's reply as Exhibit A, shows that defendant shipped plaintiff 171 cars of lumber; that after deducting freight, discounts and commissions and after making adjustments, growing out of claims from purchasers for damages, shortage, etc., plaintiff received for said lumber $62,337.95; the debit items in said account, for checks and drafts number 51, and aggregate $72,423.11, leaving a balance due, according to plaintiff's contention of $10,085.16.

It is true that defendant pleads in his answer that the note has been paid, and that the chattel mortgage is therefore null and void; but it clearly appears from his further defense that said plea is dependent upon and involves an accounting between plaintiff and defendant.

Defendant contends that the order of reference was erroneous because of his plea in bar. This Court has held, uniformly and consistently that when a good plea in bar is set up in the pleadings, until such plea is in some way disposed of, an order of reference, on objection made in apt time is erroneous and an immediate appeal will lie. *Riley v. Sears,* 151 N. C., 187.

It is held in *Oldham v. Rieger,* 145 N. C., 254, that a plea of the statute of limitations is a good plea in bar and should be disposed of before an order for accounting can be made.

An account stated is held to be a good plea in bar and that a compulsory reference should not be ordered until such plea is determined. *Kerr v. Hicks,* 129 N. C., 141; *Jones v. Wooten,* 137 N. C., 421. A

plea that plaintiff has not complied with terms and provisions of a contract which are conditions precedent to liability of defendant must be submitted to a jury or otherwise disposed of before a compulsory reference for an accounting can be ordered. *Bank v. Fidelity Co.,* 126 N. C., 320. A plea of sole seizin by reason of 20 years adverse possession by one alleged to be a tenant in common with plaintiff is a good plea in bar, but a plea of sole seizin which by its very terms involves an accounting is not a good plea in bar. *Duckworth v. Duckworth,* 144 N. C., 620.

The "entire cause of action," or the "whole action" between plaintiff and defendant, as constituted by the pleadings in this action is not dependent on the issue as to whether the note secured by the chattel mortgage has been paid or not. Defendant alleges a cause of action against plaintiff in his "further answer" and asks for affirmative relief, and plaintiff, in its reply denies the facts alleged as constituting this cause of action. The issues thus raised will clearly require the examination of a long account, involving many items and transactions, which will necessarily be the subject of controversy between the parties.

In *Alley v. Rogers,* 170 N. C., 538, *Brown, J.,* writing for the Court, says: "In those cases where this Court has held that a reference should not be made when there is a plea in bar, the plea constituting the bar has extended to the whole action, and the Court seems to have been particular to use the term "whole action" or "entire cause of action." He cites many cases to support this statement.

It is clear that the note and chattel mortgage set up in the complaint, and the contract alleged in the answer and reply, were parts of one transaction. It is equally clear that it was contemplated by the parties to this transaction that the note should be paid out of the proceeds of the sale of lumber to be manufactured and shipped under the contract. There seems to be a controversy between the parties as to whether under the contract the balance arising from the sale of the lumber, after deducting commissions should be applied to any indebtedness due by defendant to plaintiff, or whether such balances should be applied only to payment of advancement, evidenced by note and secured by chattel mortgage. An inspection of the written contract will probably determine this controversy.

The order of reference was not erroneous. The exception thereto is not sustained. The objection and exception, however, preserve defendant's right to trial by jury after the report of the referee has been filed, provided he preserves this right in accordance with the practice approved by this Court in *Baker v. Edwards,* 176 N. C., 229, and cases cited therein by *Justice Walker.*

Affirmed.

ROBERT H. LEE v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 12 November, 1924.)

1. Insurance, Life—Policy—Contracts—Provisions as to Disability—Evidence—Questions for Jury.

A provision in a policy of life insurance waiving the payment of premiums in the event of permanent and continuous disability to engage in any occupation of the insured for remuneration or profit, and for the yearly payment of a certain per cent of the face value of the policy, etc., is not confined to the ability of the insured to continue in the occupation he had previously followed, but any other occupation for remuneration or profit, and where the evidence is conflicting thereon, a question is presented for the determination of the jury.

2. Same—Instructions.

In this case there was evidence tending to show that the insured was a farmer, and had taken out a policy of life insurance with a provision waiving the payment of premiums and providing for a payment to him of a certain per cent of the face value of the policy in the event he should become permanently and continuously disabled to pursue any occupation for remuneration or profit, and that he had developed tuberculosis that rendered him incapable of attending to his farm or pursuing any business occupation, though his son to whom he had turned over the complete management of his farm would occasionally talk to him about it, and that at times he would attend meetings of the board of directors of a bank of which he was a member, and listen to the discussion of business transactions before it, for which there was a payment made of $2.00 for each meeting so attended, etc. *Held*, in his action to recover under the disability clause, the question of the defendant's liability was properly submitted to the determination of the jury; and *Held, further*, the charge of the court was free from reversible error under the facts of the case.

3. Same.

A charge of the court to the jury will be presumed to have been understood in its connected or related parts, and will not be *held* for reversible error if it thus explains correctly the law arising from proper evidence in the case, though taken disconnectedly it may be subject to criticism.

4. Same—Evidence.

Under the facts of this case tending to show conditions exactly similar: *Held*, evidence that a life insurance company had knowingly waived the collection of premiums for a while under a disability provision of its policy, is competent in the insured's action to recover the premiums he had afterwards been required to pay by a position the company had afterwards taken to the contrary.

CIVIL ACTION tried before *Daniels, J.*, and a jury, at Spring Term, 1924, of PAMLICO.

The action is on two life insurance policies in defendant company for $10,000.00 each, bearing date respectively in September, 1916, and

September, 1917, and each containing a clause insuring against "entire and permanent disabilities of the insured," the recovery sought being on these clauses of the policies for the year 1923. The stipulations of the policies directly pertinent to the inquiry are as follows:

"That whenever the company receives due proof before default in the payment of premiums, that the insured has, subsequent to the delivery of said policy, become wholly disabled by bodily injury or disease, so that he is and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days, the payment of premiums will be waived.

"If the disability occurred before the insured attained the rated-up age of sixty years, commencing with the anniversary of the policy next succeeding the receipt of such proof, the company will on each anniversary waive payment of premium for the ensuing insurance year, and in any settlement of the policy, the company will not deduct the premium so waived.

"The policy further provides, one year after the anniversary of the policy next succeeding the receipt of such proof, the company will pay the insured one-tenth (1-10) of the face of the policy, and a like sum on each anniversary thereafter, during disability until the face of the policy has been paid."

There was evidence offered on the part of plaintiff tending to show that in 1918, he had a severe attack of influenza which caused or developed into tuberculosis, which practically invalided plaintiff, rendering him "wholly unable to work and engage in any occupation for remuneration or profit." That he frequently suffers from hemorrhages from the lungs, stomach and intestines, and any ordinary exertion was liable to bring them on and that he continued in such a weakened condition that he was unequal to any sustained effort, physical or mental, and did nothing but lie around doing practically nothing. That in the years 1920, 1921 and 1922, his condition was such that defendant company recognized that plaintiff had a valid claim under these clauses of the policy, and waived the premiums and paid the ten per cent as stipulated without protest, but that in 1923, defendant refused to pay further, and plaintiff, to avoid any possible forfeiture, had paid the premiums due, under protest, to the amount of $811.35, and sues to recover the same, together with the ten per cent for the year 1923. That plaintiff's condition was much worse in 1923 than at any previous time, his hemorrhages more severe and more frequent, and that any mental effort or worry would throw him in bed. That he had given up his farm on which he had formerly worked and was wholly disabled by his disease, and continuously and in all probability permanently prevented

from engaging in any occupation whatsoever for remuneration and profit within the terms and meaning of the policies.

There was evidence for defendant tending to show that while plaintiff had suffered from tuberculosis, and of a very active type, that the indications were that the same had been arrested, and though totally disabled from doing manual labor, that mentally there was no impairment of plaintiff, and there was no reason why he could not manage his farm and give proper directions about it or do other business of an advisory kind. On cross-examination two of these witnesses said that mental effort might have a tendency to break one down.

It was also shown that during the year 1923, he had on two or three occasions attended directors' meetings of a bank, for which he was allowed two dollars per meeting, and that he had looked after other transactions of a personal kind, including some litigation affecting his private interests. Further, that during said year he had arranged for the building of a house, paying off the hands himself and giving the matter a general oversight.

In reply, and as to building the house, Hardy Keel, a witness for plaintiff, testified as follows: "I have known R. H. Lee all his days and I have recently built a house for him. Some weeks maybe he would come three or four times a week and then maybe he would not come at all, and one time he did not come in three weeks. He said he was sick. His son would come up sometimes and he said his father was sick. One day, I was at work by myself and in getting the flooring up it seemed to be spring and he picked up a piece of scantling and when he pulled up I hit it and it gave him a jar and looked like it put him out of business; he went out and came back and said the jar had given him a hemorrhage and it was about a week he did not show up. The little jar he received would not have affected a man of ordinary strength. From appearances he don't seem to be able to work but I have not noticed any dimunition of his mental activity. He hired his labor by the day to build his house. He asked me if I would take it in charge, he was not able to look after it. I took it in charge and ran it all the way through."

And as to attending the directors' meeting, plaintiff testified that he had attended two or three meetings, being unable to attend the others; that he had asked to be turned off because he was unable to attend, and did not understand that he was on the loan committee of the bank; "that he was unable to drive a car and that any one not dead could go to a bank and listen to what was said," etc.

On this conflicting evidence the cause was submitted to the jury and verdict rendered on the following issue: "Was the insured during the year 1923, wholly incapacitated by bodily injury or disease so that he

was thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit at all times during said year? Answer: 'Yes.'" Judgment on verdict for plaintiff, and defendant excepted and appealed, assigning errors.

Z. V. Rawls for plaintiff.
James H. Pou, Moore & Dunn for defendant.

HOKE, C. J. Under a correct and comprehensive charge, in which the positions of the respective parties and the pertinent evidence were fully and fairly stated, the jury has rendered its verdict for plaintiff, and we find no reason for disturbing the results of the trial. On the determinative question as contained and presented in the issue, the court, among other things, charged the jury as follows:

"Now, you will want to know what is meant by the language in the contract 'wholly incapacitated and thereby permanently and continuously prevented from engaging in any avocation whatsoever for remuneration or profit.' It does not mean merely that this disability may incapacitate him from pursuing his usual avocation, from working on his farm with his hands, but that it must incapacitate him from engaging in any avocation for remuneration or profit. One of the illustrations in the books is that where a man was an engineer and was injured and claimed to be wholly incapacitated, and the court held that the fact that he was incapacitated for running an engine would not be sufficient where it appeared he was not incapacitated for engaging in other avocations from which he might secure remuneration or profits.

"Our courts hold that the act shall be in force as it reads and that the insured cannot recover because totally disabled for his own trade or business, if he retains health, strength and physical ability sufficient for the pursuance of other avocations by which he might engage for profit or remuneration.

"It would not be necessary that the business in which he engages should actually be profitable or remunerative and he would have to take the risk that all men take in things of that sort, and the test would not be whether he could have actually made a profit. If it was such a business that he was able to engage in it in the expectation of profit or remuneration.

"Now, the fact that the plaintiff had somebody to build him a house by the day and that he was up there and paid off the hands would not constitute an avocation for profit or remuneration, nor would his attending meetings of the board of directors. These circumstances are testified to and brought to your attention by witnesses for the purpose of enabling you to see the whole situation and determine for yourselves whether he

was wholly incapacitated. He contends that he had to turn over his farm to his son, because he was wholly incapacitated to do the work, and the son testified that he was in charge and has had charge of it for two or three years, and that while he advised with his father when he is at the house and tells him what he is doing, his father does not control and direct him.

"Now, as I say, if the evidence satisfies you by its greater weight, the burden being upon the plaintiff, that during the year 1923, he was wholly incapacitated by reason of disease so that he was thereby prevented from engaging in any avocation for remuneration or profit, you would answer this issue 'Yes,' otherwise you would answer it 'No,' and if you should find from the evidence that during this time, the year 1923, the plaintiff has been engaged in a remunerative avocation, then he would not be entitled to recover, and you would answer the issue 'No.'

"I charge you further if you find the plaintiff was engaged in farming before any disability occurred and had ceased to do manual labor, but has since that time, during the year 1923, been in active charge of his farm, managing the labor, marketing the crops and otherwise handling the same, as is the custom of well-to-do farmers, that he has been attending actively the meetings as a director of the bank, then I charge you if you find these facts from the evidence that the plaintiff would not be totally disabled for carrying on an avocation for profit or remuneration, and you would answer the first issue 'No.'

"I charge you further that under the terms of the policy, it was the intention of the insured and the company to reimburse the plaintiff if he became wholly disabled from bodily disease from engaging in any occupation for remuneration or profit, and if you should find from all the evidence that the plaintiff has not been totally disabled and that he has been able to attend to his usual affairs and manage the same with profit and remuneration to himself, then in that event, although you may find he has been sick since the issuance of the policy, you would not find he was totally disabled and you would answer the issue 'No,' but as I have said, if upon a fair consideration of all the evidence, the physician's evidence and the evidence of the laymen and of the plaintiff and the defendant and their witnesses, you should be satisfied by the greater weight of the evidence that during this year he has been wholly incapacitated by disease so that he was thereby continuously and permanently prevented from engaging in any avocation for remuneration or profit, then you would answer the issue 'Yes.'"

In our opinion and as applied to the facts in evidence, these instructions are in accord with the general principles prevailing on a policy of this character, and as applied and approved by this Court in *Buckner*

v. Ins. Co., 172 N. C., p. 762; Bacon on Benefit Societies, sec. 395a; 4 Cooley's Briefs, pp. 3288, 3292, 3293.

The exceptions noted to this presentation on the principal feature of the controversy can none of them be sustained. They are either based on prayers for instruction which to the extent permissible sufficiently appear in the charge as given, or they consist of excerpts which do not in their detachment express its true significance.

In numerous decisions applicable we have approved the position that the charge of the court must be considered as a whole in the same connected way in which it was given and upon the presumption that the jury did not overlook any portion of it. If, when so construed it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. *S. v. Jenkins*, 182 N. C., p. 818; *Haggard v. Mitchell*, 180 N. C., pp. 255-258; *Harris v. Harris*, 178 N. C., pp. 7-11; *S. v. Exum*, 138 N. C., p. 599.

Appellant excepts further because plaintiff, testifying in the cause, was allowed to state that his condition in 1923 was worse than it was in 1920, 1921 and 1922, when the company, without suit, had voluntarily paid the ten per cent allowance now claimed for the year 1923. We think the evidence was properly admitted. Plaintiff had described his condition in these former years as suffering from tuberculosis contracted or developed as heretofore stated, and had also stated that in those years the plaintiff had been paid the ten per cent without suit, and the testimony here received bore directly on his condition at the time here sued for, and was competent as a recognition by defendant that plaintiff's instant condition brought him within the terms and conditions of the policy.

On careful consideration we find no reversible error in the record and the judgment for plaintiff must be

Affirmed.

MERCHANTS NATIONAL BANK v. JAMES HOWARD AND PERCY W. WELLS.

(Filed 12 November, 1924.)

1. Bills and Notes—Negotiable Instruments—Due Course—Infirmity—Notice—Statutes.

Where a purchaser of a note is one before maturity for value, but with notice of an infirmity therein which would render it invalid, he is not such a holder in due course that would sustain his action thereon. C. S., 3033, 3038, 3039.

2. Same—Renewals.

A note taken in renewal does not extinguish the original note, and those who acquire the latter with knowledge of the infirmity that would vitiate the former may not recover thereon.

3. Issues—Admissions—Appeal and Error.

Where an issue has been answered with the consent of the parties to the action, one of them may not urge for error a position that is contradictory to the issue thus answered.

4. Same—Burden of Proof.

Where there is evidence that a note sued on was affected by an infirmity that would vitiate it, the burden of proof is on one claiming to be a holder in due course without notice, to establish his position before the jury by the greater weight of the evidence. C. S., 3040.

5. Same—Banks and Banking—Officers—Interest.

Where the discount committee of a bank accepts and discounts a note at the request of its officer and member thereof, and the officer is interested therein, the principle of imputed knowledge of the officer of the infirmity of the instrument that would vitiate the note does not apply, and upon conflicting evidence the issue so raised is for the jury to determine under proper instructions of the judge.

6. Appeal and Error—Constitutional Law—Review.

On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. Const., Art. IV, sec. 8.

APPEAL by plaintiff from *Calvert, J.*, at April Term, 1924, of NEW HANOVER.

The execution of the note set out in the complaint by defendant, James Howard, and the endorsement by defendant, Percy W. Wells, are admitted. Defendants, in their answer to the complaint, allege that the execution of the original note for which the note sued on is a renewal, was procured by false and fraudulent representations, and that same was therefore without consideration, null and void. Plaintiff replies by alleging that it was a holder of the note in due course, having purchased the same for value, before maturity, and without notice of any infirmity in the instrument, or defect in the title of the person from whom it purchased the note.

The note set out in the complaint and offered in evidence by plaintiff, is dated 23 December, 1922, is for $5,000, and is due 60 days after date. It is signed by James Howard and is payable to his order, at the Commercial National Bank, Wilmington, N. C. It is endorsed by both defendants and has not been paid.

On 27 May, 1922, James Howard executed his note for $5,000, due 90 days after date. This note was endorsed by Percy W. Wells, and was payable either to the order of the maker or to the Commercial

National Bank. The consideration for this note was 50 shares of the capital stock of the Commercial National Bank of Wilmington, N. C., sold to Howard by Thomas E. Cooper, a director of said bank and subsequently its president. James Howard was induced to purchase the stock and to give his note for the purchase price by representations made to him by Thomas E. Cooper.

On 31 May, 1922, this original note was purchased by plaintiff. It was presented to the discount committee of plaintiff by Thomas E. Cooper, at that time a member of the committee and also vice-president of the bank. The note was discounted for the Commercial National Bank. Plaintiff paid face value for the note, less discount at 6 per cent. This original note was not paid at maturity, and a note executed by Howard and endorsed by Wells was taken by plaintiff in renewal. There were several renewals, the last being the note upon which this action is brought.

The issues submitted to the jury were as follows:

1. Was the original note for which the note in controversy was given as a renewal procured by fraud and misrepresentation as alleged in the answer?

2. If so, did plaintiff, Merchants National Bank, at the time of the purchase of said note have notice of such alleged fraud?

3. Did plaintiff, Merchants National Bank, purchase such original note for value and before maturity?

4. If so, did defendants at time of execution of the renewal note sued on have notice of such alleged fraud?

5. What amount, if any, is plaintiff entitled to recover of the defendants?

At the conclusion of the evidence it was agreed that the court should charge the jury to answer the first and third issues "Yes," and that the answer to the fifth issue should be reserved and answered by the court. Only the second and fourth issues were therefore submitted to the jury. These were answered "Yes" and "No," respectively.

It is therefore established by the verdict that the original note was procured by false and fraudulent representations, and that the note in controversy was given in renewal of this note; that plaintiff had notice, at the time it purchased the original note, of the fraud, but that it paid value for the note and purchased it before maturity; that defendants had no notice, at the time of the execution of the renewal note sued on, that the representations by which the original note was procured were false and fraudulent.

Judgment was rendered that plaintiff recover nothing of defendants. To this judgment plaintiff excepted, and appealed therefrom to the Supreme Court. Assignments of error are set out in the opinion.

Albert L. Cox, Wright & Stevens, and John H. Kerr, Jr., for plaintiff.
Bellamy & Bellamy and Rountree & Carr for defendants.

CONNOR, J. Assignments of error based upon exceptions appearing in the case on appeal relative to the first and third issues need not be considered, as plaintiff appellant consented, at the conclusion of all the evidence, that the court should instruct the jury to answer both these issues "Yes." The controversy between the parties was thus confined to matters involved in the second and fourth issues. Appellant relies upon its exceptions to evidence and instructions applicable to these issues for a reversal of the judgment and for a new trial.

Defendants contend that the note upon which plaintiff seeks to recover in this action was the last of a series given by defendants and taken by plaintiff in renewal of the original note. The jury has found, by consent, that this note was procured by false and fraudulent representations made by Thomas E. Cooper to the maker, James Howard, and to the endorser, Percy W. Wells. This original note was negotiable in form and was purchased by plaintiff before maturity and for value. If, at the time it purchased this note, plaintiff had no notice of the false and fraudulent representations, by means of which its execution by the maker was procured, it was a holder in due course of the note, and could have enforced payment for the full amount thereof against all parties liable thereon. C. S., 3033 and 3038.

The note upon which this action is brought is not the note procured by false and fraudulent representations. That note was dated 27 May, 1922, and was due ninety days after date. The note sued on was dated 23 December, 1922, and was due sixty days after date. Both are for $5,000.

In apt time plaintiff tendered an issue, as follows: "Did defendants negotiate the note sued on direct with plaintiff?"

To the refusal of the court to submit this issue, plaintiff excepted.

In apt time plaintiff requested the court to instruct the jury as follows: "If you find from the evidence, by its greater weight, that the note sued on was given to secure the payment of the first note and to get an extension of time, then the court charges you that defendants would be liable."

To the refusal of the court to give this instruction plaintiff excepted.

By these exceptions plaintiff presents its contention that defenses available to defendants in an action upon the original note, dated 27 May, 1922, and purchased by plaintiff, cannot be set up and maintained in an action upon the note dated 23 December, 1922, which was executed by defendants and delivered to plaintiff.

These exceptions, however, cannot now be urged by plaintiff as grounds for a new trial. Plaintiff did not except to the first issue, which was predicated upon the proposition that the note in controversy was given as a renewal of the original note, which was procured by false and fraudulent representations. This issue was answered "Yes," by consent.

Plaintiff's evidence shows that the note sued on was a renewal of the original note. Col. James R. Young, vice-president of plaintiff bank, testified that the first note, for ninety days, was discounted for the Commercial Bank on 31 May, 1922; that there was a renewal in August for sixty days, and again a renewal in October for sixty days. "This present note was received 30 December, 1922. I conducted most of the correspondence. I know that, after the first time, we renewed it without any regard to the bank. The first note was agreed to be taken up in June, and after this we looked into the financial standing of the parties; and while we were trying to collect it we were forced from time to time to renew, because we could not make collection. Nothing has ever been paid on the note."

These exceptions cannot be sustained. There was no error in refusing to submit the issue tendered, or in refusing to give the instruction requested.

The issue tendered by plaintiff was inconsistent with the first issue submitted without objection by plaintiff. Plaintiff, by its consent that this issue should be answered "Yes," admitted that the note sued on was a renewal of the original note, which was procured by false and fraudulent representations. Indeed, all the evidence was to this effect. There is no evidence that the note sued on was taken in payment of the original note.

The note sued on, being a renewal of the original note, any defense available to defendants in an action on the original note is available in this action. The defense relied upon by defendants is, that plaintiff took the original note with notice that same was procured from defendants by false and fraudulent representations, and that note sued on is a renewal of the original note. This is a good and valid defense, not only as against the original note, but also as against any note given and accepted in renewal thereof.

"Where a note is given merely in renewal of another note, and not in payment, the renewal does not extinguish the original debt or in any way change the debt, except by postponing the time for payment; and as a general rule the holder is entitled to the same rights and remedies as if he was proceeding on the original note." 8 C. J., p. 443, sec. 656; *Bank v. Hall*, 174 N. C., 477; *Grace v. Strickland, ante*, 369.

"As between the original parties and as against transferees, who are not bona fide purchasers for value, a renewal note is open to all defenses which might have been made against the original note, at least in so far as they relate to consideration, such as want or failure of consideration, fraud, usury, gambling debts, or other illegality. This does not apply, however, where a note is taken in payment and not in renewal. It is a defense to renewal notes that the signatures of the makers were obtained by fraud of the payee, in an action by the payee." 8 C. J., sec. 658. A defense available as against a payee is available as against a purchaser or transferee who is not a holder in due course. C. S., 3039.

The note sued on in this action is a renewal of a note procured from defendants by false and fraudulent representations made to defendants by Thomas E. Cooper. This original note was purchased by plaintiff for value and before maturity. It became material, therefore, to determine whether or not plaintiff had notice, at the time it purchased the original note, of such false and fraudulent representations. This question is involved in the second issue. C. S., 3033 and 3038.

The contention of defendants is that the false and fraudulent representations, by means of which the note was procured, were made by Thomas E. Cooper, vice-president and member of the discount committee of plaintiff bank, and that said Cooper presented the note to the committee and acted as a member of the committee in making the purchase; that knowledge of Cooper is imputed to plaintiff bank.

Plaintiff's contention is that Thomas E. Cooper had a personal interest in the note of defendants, and in the sale of the stock for which note was given, and that therefore his knowledge of the fraud cannot be imputed to plaintiff.

These contentions were presented to the jury by the court in an instruction, as follows: "It is admitted in this case that at the time the original note was bought by the Merchants National Bank, Thomas E. Cooper was vice-president of the bank and a member of its discount committee, and took part in the purchase of the note. The court charges the jury, if they find from the evidence that the original note was obtained by fraudulent misrepresentations of T. E. Cooper, and that it was sold by T. E. Cooper to plaintiff, or that it was sold to the Commercial National Bank, and that bank sold or discounted said note to plaintiff, and that in the discounting or purchase of said note, said T. E. Cooper was a member of the discount committee and acted in the discounting of the note, then plaintiff bank had notice of the fraud, unless you find from the evidence that Thomas E. Cooper was personally interested in the sale of the stock to defendant Howard and handled the note Howard gave originally. In the latter case the court charges you that what Thomas E. Cooper knew would not be notice to plaintiff

bank. So that, if you find from the evidence that Thomas E. Cooper was personally interested in the sale of the stock to Howard and in the note Howard gave originally, then you will answer the second issue 'No.' But if you do not find from the evidence that Thomas E. Cooper was personally interested in the sale of the stock to Howard, and in the note Howard gave originally, then you will further consider the case, and determine, independent of those considerations, whether plaintiff bank had actual knowledge of the fraud, or knowledge of such facts that its action in taking the instrument amounted to bad faith.

"On that question, if you find by the greater weight of the evidence that the plaintiff bank had no notice of the fraud, or no knowledge of such facts that its action in taking the instrument amounted to bad faith, then you should answer the second issue 'No.' Unless you so find, answer it 'Yes.'"

To this instruction plaintiff excepted. The exception is not sustained. The instruction is a clear and accurate statement of the law applicable to facts as admitted by the parties and as the jury might find them to be from the evidence. "Ordinarily, a bank is presumed to have notice of matters which are known to its president, upon the theory that he will in the line of his duty communicate to the bank such information as he has; but the law recognizes the frailty of human nature, and when the president has a personal interest to serve, or is acting in a transaction in his own behalf, the presumption does not obtain that he will communicate matters to the bank which are detrimental to him." *Bank v. Wells*, 187 N. C., 515.

There was conflicting evidence as to the relation of Thomas E. Cooper to the original note purchased by the plaintiff and as to his relations to the stock which he sold to defendants. It was within the province of the jury to find the facts from the evidence with respect to these matters, and his Honor properly so instructed the jury.

There was also evidence from which the jury might find that the discount committee of plaintiff bank knew the relations of Thomas E. Cooper to the Commercial National Bank and to the defendants; that he had formerly lived in Wilmington, the home of defendants; that he was then a director of said bank, and had formerly been one of its officers; that negotiations were then in progress for him to sever his relations with plaintiff and to return to Wilmington as president of the Commercial National Bank, and that the result of these negotiations was dependent upon the sale of the stock in said bank owned by W. B. Cooper, his brother.

Although the jury might find from the evidence that Thomas E. Cooper had a personal interest in the note which he presented for discount for the Commercial Bank, the jury might also find from the evi-

dence that the discount committee had notice of such interest. Thomas E. Cooper did not, as vice-president or as a member of the discount committee of plaintiff bank, purchase the note in which he had a personal interest. He presented the note to the full committee, and the committee purchased the note, as it had authority to do. Whatever knowledge or notice this committee had as to the personal interest of Thomas E. Cooper in the note, the plaintiff had. The court charged the jury that, independently as to whether they found that Thomas E. Cooper was personally interested in the note or in the sale of the stock to defendant Howard, they would further consider the case and determine whether or not the plaintiff had actual knowledge of the fraud, or knowledge of such facts that its action in taking the note amounted to bad faith. This was a correct instruction, and the exception to it cannot be sustained.

Upon the fourth issue the court instructed the jury as follows: "So that, gentlemen, with respect to the fourth issue, if you find from the evidence, and by the greater weight of it, that the defendants, at the time of the execution of the renewal note sued on, had knowledge of the said alleged fraud, you will answer the issue 'Yes.' Unless you so find, answer it 'No.'"

Plaintiff's exception to this instruction cannot be sustained. The law upon which this instruction is based is stated in 8 Corpus Juris, p. 444, as follows: "One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, or of false representations by the payee, waives such defense and cannot set it up to defeat or to reduce the recovery on the renewal note."

It is admitted that plaintiff is a holder of the note, which is negotiable on its face. The title of the person who negotiated the note to plaintiff having been shown to be defective, the burden is on plaintiff to prove that it is a holder in due course. C. S., 3040. Upon the answers to the first, second, and third issues, plaintiff was not a holder in due course of the original note. The burden of proof is upon plaintiff to show that defendants had notice of the fraud at time of execution of renewal note; otherwise, the defense to the original note is available as a defense to the renewal note.

Plaintiff's contention as to the facts and the law involved in this action have been submitted to the jury in a trial free from error as to matters of law or legal inference. This Court has jurisdiction to review upon appeal the decisions of the Superior Court upon matters of law and legal inference. Constitution of N. C., Art. IV, sec. 8. We find

No error.

CHARLIE SMITH, BY HIS NEXT FRIEND, ADRIAN J. NEWTON, v. JUNE MYERS AND ROY MYERS.

J. MACK SMITH v. JUNE MYERS.

(Filed 12 November, 1924.)

1. Appeal and Error—Objections and Exceptions—Record—Evidence.

An exception to the exclusion of evidence on the trial will not be considered on appeal when the record is silent as to what this evidence was expected to be, and its competence or materiality does not appear.

2. Assault and Battery—Civil Actions—Punitive Damages—Evidence—Appeal and Error.

In a civil action to recover damages for assault and battery, the exclusion of the record of conviction of defendant in the criminal action as evidence is not prejudicial to the plaintiff upon the issue of punitive damages; damages of this character being largely discretionary with the court, and the evidence excluded not relating to an aggravation of actual damages on the question of willfulness, malice, or reckless and wanton disregard of the plaintiff's rights, etc.

3. Assault and Battery—Civil Actions—Costs.

Where the recovery of damages in a civil action of assault is less than fifty dollars, the plaintiff recovers no more costs than damages. C. S., 1241 (4).

APPEAL from *Bryson, J.*, at July Term, 1924, of DAVIDSON.

The plaintiffs brought suit to recover damages for assault and battery. The two cases were tried together, and the following verdicts were returned:

Charlie Smith *v.* June Myers and Roy Myers. Did the defendants unlawfully and wrongfully assault the plaintiff, as alleged in the complaint? Answer: Yes. What actual damages, if any, is the plaintiff entitled to recover of the defendants? Answer: Ten cents. What punitive damages, if any, is the plaintiff entitled to recover of the defendants? Answer: Twenty-five cents.

J. Mack Smith *v.* June Myers. Did the defendant unlawfully and wrongfully assault the plaintiff, as alleged in the complaint? Answer: Yes. What actual damages, if any, is the plaintiff entitled to recover of the defendants? Answer: Thirty cents. What punitive damages, if any, is the plaintiff entitled to recover of the defendant? Answer: One cent.

Judgment. Appeal by plaintiffs.

Walser & Walser and Z. I. Walser for plaintiffs.

Phillips & Bower for defendants.

ADAMS, J. The plaintiff in the first case offered in evidence the record in a criminal action against Roy Myers to show that this defendant had pleaded guilty of the assault set out in the complaint and had been fined; and the plaintiff in the second case offered to prove upon the cross-examination of D. C. Craver, a witness for the defendant, the substance of the verdict in S. *v.* June Myers. The evidence was excluded in each instance and the plaintiffs excepted.

The record does not disclose what the witness Craver would have testified as to the verdict and for this reason, if for no other, the latter exception is without merit. *Hosiery Co. v. Express Co.*, 186 N. C., 556; *Snyder v. Asheboro*, 182 N. C., 708; *In re Edens, ibid.*, 398.

The second issue in the first action was answered in favor of the plaintiff; and the exclusion of the record in S. *v.* Roy Myers was harmless unless the evidence was competent in aggravation of punitive damages. In our opinion it was not competent for this purpose. Vindictive or punitive damages are treated as an award by way of punishment to the offender and as a warning to other wrongdoers; they are not allowed as a matter of course, but only when there are some features of aggravation, as willfulness, malice, rudeness, oppression, or a reckless and wanton disregard of the plaintiff's rights. *Hodges v. Hall*, 172 N. C., 29. The record of a simple admission of guilt tended to disclose none of these features. In *Smithwick v. Ward*, 52 N. C., 64, the Court held that in a civil action for assault and battery the jury should be permitted to consider the fine imposed in a criminal action for the same assault in abatement of exemplary damages, *Manly, J.*, saying: "When the inquiry is made by the jury in a civil action how much ought to be given for smart money, it is material and legitimate to know how much the defendant has been made to smart already, that the jury may estimate how much more will be required to effect the object of the law." But the decision is not in support of the position taken by the plaintiffs in these actions.

The proposed evidence was properly excluded; but there is an error in the judgment.

All the issues in each case were answered in favor of the plaintiff. In each case the plaintiff was properly allowed costs to the amount of his recovery; but it was adjudged also "that the defendant recover of the plaintiff the defendant's costs."

At common law neither party to a civil action recovered costs and each paid his own witnesses; but now the recovery of costs is entirely dependent upon statutory provisions. *Costin v. Baxter*, 29 N. C., 111; *Chadwick v. Ins. Co.*, 158 N. C., 380; *Waldo v. Wilson*, 177 N. C., 461. As a general rule when the plaintiff establishes his right to recover he establishes also his right to full costs; but in an action for assault,

battery, false imprisonment, libel, slander, malicious prosecution, and seduction, if the plaintiff recover less than fifty dollars as damages, he shall recover no more costs than damages. *Coates v. Stephenson,* 52 N. C., 124; C. S., 1241 (4). This provision was not intended to extend any grace or favor to the defendant, but to discourage the plaintiff from prosecuting frivolous, wilful, or malicious actions for torts of the character described in the statute. Section 1242 applies where the plaintiff fails to establish his right to recover, but does not authorize the defendants' recovery of their costs against the plaintiffs. The plaintiffs were the prevailing and the defendants the losing parties, and costs cannot be taxed against the party who recovers judgment. *Wall v. Covington,* 76 N. C., 150; *Cook v. Patterson,* 103 N. C., 127; *Knight v. Holden,* 104 N. C., 107.

The judgment in each case is modified by striking out the recovery against the plaintiff of the defendant's costs, and as modified is affirmed. In each case the cost of the appeal will be divided between the parties.

Modified and affirmed.

MRS. SARAH GETSINGER v. DR. E. F. CORBELL ET ALS.

(Filed 12 November, 1924.)

Insanity—Commitment—Statutes—Negligence—Evidence—Questions for Jury.

Omission to perform the material requirements of a statute in application to the clerk of the Superior Court for the commitment of one to the insane asylum, such as the personal examination of the person sought to be committed, etc., is some evidence in her action to recover damages for a wrongful conspiracy against her to deprive her of her liberty, etc., to be considered on the question of the observance by the defendants of a duty required of them; and it constitutes reversible error for the trial judge to instruct the jury that the element of negligence was not to be considered by them in arriving at their verdict upon the issue. C. S., 6191, 6192, 6193.

APPEAL by plaintiff from *Bond, J.,* and a jury, September Term, 1923, of PASQUOTANK.

C. R. Pugh, P. W. McMullan and Aydlett & Simpson for plaintiff.

A. P. Godwin and Ehringhaus & Hall, for defendants.

CLARKSON, J. This was a civil action brought by plaintiff against Dr. E. F. Corbell, L. M. Rountree and N. A. Getsinger, the latter the husband of the plaintiff.

The defendant, Getsinger, was never served with summons although on the trial below was a witness for the other defendants.

The plaintiff alleges: "That during the year 1920, the defendants above named formed a conspiracy to harass, to damage and to injure the plaintiff, and to have her committed to the State Hospital for the Insane, both of the defendants well knowing that the plaintiff was in good mental condition—that she had her senses and was not a person to be committed to the State Hospital. That pursuant to said conspiracy and in execution of its wrongful purpose and design, the defendants thereupon wrongfully and unlawfully, maliciously and without any cause, made affidavit that the plaintiff was insane and was a fit person to be committed to the State Hospital for the Insane, showing homicide tendencies at times, all of which defendants knew was untrue and all of which further was, as plaintiff is informed, believes and avers, was done by the defendants for the purpose of committing the plaintiff to the State Hospital for the Insane, and for degrading and humiliating her and depriving her permanently of her liberty."

Papers in the usual form to commit persons to the hospital for the insane were obtained from the clerk of the Superior Court of Gates County. N. A. Getsinger, plaintiff's husband, made the affidavit before the clerk that she was insane. The usual questions (38 in number) were answered and signed by all three of the defendants and sworn to before R. W. Simpson a justice of the peace, on 8 October, 1920. The clerk adjudged that plaintiff was a fit subject for a hospital and ordered that she be committed to the State Hospital at Raleigh. The clerk made a further order to the sheriff of Gates County reciting that it was made satisfactorily to appear to him that the plaintiff was insane and a fit subject for a state hospital, etc., and commanding him to deliver the plaintiff to the superintendent of the State Hospital at Raleigh for safe-keeping. The papers are regular on their face. The plaintiff having been informed by a neighbor of what had been done, fled with her six-year old child to Virginia. Shortly after this, she and her husband made an amicable agreement as to the division of certain property he owned and in regard to his withdrawing the proceedings to send her to the State Hospital, and she keeping the child upon certain terms. The papers committing her to the hospital were signed by the clerk on 11 October, 1920, and the agreement with her husband was made 23 November, 1920. The summons in the case was issued 10 December, 1921. The record in the case contains 126 pages and 41 exceptions.

After a careful reading of the entire record and with knowledge that the case took a long time to try and the burden of a new trial, we are constrained to send the case back on a matter we think prejudicial to plaintiff. We will consider the law and this single exception.

Where parties in pursuance of a conspiracy or combination to use legal proceedings fraudulently to injure another, a person who has been injured may bring an action to recover damages sustained. 12 C. J., p. 588, sec. 110 (3); *Davenport v. Lynch,* 51 N. C., p. 545; 5 Am. L. Rep., (Anno.) p. 1097.

The first issue submitted to the jury was as follows: "Did defendants, Dr. E. F. Corbell and L. M. Rountree, or either of them, with intent to injure and annoy the plaintiff, Mrs. Getsinger, fraudulently conspire and agree with her husband to file papers to have her put in the hospital as alleged?"

The jury having been out several hours deliberating, about 11:30 at night, they sent for the judge, and the record made by the court below is as follows: "After court adjourned, the jury sent word to the judge that they wanted to see him. He came to the courthouse and came up to where they were with the sheriff and clerk, and one of the jurors, all being present, stated that they wanted to ask him the following questions. That they wanted to know on the first issue whether negligence on the part of Dr. Corbell or Rountree would have any bearing on the issue. The judge answered the question as follows: 'It is not a question of negligence, it is a question of whether or not they fraudulently conspired or agreed with Mr. Getsinger to file papers with intent to annoy and injure her and have her put in the hospital.'"

After this instruction was given, the jury answered the first issue "No."

Now the question presented by the jury to the court below is presented to us for consideration. "Whether negligence on the part of Dr. Corbell or Rountree would have any bearing on the issue."

C. S., 6191 is as follows: "Whereupon, unless the person in whose care or custody the insane person is will agree to bring him before the clerk without a warrant, or unless the clerk shall be of the opinion that it will be injurious to the insane person to be brought before him, the clerk shall issue a precept, directed to the sheriff or other lawful officer, substantially in the following form:

"State of North Carolina,

To the Sheriff or Other Lawful Officer of ..... County. Greeting:

Whereas information, on oath, has been laid before me that .... is insane, you are hereby commanded to bring him before me within the next ten days, that necessary proceedings may be had thereon.

Given under my hand ..... day of ..... A.D., ...

.....

Clerk Superior Court."

C. S., 6192, is as follows: "If the alleged insane person be confined in jail otherwise than for crime, the sheriff shall remove him from the jail upon the order from the clerk. Upon the bringing of the alleged insane person before the clerk by his friends, or upon the return of the precept with the body of the insane person, the clerk shall call to his assistance the county physician of the county, or some other licensed and reputable physician, resident of this State, and shall proceed to examine into the condition of mind of the alleged insane person. He shall take testimony of at least one licensed physician, resident of this State, and, if possible, a member of the family, or some friend or person acquainted with the alleged insane person, who has had opportunity to observe him after such insanity is said to have begun."

C. S., 6193, provides that the clerk may discharge person, require bond or commit to hospital. C. S., 6194, provides that the examination may be at home of patient. C. S., 6195, provides when justice of the peace may make examination. C. S., 6196, questions to be answered and certified to superintendent of State Hospital.

It appears in the evidence, undisputed from the record, that the defendants proceeded in having the plaintiff declared insane without subjecting her to an orderly inquisition of lunacy. That is to say, without notice to her of the proceeding instituted for that purpose and without having her present for examination at any stage of such proceeding. In other words, the entire proceeding to put plaintiff in the hospital for the insane was not done by the defendants in strict compliance with the law. The jurors, men of intelligence and moral character, on the first issue having in mind no doubt this fact, asked the court below "whether negligence on the part of Dr. Corbell or Rountree would have any bearing on the issue." We think it would, and the court ought to have so charged the jury. Negligence is a word well known in its common acceptance. Webster defines it to mean: "The quality or state of being negligent; lack of due care; omission of duty; habitual neglect; heedlessness."

To acquit the defendants on this issue, they must have acted in good faith, not fraudulently.

In law "negligence" is the failure to exercise ordinary care; the failure to exercise which constitutes negligence is that degree of care which a prudent man should use under like circumstances and charged with like duty. Negligence applicable here is definition of *Stacy, J.*, in *Whitt v. Rand,* 187 N. C., 808: "That there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed."

If the jury had come to the conclusion under the facts and circumstances of the case that the defendants were guilty of negligence, the court should have instructed them that this negligence was some evidence to be considered, with the other evidence in the case, on the issue as to whether defendants acted fraudulently or in good faith. It was not convincing, but a circumstance to be considered with the other evidence in the case. Under the facts of this case, the jury's request, late at night, having been out for some time, we think that the charge as given was prejudicial to plaintiff and constitutes reversible error.

For the reasons given, there must be a

New trial.

OSCAR HAIRSTON v. ERLANGER COTTON MILLS.

(Filed 12 November, 1924.)

1. Employer and Employee—Master and Servant—Evidence—Nonsuit—Questions for Jury.

In an action against a cotton mill by its employee to recover damages for an alleged negligent injury, evidence that the defendant's vice-principal, with fellow servants of the plaintiff, was at work on the tops of boilers 30 feet high, at the foot of which the plaintiff was at work with the knowledge of the vice-principal, to whom he had protested against the danger, is sufficient to take the case to the jury and deny defendant's motion as of nonsuit thereon.

2. Same—Fellow Servant.

An employee may recover damages against his employer for injuries caused by the other employees' negligence, combined with that of the employee's fellow servants.

3. Same—Vice-Principal.

Where the negligence complained of in an action by the employee to recover damages of his employer for the negligent infliction of an injury, the doctrine of the negligence of fellow servants does not apply when the fellow servants, in the respect complained of, were acting under the direct orders of the defendant's vice-principal who was there present.

CIVIL ACTION tried before *Bryson, J.*, and a jury, at July Term, 1924, of DAVIDSON.

The action is to recover damages for an injury caused by alleged negligence of defendant company in not providing for plaintiff, an employee, a safe and proper place in which to do his work. On denial of negligence the cause was submitted to the jury, and verdict rendered as follows:

1. Was plaintiff injured by negligence of defendant as alleged in complaint? Answer: "Yes."

2. What amount of damages is plaintiff entitled to recover? Answer: "$700.00."

Judgment on the verdict and defendant appealed, assigning for error the refusal to allow its motion for nonsuit.

Spruill & Olive for plaintiff.
Raper & Raper, for defendant.

HOKE, C. J. The evidence tended to show that on 18 February, 1923, plaintiff, an employee of defendant company, was, in the course of his employment, engaged in cleaning off the boilers in the boiler room of defendant company. That there were six of these boilers in the room, placed in an upright position, and each being about thirty feet high. That plaintiff at the precise time of the occurrence was standing very near boiler No. 3, washing the crown sheet just above the furnace, when a heavy piece of iron, two inches thick, four inches in diameter, weighing twelve to fourteen pounds, fell from the top of this boiler No. 3, and struck plaintiff on the shoulder, breaking plaintiff's shoulder blade and knocking him to the floor unconscious, from which he suffered and now suffers greatly, and lessened his capacity for work, etc. That while plaintiff in the line of his duty was engaged in washing off the boilers, as stated, a number of other employees, under the direction and immediate supervision of one Demarcus, a foreman and vice-principal of defendant company, went up on top of the boilers for the purpose of cleaning out the flues. That this was done from the top, and this piece of iron that fell on plaintiff when in place was used to cover a hole in the tram head of the boiler and had evidently been taken from its place and left on the top of the boiler at which plaintiff was at work. That plaintiff, before he was hurt had asked Demarcus, the boss, not to scrape off that boiler while plaintiff was engaged in washing it, and he replied that he had enough men to work on all of them; and further that he, Demarcus, was where he could see plaintiff engaged in washing the crown sheet under boiler No. 3.

Upon this the evidence chiefly pertinent, we are of opinion that the court made correct decisions in disallowing defendant's motion for nonsuit. It is the fully recognized principle in this jurisdiction that an employer of labor in the exercise of reasonable care must provide for his employees a reasonably safe place to work, and provide them with implements, tools and appliances reasonably safe and suitable for the work in which they are engaged. *McKinney v. Adams*, 184 N. C., p. 562, and authorities cited. And it is equally well established that on a motion to nonsuit, the evidence making in favor of plaintiff's right must be taken as true and interpreted in the light most favorable to him.

Pettitt v. R. R., 186 N. C., p. 9; *Moore v. R. R.*, 179 N. C., p. 639; *Aman v. Lumber Co.*, 160 N. C., p. 369.

Applying these principles, it was assuredly a breach of duty on the part of the employer to put these hands to work on the top of the boilers, cleaning out the flues and involving the displacement of the heavy iron weights, which were liable to roll down on plaintiff, engaged in his work below. True, there may have been negligence on the part of some of the hands, fellow servants of plaintiff, but the threatening conditions presented were caused by the employer in sending the hands up there and keeping them at work while plaintiff was engaged below, our decisions on the subject being to the effect that where the negligence of an employer and a fellow servant concur in producing an injury, an action lies, the claimant himself being free from blame. *Harmon v. Contracting Co.*, 159 N. C., p. 28; *Wade v. Contracting Co.*, 149 N. C., p. 177. A position that is further emphasized by the fact that the work itself was being done under the immediate supervision and direction of a vice-principal who was acting in disregard of an express remonstrance, and for whose misconduct the defendant, his employer, is responsible. *Davis v. Shipbuilding Co.*, 180 N. C., p. 76; *Smith v. R. R.*, 170 N. C., p. 184.

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

No error.

ANGIE C. MANUEL, ADMX., v. SOUTHERN RAILROAD COMPANY.

(Filed 12 November, 1924.)

1. **New Trials—Newly Discovered Evidence—Motions.**

Held, in this case, the affidavits filed on motion for a new trial in the Supreme Court for newly discovered evidence, are insufficient.

2. **Carriers — Railroads — Negligence — Contributory Negligence — Evidence—Nonsuit.**

Evidence in this case that plaintiff's intestate was killed on a dark night by defendant's train approaching without light or warning, while crossing its track, raised issues as to defendant's negligence, and the contributory negligence of the intestate, and defendant's motions to nonsuit after the close of the plaintiff's evidence and renewed after the close of all the evidence, were properly denied.

APPEAL by defendant from *Bryson, J.*, at August Term, 1924, of GUILFORD.

Civil action to recover damages for an alleged negligent injury, resulting in the death of plaintiff's intestate.

Upon denial of liability and the usual issues of negligence, contributory negligence and damages, being submitted to the jury, there was a verdict and judgment for the plaintiff. Defendant appeals, assigning errors.

H. A. Jones and R. C. Strudwick for plaintiff.
Wilson & Frazier for defendant.

STACY, J. The defendant, *in limine,* lodged a motion for a new trial on the ground of newly discovered evidence. It is alleged that the information which the defendant considers vital and important to its defense, came to its attention after the adjournment of the term of court at which the case was tried, and after the appeal was docketed here. *Allen v. Gooding,* 174 N. C., 271. From an examination of the affidavits filed by both sides in support and denial of said motion, we are of opinion that it must be overruled. The showing made in this respect falls short of the requirements laid down in *Johnson v. R. R.,* 163 N. C., p. 453.

There is evidence on the record tending to show that plaintiff's intestate was killed on the night of 9 October, 1922, "at a place designated as 12th Street where it crosses the railroad" in the village of White Oak, near Greensboro, N. C. The deceased was a resident of said village, lived on Spruce Street, near the tracks of defendant company, and had gone across the railroad to an ice-house to get some ice for use in his home. On his return and as he was crossing the railroad he was struck by defendant's passenger train No. 35 and killed. There was evidence that the train was running without a headlight; that it gave no warning or signal of its approach; and that it was moving at a rapid rate of speed. It was a dark, rainy night.

The evidence for the defendant was quite different from that offered by the plaintiff. It tended to exculpate the defendant from all liability and to show that plaintiff's intestate was guilty of contributory negligence; but the crucial facts have been resolved by the jury in favor of plaintiff's claim. On the evidence, the case was properly submitted to the jury. The trial court was correct in overruling the defendant's motion for judgment as of nonsuit, entered at the close of plaintiff's evidence and renewed at the close of all the evidence. On motion to nonsuit, the evidence must be taken in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Oil Co. v. Hunt,* 187 N. C., 157; *Christman v. Hilliard,* 167 N. C., 4.

The instant case is not unlike *Morrow v. R. R.*, 147 N. C., 623, where a pedestrian was using the railroad track as a walkway in the town of Hickory, at a place where it was customary so to use the track, and was struck by a train in the night time and injured. There was evidence tending to show that the engine in question had no lights and had given no signal or warning of any kind. Under these circumstances, it was held that the question of contributory negligence was one for the jury. This case was approved in principle in *Norris v. R. R.*, 152 N. C., 512.

In these and other like decisions, the pedestrian, by default of the railroad company, was placed in a position where "to look and to listen," the ordinary way that the average man avoids the danger in such instances, was not likely to avail him, and the cases were therefore excepted from the doctrine announced in *Neal v. R. R.*, 126 N. C., 634, *Exum v. R. R.*, 154 N. C., 413, and many others, all of which are reviewed in a valuable and discriminating opinion by the present *Chief Justice* in the recent case of *Davis v. R. R.*, 187 N. C., 147.

A careful perusal of the record leaves us with the impression that the case has been tried substantially in agreement 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 or prejudicial error. The verdict and judgment will be upheld.

No error.

STATE v. JUNIUS HOLDER AND ARTHUR HOLDER.

(Filed 12 November, 1924.)

Criminal Law—Felony—Statutes.

Where the finder of the property of another of the value of more than $20 takes the same with the intent of misappropriating it to his own use, and deprive the owner thereof, it is a felony under the provisions of our statute, C. S., 4249.

APPEAL by defendants from *Shaw, J.*, at April Term, 1924, of RICHMOND.

Criminal prosecution, tried upon an indictment charging the defendants with larceny and with receiving stolen goods valued at more than $20.00.

From an adverse verdict and judgment pronounced thereon, the defendants appeal, assigning errors.

STATE *v.* HOLDER.

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

W. R. Jones for defendants.

STACY, J. The defendants, two brothers, white boys 21 and 19 years of age respectively, who live in the country with their father, about 10 miles south of Rockingham, N. C., were indicted at the April Term, 1924, of the Superior Court for Richmond County, charged (1) with the larceny of certain personal effects of the value of more than $20.00, the property of Charles Bendscheller, and (2) with receiving said articles of personal property knowing them to have been feloniously stolen or taken. C. S., 4249 and 4250.

The prosecuting witness and a friend, tourists passing through the State in an automobile, had some road trouble, or their car was stuck in the mud not far from where the defendants live in Richmond County. This was on Sunday, 6 April, of the present year. The defendants, together with others who had collected on the road, helped the tourists pull their car out of the mire; and very soon after they had left, driving southward, an overcoat belonging to one of them, was discovered on the side of the road. Henry McGee, who was riding with the defendants in their father's Ford car, said that the tourists would be back for it as soon as they discovered its loss, and in this he was correct; but one of the defendants picked up the coat, put it in their car and took it away. Upon examination, they found in the pockets of the coat a pistol, a pocketbook, travelers checks issued by the American Railway Express Company for $400.00, a fountain pen, a pencil and $7.00 in money. They divided the articles, burned the checks, and gave Sam Brady, a colored boy, $1.00 and told him not to say anything about the matter. They took the coat home, showed it to their mother and sisters and told them about the men leaving it.

In a very short time the tourists returned to get the coat. Not finding it where it had been left, they informed the sheriff that it had been stolen, and in company with one of the sheriff's deputies, they went to the home of the defendants and there found the coat. It was hanging behind a door in one of the rooms where they were accustomed to hang their clothes. No search was made for the coat; the defendants' little sister brought it out from behind the door. The boys voluntarily gave it up. The defendants claimed at first that they did not know anything about the checks, but later they admitted that they had destroyed them. There was evidence that they did not know what a check was. One of the boys could read and write; the other could not. Everything was returned to the prosecuting witness, except the travelers checks, upon which he stopped payment, and his pistol valued at $9.00. There is

nothing on the record to show what became of the pistol. The deputy sheriff testified that he found it in the Ford car belonging to the defendants' father.

All this occurred on Sunday. Court convened the following day. The grand jury promptly returned a true bill against the defendants. They were put on trial Monday morning, convicted and sentenced to the State's Prison for a term of 18 months.

The exception, upon which the defendants chiefly rely, is the one addressed to the following portion of the charge:

"Where property is lost and a person finds it, then the duty of the finder is to keep the property for the purpose of finding the owner and he must use reasonable means for the purpose of finding the owner. If he keeps it and keeps it intact for the owner, he has a right to do that, but if the property is not abandoned but is left by accident or lost and a person finds it and he takes it with the intention at the time of taking it to steal it, he is just as guilty of larceny as if he had gone in the night time and stolen it secretly."

It is the position of the defendants that they cannot be convicted of larceny, but only of forcible trespass, because of the open manner in which the property was taken. We are unable to agree with this view of the law. *S. v. Farrow*, 61 N. C., 161. The open manner of the taking is not inconsistent with larceny, provided it be done with a present, felonious intent. *S. v. Powell*, 103 N. C., 424. Larceny differs from forcible trespass in that in the former, there must be a felonious taking and carrying away of the goods and chattels of another with intent to deprive the owner of the use thereof and with a view to some advantage to the taker; whereas, in the latter an indictable trespass may consist of a forcible injury to the property of another, without taking it away, and from some motive other than advantage to the trespasser. *S. v. Deal*, 64 N. C., 270; *S. v. Foy*, 131 N. C., 804; *S. v. Oxendine*, 187 N. C., 663.

To constitute the crime of larceny, there must be an original, felonious intent, general or special, at the time of the taking. If such intent be present, no subsequent act or explanation can change the felonious character of the original act. But if the requisite intent be not present, the taking is only a trespass, and it cannot be made a felony by any subsequent misconduct or bad faith on the part of the taker. *S. v. Arkle*, 116 N. C., p. 1031.

The case was left to the jury under a charge free from error, and the defendants have been convicted of the larceny of goods in excess of $20.00 in value. This is a felony under our statute. The validity of the trial must be sustained.

No error.

C. B. CLEGG v. J. C. BISHOP.

(Filed 12 November, 1924.)

Contracts, Written—Statute of Frauds—Evidence.

The party to be charged in this suit for specific performance of a contract to convey lands, under the Statute of Frauds, C. S., 988, is the vendor therein, and the vendee, the plaintiff in the action, does not fulfill the duty imposed on him to show that the statute has been complied with by a writing by which he alone is bound.

APPEAL by plaintiff from *Lane, J.*, at May Term, 1924, of GUILFORD. Suit for specific performance.

The defendant and The American Land Company made a written contract by which the company was to offer for sale for the defendant in separate lots a 10-acre lot of land in Greensboro. The defendant was to do such work as was necessary to put the property in good condition. The company was to advertise the sale, furnish auctioneers, etc., and at the close of the sale was to receive ten per cent of the gross receipts and $500 for expenses. The defendant agreed to make deeds for all the lots sold and settled for. The sale was advertised by the company to take place on 9 May, 1921. At the sale the plaintiff became the highest bidder for lot No. 3, and the following card was signed by the plaintiff and delivered to the company:

"This is to certify that I have this day bought through American Land Company lot No. 3, block ..... as shown by the map of ....for which I agree to pay $171.00 per foot, according to the terms announced by the auctioneer, and to secure said payments, I hereby assign to them all of my property, real and personal, waiving especially any rights of homestead exemption, and the payment of which I hereby bind myself, my heirs, executors and administrators."

"Witness my hand and seal, this the ..... day of ....., 19 ..... .

Name: C. B. CLEGG (Seal)

Address .....

Witness ....."

The court sustained the defendant's objection to the introduction of this card and of a recorded plat showing the subdivision of lots 13, 15, 16 of the Bishop property, and the plaintiff excepted. Judgment of nonsuit. Appeal by plaintiff.

Dallas C. Kirby for plaintiff.

Hobbs & Davis for defendant.

ADAMS, J. This is a suit to enforce the specific performance of an alleged contract for the sale of a lot in the city of Greensboro. In his answer the defendant denied the contract declared on and thereby imposed upon the plaintiff the necessity of showing that the contract had been executed in compliance with the statute of frauds. *Winders v. Hill,* 144 N. C., 617; *Henry v. Hilliard,* 155 N. C., 372, 379; *Stephens v. Midyette,* 161 N. C., 323. This statute provides that all contracts to sell or convey land shall be void unless put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized. C. S., 988. The party to be charged in this action is the defendant; therefore unless the paper offered in evidence was signed by him or by some one thereto lawfully authorized by him it was properly excluded. *Brown v. Hobbs,* 154 N. C., 545; *Wellman v. Horn,* 157 N. C., 170. The paper or memorandum offered by the plaintiff does not show the required "signing" by the defendant or his agent. It embodies an obligation on the part of the plaintiff to purchase the lot; but on the part of the defendant it neither embodies nor purports to embody any obligation to convey. It was a printed form card prepared before the sale on which were written the words and figures "3—$171 per foot" in the blank spaces. There is no evidence that the words "American Land Company" were written at the time of the sale or that the memorandum was physically connected with any paper signed by the defendant. *Dickerson v. Simmons,* 141 N. C., 325; *Love v. Harris,* 156 N. C., 88; *Flowe v. Hartwick,* 167 N. C., 448; *Keith v. Bailey,* 185 N. C., 262.

We find no error and affirm the judgment of the lower court.

Affirmed.

JERRY CORBITT AND JESSE CORBITT BY HIS NEXT FRIEND, JERRY CORBITT, v. THE ROYER-FERGUSON COMPANY.

(Filed 12 November, 1924.)

Master and Servant—Employer and Employee—Negligence—Res Ipsa Loquitur—Evidence—Nonsuit—Questions for Jury.

Upon a motion as of nonsuit, considering the evidence in the light most favorable to the plaintiff: *Held,* evidence tending to show that the plaintiff in the course of his employment, had his hand injured by the slipping of the mechanism of a jack operated by other employees while raising a donkey engine which had been derailed, upon the track, requiring under the principle of *res ipsa loquitur* that the cause be submitted to the jury, a motion to nonsuit was properly overruled.

CORBITT *v.* ROYER-FERGUSON CO.

CIVIL ACTIONS tried before *Lane J.*, and a jury, at February Term, 1924, of GUILFORD.

There were two actions instituted for this injury, one by the minor, Jesse Corbitt, the injured person, employee of defendant, and the other by his father for loss of service of the minor son incident to the injury, and caused by the alleged negligence of defendant company. The two actions having been consolidated, and the cause submitted to the jury on appropriate issues, there was verdict for plaintiffs. Judgment. And defendant appealed, assigning for error chiefly the refusal of the court to enter judgment of nonsuit.

T. W. Albertson and D. H. Parsons for plaintiffs.
Peacock & Dalton for defendant.

HOKE, C. J. There were facts in evidence tending to show that defendant company was engaged in constructing a hard-surface road about two miles north of High Point in said county, and had there in the work a temporary track for cars, drawn by donkey engines. That one of these having become derailed, defendant's employees, with the view of replacing same on track, had raised it about eighteen inches with an implement called a jack, worked by a lever, etc. That plaintiff, Jesse Corbitt, an employee of the company, not immediately engaged in the jacking process, but in the line of his duty, was placing some blocks under the engine to hold same while preparation was made to raise it higher, and while so engaged the springs and fastenings of the jack seemed to give way, letting the engine down, and plaintiff's hand was caught in the jack as it fell or was knocked to one side, and plaintiff was severely and painfully injured. That the engine was very heavy and the one jack, weighing about 200 pounds, was all that defendant had there for the purpose, and same gave way under the weight or pressure of the engine, thereby causing plaintiff's injury.

It is uniformly held with us that on motions of this character the evidence which makes in favor of plaintiff's right to recover must be taken as true and interpreted in the light most favorable to him. *Pettitt v. R. R.*, 186 N. C., p. 9. Considering the record in view of this accepted principle, it is, in our opinion, the clearly permissible inference, as plaintiff contends, that the one jack used on this occasion was inadequate for the purpose, and furthermore, the same having slipped down without explanation offered or suggested, the evidence of the occurrence seems to permit and require the application of the doctrine of *res ipsa loquitur*, carrying the cause to the jury on the issue as to defendant's negligence. *Hinnant v. Power Co.*, 187 N. C., p. 288;

McAllister v. Pryor, 187 N. C., p. 832; *Dellinger v. Building Co.,* 187 N. C., p. 845; *Harris v. Mangum,* 183 N. C., p. 235.

The cause, then, being one for the jury, it appears to have been submitted under a full and adequate charge, and we find nothing therein that gives to appellant any just ground of complaint. The judgment below must, therefore, be affirmed.

No error.

MARY STRUNKS, ADMX., v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 12 November, 1924.)

Appeal and Error—Second Appeal—Review—Supreme Court.

A party to an action may not have the decision of the Supreme Court again reviewed by it, upon a second appeal, upon the same state of facts, the former decisions having become the law of the case.

APPEAL by defendants from *Lane, J.,* at April Term, 1924, of GUILFORD.

Civil action to recover damages for an alleged negligent injury, resulting in the death of plaintiff's intestate. The action is one arising under the Federal Employers' Liability Act, it being conceded on the trial that the defendant is a common carrier by railroad, engaged in interstate commerce and that plaintiff's intestate was employed by the defendant in such commerce at the time of his injury and death.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered by them in favor of plaintiff. From the judgment rendered, defendants appeal.

R. C. Strudwick and Adams & Adams for plaintiff.
Wilson & Frazier for defendant.

STACY, J. This case has been tried three times in the Superior Court, and this is the third appeal here. Our previous decisions are reported in 184 N. C., 582, and 187 N. C., 175.

On the first appeal a new trial was granted for error in the charge on the issue of damages; but, as the case was correctly tried on the question of the defendant's liability, we restricted the new trial to the *quantum* of damages to be awarded. On the second appeal, a new trial was again granted for failure of the judge to admit evidence tending to show contributory negligence on the part of plaintiff's intestate, it being competent under the Federal Employers' Liability Act to plead and

to show the contributory negligence of plaintiff's intestate in diminution of damages, and the question of contributory negligence not having been settled on the first trial except under the single issue directed to the defendants' negligence. *Cobia v. R. R., ante,* 487.

On the present appeal, no error is assigned relating to the trial on the question of damages. Appellants say in their brief:

"Frankness compels us to say that there is no question presented in this appeal upon which the court has not already passed in the former appeals, but we have deemed it necessary, in order that we might present the question involved (the action being under the Federal Employers' Liability Act) to the Supreme Court of the United States for its decision, that we bring the case again to the attention of this Court."

We are not now permitted to review any question heretofore decided in the present case, as a party who loses in this Court may not have the case reheard by a second or third appeal. *Holland v. R. R.,* 143 N. C., 435. Our former decisions have become the law of the case so far as the questions then presented and decided are concerned. *Ray v. Veneer Co., ante,* 414.

"A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Harrington v. Rawls,* 136 N. C., 65. To the same effect and tenor are the following decisions: *Nobles v. Davenport,* 185 N. C., 162, *Public Service Co. v. Power Co.,* 181 N. C., 356, *Hospital v. R. R.* 157 N. C., 460, *Gerock v. Tel. Co.,* 147 N. C., 1, and others that might be cited.

The judgment as entered will be upheld.

No error.

ARTHUR VANDERBILT ET AL., RECEIVERS OF THE SOUTHERN COTTON OIL COMPANY, v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 November, 1924.)

War—Limitation of Actions—Statutes.

The Federal Transportation Act, placing railroads, etc., under Government control as a war measure during the war with Germany, and the later act releasing them therefrom, did not interfere with the commencement or the prosecution of actions in the State courts between citizens of the same or different States to recover damages for a breach of contract for the sale of goods; the later act expressly limiting the time to two years thereafter; and an action of this character arising during war control is barred by our State statute of limitations after three years (C. S., 404, 405) from the time of their accrual.

VANDERBILT *v.* R. R.

APPEAL by plaintiff from judgment rendered by *Pittman, J.*, at February Term, 1924, of JOHNSTON.

On 22 March, 1917, the Southern Cotton Oil Company delivered to defendant, at Selma, N. C., 96,500 pounds of cotton-seed oil, to be transported and delivered to plaintiff at Bayonne, N. J. Defendant delivered only 82,800 pounds of said oil, and this action was instituted by the receivers of the Southern Cotton Oil Company, on 19 May, 1921, to recover of the defendant damages for the failure to deliver the balance of said shipment, to wit, 13,700 pounds. Upon answer filed and issues joined, the jury found, as appears by the verdict, that plaintiff was damaged by the negligence of defendant in the sum of $1,683.17, with interest from 2 April, 1917. It was agreed by attorneys, in open court, that upon certain written admissions the court should answer the third issue, which was as follows:

"3. Is plaintiff's cause of action barred by the three-year statute of limitations, as alleged in the answer?"

The court, being of opinion that as a matter of law, upon the admitted facts, the action was barred, answered the issue "Yes," and signed judgment that plaintiff recover nothing of defendant in the action. To this judgment plaintiff excepted.

The following stipulation appears in the case on appeal settled by the judge:

"By agreement of counsel, in open court, representing both the plaintiff and defendant, the only question at issue in this action is whether or not the plaintiff's cause of action is barred by the statute of limitations. It is admitted that the three-year statute of limitations was properly pleaded in bar of plaintiff's cause of action."

Charles E. Cotterill and F. H. Brooks for plaintiff.
Ed. S. Abell for defendant.

CONNOR, J. This action was commenced by the issuance of summons on 19 May, 1921. It is admitted that the cause of action accrued on 2 April, 1917. The statute of limitations, therefore, began to run on that date, and more than four years had expired before the action was commenced. The objection that the action was not commenced within the period prescribed by statute was duly taken in the answer. C. S., 404, 405.

The period of time prescribed by the statute of limitations in force in North Carolina, at the date when plaintiff's cause of action accrued, and within which same must be commenced, was three years. C. S., 441.

Attorneys for plaintiff, who challenge the correctness of the holding that plaintiff's cause of action was barred by this statute, in their brief,

say: "The shipment of freight involved was made from Selma, N. C., on 22 March, 1917. Suit was filed 19 May, 1921, or more than three years after the cause of action arose. Without more appearing, the North Carolina statute would, of course, bar recovery. But Federal control of the railways intervened between the time of making shipment and the institution of the suit. It is the position of plaintiff, appellant, that during the period of Federal control (beginning 31 December, 1917, and ending 28 February, 1920) the operation of such North Carolina statute of limitations was suspended by the very terms of a constitutional enactment of the United States Congress, known as section 206 of the Transportation Act of 1920. If such period of Federal control (twenty-six months) be excluded, the suit was filed in ample time."

The North Carolina statute, in force when plaintiff's cause of action accrued, and which was applicable to it, has not been repealed, altered or amended by the General Assembly of North Carolina. It is now, and has been continuously from the accrual of the cause of action to the issuance of summons, a bar to plaintiff's action. The defendant was at all times, during said period, subject to the processes of the courts of this State, and, for the purposes of jurisdiction, was and is now a North Carolina corporation. *McGovern v. R. R.*, 180 N. C., 219; *Brown v. Jackson*, 179 N. C., 363; *Staton v. R. R.*, 144 N. C., 135. The dockets of the courts of this State show that during this period actions accruing prior to 31 December, 1917, were constantly commenced and prosecuted to final judgment in said courts against this defendant by both resident and nonresident plaintiffs.

There was no interruption of the ordinary course of judicial proceedings in the courts of this State which prevented the service of process for the commencement of actions against this or any other defendant. No conditions existed in North Carolina or in the United States such as the Supreme Court of the United States, in *Hanger v. Abbott*, 6 Wall., 532 (18 L. Ed., 939), held, had the effect to suspend, during the Civil War, statutes of limitations in suits "between the inhabitants of the loyal States and the inhabitants of those in rebellion." *U. S. v. Wiley*, 78 U. S., 508 (20 L. Ed., 211).

The sole contention of plaintiff is that the North Carolina statute was suspended during the period of Federal control of railroads, from 31 December, 1917, to 28 February, 1920, by an act of Congress, and that the time between said dates should be deducted from the time which elapsed between the date of accrual of the cause of action and the date of the issuance of the summons.

The Transportation Act, 1920, provides that Federal control of railroads and systems of transportation shall terminate on 1 March, 1920, and that the President shall on said date relinquish possession and con-

trol of all railroads and systems of transportation then under Federal control. Section 206 of said act relates to causes of action arising out of Federal control. Paragraph (f) of said section is as follows: "The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the commission for causes of action arising prior to Federal control."

The President had taken possession and assumed control of the railroads and transportation systems of the country, under an act of Congress, as a war measure, which had become necessary in the national defense. The United States was at war with a foreign government. The relations of its own citizens with each other were not affected by the existence of war. The conditions during the Civil War, relied upon to sustain the decision of the Supreme Court of the United States in *Hanger v. Abbott, supra,* did not exist during the period of Federal control. The Court there held that "A state of war existing between the governments of the creditor and debtor suspends the right and opportunity of a citizen of one belligerent to sue in the courts of the other, and as a consequence the statute of limitations is suspended during the existence of the war, and that time is not computed in the limitation of the action." This is declared to be law, without regard to any statute. This statute, however, was not enacted to meet such a condition as prevailed at the time the act of Congress, approved 11 June, 1864, was enacted.

In *Stewart v. Bloom,* 78 U. S., 382 (20 L. Ed., 176), the Supreme Court of the United States held that the act of Congress, approved 11 June, 1864, relative to causes of action accruing during the Civil War, applied not only to cases in the Federal courts, but also to cases in the courts of the States, and suspended State statutes of limitation pending in the State courts. *Justice Swayne,* in the opinion filed for the Court, says: "We are of the opinion that the meaning of the statute is that the time which elapsed while the plaintiff could not prosecute his suit by reason of the rebellion, whether before or after the passage of the act, is to be deducted. Considering the evils which existed, the remedy presented, the object to be accomplished, and the consideration by which the lawmakers were governed—lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction—we cannot doubt the soundness of the conclusion at which we have arrived." Replying to the contention that the statute as thus construed was not warranted by the Constitution of the United States, he says: "The power to pass it is necessarily implied from the powers to make war and suppress insurrection." Plaintiffs were citizens and residents of New York. Defendants were citizens and residents of Louisiana. The suit was brought in the Fourth District Court of New

Orleans, on 16 April, 1866, upon a note dated 10 August, 1860, and due seven months after date. The time prescribed by the State statute for the commencement of the action was five years.

The cause of action in the instant case accrued on 2 April, 1917. Defendant was, on said date and at all times since has been, a North Carolina corporation, for the purposes of jurisdiction. This action was brought on 19 May, 1921, in the Superior Court of North Carolina. This Court had jurisdiction of the action by virtue of the laws of North Carolina. Its jurisdiction was not dependent upon any law of the United States. The time prescribed by the State statute for the commencement of the action was three years. Is the time from 31 December, 1917, to 28 February, 1920, to be deducted and not computed in determining whether three years had elapsed from the accrual of the cause of action to the commencement of this action in the Superior Court of North Carolina by virtue of paragraph 206 (f) of the Transportation Act, 1920, enacted by the Congress of the United States?

Let us follow the light which *Justice Swayne* says every court must hold up for its guidance when seeking the meaning of a statute which requires construction. This statute requires construction by us, for we find that other courts have not agreed as to its meaning. Adopting the reasoning and authorities of some of these courts, we should answer the question presented by this appeal in the affirmative. If we follow other courts, our answer must be in the negative.

By an act of Congress, approved on 29 August, 1916, the President, in time of war, was empowered to take possession and assume control of any system or systems of transportation or any part thereof for the transportation of troops, war materials and equipment, and "for such other purposes connected with the emergency as may be needful or desirable." U. S. Comp. Stat., 1974-A.

On 6 April, 1917, Congress declared "That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared, and that the President be and he is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government, and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States."

By proclamation, issued on 26 December, 1917, the President, on 28 December, 1917, took possession and assumed control of each and every system of transportation located wholly or in part within the boundaries of the Continental United States and consisting of railroads. Said proclamation includes the following paragraph: "Except with the

prior written assent of said Director (General of Railroads), no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers, and judgments rendered as hitherto until and except so far as said director may by general or special orders otherwise determine." The transportation system and railroads of defendant thus came under Federal control.

Section 10 of the Federal Control Act, approved 21 March, 1918, is as follows: "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of the act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

Justice Brandeis, in *Missouri Pacific R. R. Co. v. Ault,* 256 U. S., 554 (65 L. Ed., 1087), says: "Thus, under section 10, if the cause of action arose prior to Government control, suit must be instituted or continued to judgment against the company as though there had been no taking over by the Government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue or the time for trial. If the cause of action arose while the Government was operating the system, the carrier while under Federal control was nevertheless liable and suable. This means, as a matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts." General Order No. 50, issued by the Director General, required that suits upon causes of action arising during Federal control should be brought against the Director General by name, and not otherwise. Suits upon causes of action arising prior to Federal control must be brought against the company.

The Transportation Act, 1920, which includes the paragraph, 206 (f), relied upon by plaintiff, was approved 28 February, 1920. By virtue of this act, Federal control terminated on 1 March, 1920, and the President relinquished possession and control of all railroads and systems of transportation then under Federal control. Thus, certainly, from the date of the accrual of the cause of action, 2 April, 1917, to 28 February, 1920, the statute of limitations (C. S., 411) was in full force, and there

is no contention that during this period the statute was not running against plaintiff and in favor of defendant. Defendant was subject to the processes of the courts of this State, and the plaintiff was warned, by proclamation of the President, acts of Congress and decisions of the courts, that notwithstanding the existence of a state of war between the United States and foreign powers, and notwithstanding the possession and control by the President of the railroad and transportation system of the defendant company, plaintiff might bring its action against defendant, and that upon failure to do so, the action would be barred at the expiration of three years from 2 April, 1917, upon defendant's plea of the statute.

In the enactment of this statute—section 206 (f)—Congress was not providing for a condition such as existed during the Civil War, when the courts of some of the States of the Union were not open to citizens and residents of other States for the commencement and prosecution of actions. The reasons given and authorities cited in support of the decisions of the Supreme Court of the United States in *Hanger v. Abbott* and *Stewart v. Bloom* are not applicable to the proposition presented by this appeal. Congress was not confronted, in 1920, with the evils which existed in 1864. It was not seeking to accomplish by this act the same object it had in view in the enactment of the act of 11 June, 1864. The considerations which moved the lawmakers in 1920 were not the same as those of 1864. At all times during the period of Federal control, the courts of North Carolina, as well as of all the other States, were open, not only to her own citizens, but also the citizens and residents of all her sister States.

The construction of section 206 (f) of the Transportation Act, 1920, urged upon us by the plaintiff, by which this statute would be construed as suspending, retrospectively, State statutes of limitation, as applied to actions brought and prosecuted in the State courts, and of which such courts had jurisdiction under the laws of the States, is inconsistent with the purpose and policy of the Federal Government with respect to actions that had accrued prior to Federal control, as declared in the proclamation of the President and as declared by Congress in the Federal Control Act of 1918. It would require us to hold that Congress, in the very act by which Federal control was terminated and the railroads restored to their owners, had undertaken to legislate about a matter which it had expressly declared its purpose not to affect. The President's proclamation of 26 December, 1917, has not been recalled or rescinded. No order inconsistent with said proclamation had been made by the Director General. The provision of the Federal Control Act, approved 21 March, 1918, has not been repealed. This construction would result in holding that by virtue of the proclamation and the

Federal Control Act no obstacle was interposed to the commencement and prosecution of actions, and yet that during the very time when actions could be brought against the carriers, the statutes of limitation were suspended, and this by virtue of an act passed to terminate Federal control and restore the railroads to their owners.

It is conceded that the Legislature has power to repeal or suspend the effect of a statute of limitations before it operates, and to give such repeal or suspension a retroactive effect. *Pearsall v. Kenan,* 79 N. C., 472. But "the presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied." *United States v. Fidelity and Guaranty Co.,* 209 U. S., 306 (52 L. Ed., 804), cited and approved by *Allen, J.,* in *Barnhardt v. Morrison,* 178 N. C., 563. In the instant case the three-year statute had not operated to bar plaintiff's action on 28 February, 1920, and therefore the power of the Legislature to suspend a statute of limitations so as to revive an action which is barred, is not presented. See *Campbell v. Holt,* 115 U. S., 620 (29 L. Ed., 483), and *Whitehurst v. Dey,* 90 N. C., 542. If plaintiff's construction, however, is sustained, the act will apply to a cause of action already accrued, and against which the statute of three years had been running for nearly two years and nine months. This construction ought not to be adopted, "unless the words of the statute are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of Congress cannot otherwise be satisfied."

The purpose of Congress in enacting the Transportation Act, 1920, is declared in the title to be "To provide for the termination of Federal control of railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employees; to further amend an act entitled 'An act to regulate commerce, approved 4 February, 1887, as amended,' and for other purposes." There is nothing in the act which discloses any purpose to affect by legislation any other matters.

Section 206 of the act, which includes paragraph (f), has as its subtitle "Causes of action arising out of Federal control." It does not purport to deal with any other causes of action, of which courts of law or equity or admiralty courts have jurisdiction.

Paragraph (a) provides that "Actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal

Control Act or the act of 29 August, 1916), of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose. Such actions, suits or proceedings may, within the periods of limitation now prescribed by State or Federal statutes, but not later than two years from the passage of this act, be brought in any court which, but for Federal control, would have had jurisdiction of the cause of action had it arisen against such carrier."

Here is a specific reference to "State or Federal" statutes of limitation, and an express provision that causes of action arising during Federal control shall be barred at the expiration of two years from 28 February, 1920. The effect of this provision is to shorten the period in which such actions may be commenced, when the State or Federal statute applicable is more than two years, whereas paragraph (f), if construed as plaintiff contends, would lengthen the time within which actions arising prior to Federal control must be commenced. This paragraph is applicable expressly to actions arising out of Federal control and commenced in State or Federal courts. Congress is here dealing with actions arising out of the "possession, use or operation" by the Government of the railroads of common carriers, upon the ground that the Government is liable and suable on these causes of actions, as held by *Justice Brandeis* in the *Ault case.*

Inasmuch as Federal control is terminated by the act, and all powers theretofore conferred upon and exercised by the President with respect to these railroads and systems of transportation shall no longer be had or exercised by him, provision is made in this and succeeding paragraphs of the section for the commencement and prosecution of such actions as have arisen out of Federal control, in any court, State or Federal, which has jurisdiction, and for the payment of final judgments, decrees and awards in such actions, suits and proceedings.

Paragraph (c) deals with and provides for complaints for reparation for damages which may be filed with the Interstate Commerce Commission.

Paragraph (f), relied upon by plaintiff as suspending the statute of limitations plead in this action, deals with (1) actions against carriers, and (2) claims for reparation to the Interstate Commerce Commission for causes of action arising prior to Federal control. The only "actions against carriers" for which the Government has assumed liability, or for which Congress has provided, are actions arising out of Federal control. These actions may be commenced in State or Federal courts within the time prescribed in paragraph (a), after termination of Federal control, provided such time shall not exceed two years from 28 Feb-

ruary, 1920. Thus a date is fixed when the Government may ascertain its total liability for actions growing out of the possession, use or operation of the railroads and systems of transportation which were taken over pursuant to acts of Congress enacted as a war measure.

The interstate Commerce Commission was created by Congress before the existence of a state of war between the United States and the Imperial German Government, and continues after the termination of the war. It has jurisdiction to hear and determine claims arising both prior to and during the period of Federal control. The power of Congress to legislate, both as to its jurisdiction and procedure, is unquestioned.

Paragraph (a) prescribes the period of limitations for the commencement of actions against carriers arising out of Federal control. Such periods are the same as those prescribed by State or Federal statutes, provided they shall expire not later than two years after 28 February, 1920. Congress has not undertaken to suspend the statutes of limitation, State or Federal, applicable to actions against carriers arising prior to Federal control. Claims for reparation may be filed with the Interstate Commerce Commission within one year after the termination of Federal control, but the period of Federal control shall not be computed for the commencement of causes of action upon which complaints are filed which arose prior to Federal control.

Paragraph (f) of section 206 of the Transportation Act, 1920, has been relied upon by plaintiffs in actions brought in other jurisdictions as suspending State statutes of limitation in actions against carriers arising prior to Federal control. The construction of this statute has not been uniform, and courts, both State and Federal, have not agreed in their decisions upon the question presented.

In *Bell v. Baker,* 249 S. W., 246, decided 7 February, 1923 (rehearing denied 7 March, 1923), the Court of Civil Appeals of Texas held that the statute applies to actions against carriers in Federal courts under Federal laws only. This was an action for damages arising from personal injuries sustained on 9 February, 1917. The action was commenced on 19 January, 1921. The period of limitation under the Texas statute was two years. *Fly, C. J.,* writing the opinion of the Court, says: "There is nothing in the law that indicates in the slightest that it had any other reference than to the Federal laws, about which Congress is given constitutional authority to make rules. This view is fortified by the fact that the provision applies to actions against carriers or in claims for reparation to the commission. The latter being only before a Federal commission and being linked with actions against carriers, we must conclude that actions against carriers in Federal courts

are intended. Clearly, actions against carriers in State courts, founded on matters arising before Federal control began, are so utterly beyond the province of Federal control that it will be presumed that no such unwarrantable interference with State laws was intended. Congress had nothing to do with causes of action arising against railroad companies before, as a war measure, the President of the United States was clothed with autocratic powers over the common-carrier systems of America."

In *Georgia Southern & F. Ry. Co. v. Smiley,* 108 S. E., 273, the Supreme Court of Georgia held that section 206 (f) of the Transportation Act, 1920, applies only to Federal courts. The cause of action arose on 11 December, 1917; the action was commenced on 22 June, 1920. The Georgia statute prescribed two years as the period in which actions must be brought. *Hill, J.,* says: "There is nothing in the Federal Act of 1920 which expressly or by necessary implication repeals the authority conferred by the act of 1918 to bring the suit in the State courts according to law."

In *Cravens v. Louisville & N. R. R.,* 242 S. W., 628, the Court of Appeals of Kentucky, in opinion filed 28 February, 1922 (rehearing denied 28 June, 1922), held that the statute is not limited to actions brought in Federal courts, and applies also to actions in the State courts. The cause of action arose on 20 December, 1917; the action was commenced on 17 January, 1919; the one-year statute of limitations was pleaded. *Clay, J.,* citing *Stewart v. Bloom,* 11 Wall., 493 (20 L. Ed., 176), concludes that the statute applies to actions in State courts, and holds that the statute as thus construed is valid and is within the power of Congress as a war measure. This act was passed in 1920, although the armistice had been signed on 11 November, 1918, thus, in the words of President Wilson, addressing a joint meeting of the Senate and House of Representatives, bringing the war to an end. The Court of Appeals of Kentucky had held, in *Louisville & N. R. R. Co. v. Steele,* 202 S. W., 878, *Settle, C. J.,* writing the opinion, which was filed 23 April, 1918, that section 10 of the Federal Control Act, approved 21 March, 1918, did not prevent a litigant from bringing his action against a common carrier in any court of competent jurisdiction.

In *Standley v. U. S. R. R. Administration et al.,* 271 Fed., 794, it is held by *United States District Judge Westenhaver* that the time during Federal control should not be computed in determining whether the plaintiff's action, which accrued 21 July, 1914, was barred by the four-years statute of limitations of Ohio. It was ordered, however, that the action be dismissed as against the Director General, for the reason that it arose prior to Federal control, but leave was given plaintiff to amend his petition as against the Pennsylvania Railroad Company.

In *New York Central R. R. Co. v. Lazarus,* 278 Fed., 900, *Manton, Circuit Judge,* says: "It is contended that section 206 (f) of this act invalidates the period of limitation set forth in the conditions of the uniform bill of lading, and that therefore this action was commenced in time. The argument is, that section 206 (f) applies to all periods of limitations, whether applied by contract, regulation or statute. As the phrase, 'periods of limitation,' is used in these sections of the Transportation Act, we think the words apply to limitations 'now prescribed by the State or Federal statutes.'" This action was brought in the District Court of the United States for the Southern District of New York. The Circuit Court of Appeals reversed the judgment in the District Court, holding that the action could not be maintained because of the provision in the bill of lading. The decision is based upon the holding that section 206 (f) does not apply to a period of time prescribed by contract for the commencement of the action.

In *Hilbert v. Pennsylvania R. R. Co.,* 120 Atl., 778, a compulsory nonsuit was sustained by the Supreme Court of Pennsylvania, because the action was not brought within the time prescribed by the bill of lading. The opinion of the Court, disposing of the suggestion that section 206 (f) of the Transportation Act, 1920, affects the action, concludes with these words: "Hence, as the cause of action did not accrue prior to Federal control, the last-quoted provision has no application, and we need not consider whether it applies to a contractual limitation."

In *Arcadia Mills et al. v. Carolina C. & O. Ry. et al.,* 293 Fed., 693, *Knapp, Circuit Judge,* holds that by reason of section 206 (f) the time during Federal control should be deducted in determining whether an action brought in the United States District Court of South Carolina to enforce an order of the Interstate Commerce Commission is barred. The question as to whether the section is applicable to an action brought in a State court upon a cause of action within the jurisdiction of a State court is not presented.

A careful consideration of the question so clearly presented to us by this appeal leads to the conclusion that the assignment of error is not sustained, either on principle or by the authorities. The construction of section 206 (f) of the Transportation Act, 1920, as set out in this opinion, makes it unnecessary to consider or to discuss the interesting question as to whether, if the construction insisted upon by plaintiff is correct, it was within the constitutional power of Congress, after the virtual repeal of the Federal Control Act of 1918, enacted as a war measure, to enact this statute so construed. "A statute of limitations, strictly so called, excluding, of course, those cases where a title or right may be acquired by prescription, operates generally on the remedy

directly, and does not extinguish the right. The power of the Legislature of each State to enact statutes of limitation and rules of prescription is well recognized and unquestioned. It is a fundamental principle of law that remedies are to be governed by the laws of the jurisdiction where the suit is brought. The *lex fori* determines the time within which a cause of action shall be enforced." 17 R. C. L., Art. Lim. of Actions.

For the reasons stated, and upon the authorities cited therein, we are of the opinion that the judgment should be affirmed, for that there is

No error.

M. F. DOUGLAS v. FRED B. RHODES, INDIVIDUALLY, AND FRED B. RHODES, TRADING AS FRED B. RHODES COMPANY.

(Filed 19 November, 1924.)

Mortgages—Sales—Description of Land—Notice—Statutes—Deeds and Conveyances.

Advertisements for the sale of land under foreclosure of mortgage or deed of trust are required by our statute (C. S., 2588) to describe the lands "substantially" as in the conveyance thereof; and while it may be more advisable to give the exact description, the deed made in pursuance thereof is not necessarily void for lack of such description, as where the land is designated as a well-known and certain tract, or place of business, or manufacturing plant, with reference to the book in the office of the register of deeds where the description is given, with number of page, etc., for a more particular description, it is a sufficient description of the land and will convey the title if the notice of such has been published in accordance with the terms of mortgage or deed in trust.

APPEAL by defendant from *Bryson, J.*, and a jury at August Term, 1924, of GUILFORD.

Plaintiff claims he is the owner and entitled to the possession of a certain piece of land in High Point Township, Guilford County, North Carolina, describing it by metes and bounds, containing 6.75 acres more or less, subject to two deeds of trust (1) $40,000 to A. M. Scales, trustee, (2) $13,375 to Fred Peacock, trustee. That the defendant is in the unlawful possession of same and prays judgment for the possession.

The defendant admits the indebtedness above set forth, but denies that he is in the unlawful possession of the land and that the plaintiff is entitled to the possession.

The defendant, for a further defense says: "That on or about the 15th day of March, 1924, the plaintiff made a sale of the property

described in the complaint which sale was not legal in that the plaintiff did not advertise the sale in the newspaper, at the courthouse door and three other public places as required by law and the deed of trust, and that the advertisement in the paper did not describe the property as it is described in the deed of trust and a deed thereunder conveyed no title."

The defendant demands that the cause of action be dismissed.

It was shown by the testimony and uncontradicted that the land was advertised at the courthouse door in Guilford County and three other public places in the county, and that it was published once a week for four weeks in the "Greensboro Patriot," according to C. S., 687 and the terms of the deed in trust.

The record shows a deed of trust from defendant and wife to E. W. Myers, trustee. A deed from E. W. Myers, trustee, to Margaret Douglas, deed from M. G. Douglas and Margaret Douglas to R. M. Roberson and from R. M. Roberson to the plaintiff. All the deeds were in proper form and duly executed and recorded. All describing the land set forth in the complaint by metes and bounds.

The issues submitted to the jury and answers thereto were as follows:

1. Is the plaintiff the owner and entitled to the immediate possession of the land described in the complaint? Answer: "Yes."

2. Is the defendant in the wrongful possession of said land? Answer: "Yes."

From the judgment rendered the defendant excepted and appealed to the Supreme Court.

The following exceptions and assignments of error were made by defendant:

1. To the refusal of the court to direct a verdict for the defendant.

2. To the instruction of the court that the notice of sale set out in the record was, in law, sufficient.

3. To the refusal of motion to set aside the verdict for errors contained in the trial and in the instructions and to the rendering of the judgment set out in the record.

Broadhurst & Robinson for plaintiff.
Z. I. Walser for defendant.

CLARKSON, J. From the entire record the only material matter to be considered is whether the description of the land in the advertisement made by E. W. Myers, trustee, was a substantial compliance with the law in regard to sales under deeds of trust or mortgages. The advertisement by E. W. Myers, trustee, is as follows:

LAND SALE

"Pursuant to the powers vested in him by a deed of trust executed to him by Fred B. Rhodes and wife, dated 1 August, 1923, and recorded in Book 418, page 558, in the office of the register of deeds of Guilford County, N. C., the undersigned will sell to the last and highest bidder for cash at public auction in front of the east door of the courthouse in Greensboro, Guilford County, on the 15th day of March, 1924, at 12 o'clock noon, a certain tract or parcel of land situated in High Point Township, Guilford County, and more particularly described as follows:

"Being that land and buildings known as the Melton-Rhodes Company or the Rhodes Company factory and consisting of about 6.75 acres, together with the machinery in said buildings. For a description by metes and bounds see above mortgage deed.

"This sale is made subject to any prior valid mortgages that may be a lien on said premises superior to the above deed of trust.

"Default having been made in the payment of interest on the note secured by said deed of trust, the undersigned is fully authorized and empowered to make this sale. This 11 February, 1924."

It seems to be settled law in this State that C. S., 687, as regards to the notice at the courthouse door and three other public places in the county for 30 days immediately preceding the sale and also published once a week for four weeks in a newspaper published in the county, applies to *execution* and *judicial sales* of real estate. It is a matter of contract under deed of trust, mortgage, etc., of real estate. *Hogan v. Utter,* 175 N. C., p. 332 and cases cited.

C. S., 2588 is as follows: "Real Property; notice of sale must describe premises. In sales of real estate under deeds of trust or mortgages it is the duty of the trustee or mortgagee making such sale to fully describe the premises in the notice required by law substantially as the same is described in the deed of authority under which said trustee or mortgagee makes such sale."

We think a fair construction of C. S., 2588, *supra,* would be applicable to a sale under the power in a deed in trust or mortgage. The notice *required by law* under the statute would be the notice in the deed in trust or mortgage. This section is under C. S., ch. 54—"Mortgages and Deeds of Trust." The language of the section is *"fully describe* the premises . . . *substantially* as the same is described in the deed of authority, etc." In *House v. Parker,* 181 N. C., p. 42, it is said: "But the general laws of the State in force at the time of its execution and performance enter into and become as much a part of the contract as

if they were expressly referred to or incorporated in its terms. *O'Kelly v. Williams,* 84 N. C., 281; *Graves v. Howard,* 159 N. C., 594, and *Van Huffman v. Quincy,* 4 Wallace, 552."

The contention of the defendant is that the trustee's deed is void in not complying with the statute "in that it failed to describe the property 'substantially' as it is in the deed of trust—in fact not at all." We cannot so hold. If the legislature had intended that the real estate (set forth by metes and bounds in the deed of trust in the present case) in a deed of trust or mortgage should be described by metes and bounds when advertised for sale under the terms of the deed of trust or mortgage, it could have easily said so in the statute, but on the contrary it used the word "substantially." The word "substantially," Webster defines to mean: "In a substantial manner, in substance, essentially." It does not mean an accurate or exact copy. The purpose and intent of the statute was to give complete and full notice to the public of the land to be sold, so that the public generally would know and understand from the advertisement the exact property offered for sale.

In the case at bar, the notice contained the name of the grantors, Fred B. Rhodes and wife, the date, book and page in the office of the register of deeds of Guilford County, N. C., in which the deed of trust was recorded, terms, date, hour and place of sale, "a tract or parcel of land in High Point Township, and more particularly described as follows: being that land and buildings known as the Melton-Rhodes Company or the Rhodes Company factory and consisting of about 6.75 acres together with the machinery in said buildings. For a description by metes and bounds see above mortgage deed."

There is no concealment, and nothing to mislead in the advertisement, "land and buildings known as the *Melton-Rhodes Company* or the *Rhodes Company factory,*" acreage given together with machinery in buildings. Then, if anyone wanted to know the metes and bounds, reference is made to above mortgage deed which gives the page in the registry office.

In *Newman v. Jackson,* 25 U. S., (12 Wht.) p. 570, 6 Law Ed., it is said: "The law has prescribed no particular form for a notice of this description. It is sufficient if, upon the whole matter, it appears calculated reasonably to apprise the public of the property intended to be sold."

In 19 R. C. L., p. 571, part of sec. 382, it is said: "The notice of sale ought to contain such a description of the property to be sold as will enable intending purchasers, in the exercise of ordinary diligence, to identify it. It should give as full and complete a description of the

property as is possible in the exercise of ordinary diligence for that purpose, in view of the character, condition, and location of the property. It is not necessary, however, to give a minute description of the exact location of the property by metes and bounds; any description which informs the public of the property to be sold is sufficient. Nothing further is required if the information given enables the public to understand, by the exercise of ordinary intelligence, what property is offered for sale, and to identify the same by examination, if a more particular knowledge is desired."

Our statute is in affirmance of the common law which from the authorities hold that the notice must give the description substantially as described in the deed of authority under which the sale is made. Sometimes the description by metes and bounds would not be as intelligible to the public as the reference to a well known place as "Mount Vernon," the home of George Washington, "Monticello," the home of Thomas Jefferson, "Arlington," the home of Robert E. Lee, or "Hermitage," the home of Andrew Jackson.

In the advertisement we have land and buildings known as "Melton-Rhodes Company" or the "Rhodes Company factory."

In *Jessup v. Nixon,* 186 N. C., p. 102, it is said: "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." *Carson v. Fleming, post,* 600.

In *Hutton v. Cook,* 173 N. C., p. 498, *Walker, J.,* said: "The second deed referred to the first for description of land and this description is to be taken as embodied in the second deed, *Gudger v. White,* 141 N. C., 507."

The courts do not look with favor on any notice in the sale of real estate under power given unless the description is full and will give clear and intelligent notice to the public of the land to be sold. It may be noted that to prevent wrong and oppression that frequently occurred in these power of sales, necessary for the life of business, the Legislature has made provision for re-opening these sales on advance bids. C. S., 2591; *In re Ware,* 187 N. C., p. 693.

In *Hinton v. Hall,* 166 N. C., p. 480, it was said: "It was true that failure to advertise according to the terms of the power of sale invalidates the sale. *Eubanks v. Becton,* 158 N. C., 230. But it is said that such sale is not absolutely void, but will pass the legal title. *Eubanks v. Becton, supra; Brett v. Davenport,* 151 N. C., 58. While such sale would be set aside as to the purchaser, a subsequent or remote grantee without notice and in good faith takes a good title against such defects

or irregularities in the sale of which he had no notice. 27 Cyc., 1494." *Brewington v. Hargrove,* 178 N. C., p. 146; *Harvey v. Brown,* 187 N. C., p. 365.

It may be noted that sec. 1042, Revisal of 1905, is as follows:

"Advertised at courthouse door. All property, real and personal, sold under the terms of any mortgage or other contract, expressed or implied, whether advertised in some newspaper or otherwise, shall be advertised by posting a notice at some conspicuous place at the courthouse door in the county where the property is situated, such notice to be posted for at least twenty days before the sale, unless a shorter time be expressed in the contract."

C. S., 2585 is in the exact language of 1042, *supra,* except the words "All personal property" are in the section instead of "All property real and personal"—"real property" is left out. In Public Laws 1909, ch. 49, "real and personal" were struck out and after "all" the word "personal" was inserted. The section as thus amended was brought forward in C. S., 641, Revisal of 1905, is as follows:

"How advertised; cost of newspaper publication. No real property shall be sold under execution, deed in trust, mortgage, or other contract hereafter executed, until notice of said sale shall be posted at the courthouse door and three other public places in the county for thirty days immediately preceding such sale, and also published for four weeks in some newspaper published in the county, if a paper is published in the county: *Provided,* the cost of such newspaper publication shall not exceed three dollars, to be taxed as cost in the action, special proceeding or proceeding to sell." Public Laws 1909, ch. 705, after "also published" in line 6 was added "once a week." This section is brought forward and is substantially C. S., 687. *Palmer v. Latham,* 173 N. C., p. 61 and *Hogan v. Utter, supra,* hold this section applies to *execution* and *judicial sales.*

It would be a matter for the Legislature to determine if sales under deeds of trust or mortgages on land should be advertised as is required in execution and judicial sales or what other notice should be given. It is usual to advertise under the terms of the real estate deed of trust or mortgage and also as required in execution and judicial sales. This course is commended, but is not a legal requirement, and from the record seems to have been done in the present case. Frequently the requirements in the deed of trust or mortgage are the same as the law provides for sales of real estate under execution or judicial sale.

From a careful inspection of the record and examination of the authorities cited by counsel, we can find

No error.

C. R. HILL v. HUFFINES HOTEL COMPANY.

(Filed 19 November, 1924.)

1. Pleadings—Judgment by Default—Clerks of Court—Judge—Default and Inquiry—Jurisdiction.

Chapter 304, Public Laws of 1919, and chapter 92, Public Laws, Extra Session 1921, in regard to pleadings, etc., before the clerk of the Superior Court, do not in all instances deprive the Superior Court judge of his jurisdiction to enter judgment by default final, or default and inquiry in proper instances, and where the clerk has failed to enter a judgment by default and inquiry by default of an answer when the statute so provides, but transfers the cause to the civil issue docket, it is not error for the trial judge, after the lapse of several terms, and the answer having long since been due, to proceed with the inquiry before the jury on the issue of damages, and when accordingly the jury has assessed the damages, his action in refusing to sign judgment thereon on defendant's motion as a matter of law as not being in accordance with the due course and practice of the courts, is reversible error.

2. Same—Meritorious Defense.

Upon defendant's motion to set aside a judgment for excusable neglect, it is necessary for him to also show a meritorious defense.

APPEAL by plaintiff from *Lane, J.*, at April Term, 1924, of GUILFORD. Action to recover damages for false imprisonment.

The only evidence offered upon the trial was the testimony of the plaintiff, the substance of which follows. In November, 1922, the plaintiff registered as a guest at the Huffines Hotel in Greensboro and remained there about two days. He was sitting in his room reading a magazine at 9:30 p. m., when the manager of the hotel entered the room without knocking and in a brusque manner said that the water was running through the floor of the room occupied by the plaintiff to the room below. The plaintiff replied he had not been near the lavatory and did not know the water was running. He afterwards found a wet spot there on the carpet about two feet in diameter, but the carpet had absorbed the water. Plaintiff went to bed and after reflecting concluded he would check out. He went to the office and found a charge against him of $25 for damage to the room. He refused to pay it and tendered the amount of his bill, but the clerk refused to check him out. The manager, who had been sent for, came in and insisted upon plaintiff's payment of this charge. This was at midnight. The manager called for policemen and two plainclothes men came to the hotel. He again demanded the $25 and when the plaintiff still refused to pay it said the plaintiff would have to pay it or go to jail. The policemen arrested the plaintiff without a warrant and carried him along the main street

to police headquarters. The manager was present but no offense was proved and the plaintiff was released.

The summons against the defendant was issued 18 November, 1922, was returnable on 5 December, and was served 22 November. The complaint was filed in due time, but the defendant did not file an answer. About 18 months intervened between the term when the summons was served and the complaint filed and the term at which the action was tried. Meantime many terms were held for the trial of both civil and criminal actions. The case was regularly put on the calendar for trial and at the hearing the court charged the jury fully upon all phases of the evidence and the law applicable, and the following verdict was returned:

1. Did the defendant cause plaintiff to be arrested without a warrant or other lawful process, as alleged in the complaint? Answer: "Yes."

2. What damage, if any, is plaintiff entitled to recover? Answer: "$2,500."

The plaintiff tendered a judgment in accordance with the verdict and thereupon defendant through counsel entered a general appearance, objected to the signing of the judgment so tendered and moved to set aside the verdict for the following asserted reasons:

1. For that the summons was not duly served upon defendant as required by the pertinent provisions of the statutes in such case made and provided.

2. For that the failure of defendant to file an answer and make defense was due to excusable neglect.

3. For that the verdict was excessive.

4. For that the trial and verdict were not in accordance with the regular and orderly practice of the court in that, no answer having been filed, the only course open to plaintiff was to seek and obtain a judgment by default and inquiry at this term and prosecute the inquiry at a succeeding or the next succeeding term of the court.

Upon this motion defendant submitted affidavits denying plaintiff's testimony and alleging that plaintiff was drunk and disorderly and that he had not been arrested. Plaintiff filed counter affidavits and the judge refused to sign the judgment tendered by plaintiff and refused to set aside the verdict on the alleged ground of a want of service, or of excusable neglect, or excessive damages, and found that the defendant had not shown a meritorious defense to the cause set out in the complaint, but made the following order:

"The court, being of the opinion that the submission of the case at this term to a jury and the verdict rendered thereupon are not in accordance with the regular and orderly practice of the court and with the provisions of the statutes in such case made and provided, allows the motion as predicated upon the fourth ground and sets the verdict

aside for the reason assigned on that ground and for that reason alone. To the action of the court in so setting aside the verdict and in refusing to sign the judgment tendered by plaintiff, plaintiff excepts and appeals in open court from the action and ruling of the court to the Supreme Court."

Bynum, Hobgood & Alderman and G. M. Patton for plaintiff.
Brooks, Parker & Smith for defendant.

ADAMS, J. The trial judge found the facts to be that the defendant had been duly served with summons and had not shown excusable neglect or a meritorious defense, and that the damages awarded were not excessive. He set aside the verdict, not as a matter of discretion, but for the assigned reason that the trial had not been conducted in accordance with the regular and orderly practice of the court. He held that the only course open to the plaintiff was to obtain a judgment by default and inquiry and to prosecute the inquiry at a succeeding term of the court; and the sole question to be decided is whether there was error in this ruling.

The summons was issued 18 November, 1922, several months after chapter 92 of the Public Laws, Extra Session, 1921, had gone into effect. The provisions of this act in reference to process and pleadings differ materially from the statutes previously in force.

Prior to the act of 1919 (Public Laws, ch. 304) the practice, concisely stated, was as follows: the summons was returnable to a regular term of the Superior Court to be held in the county from which it was issued (Revisal of 1905, secs. 430, 434, 435); the complaint was to be filed in the clerk's office on or before the third day of the term to which the action was brought, and at the same term the defendant was to appear and demur or answer (*ibid.*, sec. 473); if the defendant failed to appear the plaintiff, if not entitled to a judgment by default final, was authorized to take a judgment by default and inquiry. The inquiry was to be executed at a succeeding term for the obvious reason, if for no other, that the defendant's right to answer precluded such inquiry at the return term.

In the act of 1921, *supra,* it is provided that a clerk of the Superior Court may enter a judgment by default and inquiry, and further: "If no answer is filed the plaintiff shall be entitled to judgment by default final or default and inquiry as authorized by C. S., 595, 596, and 597 and all present or future amendments of the said sections; . . . and in all cases of judgment by default and inquiry rendered by the clerk, the clerk shall docket the case in the Superior Court at term time for trial upon the issues raised before a jury, or otherwise as provided by law,

and all judgments by default and inquiry shall be of the same force and effect as if rendered in term and before a judge of the Superior Court." P. L., 1921, Ex. Ses., ch. 92, sec. 1 (9, 12).

As we understand the defendant it insists that a judgment by default and inquiry should have been entered by the clerk and the cause should then have been transferred to the Superior Court docket for the award of damages. The position assumes, we take it, that the clerk had the exclusive power to render such judgment and that the case when heard was not properly before the judge. When the Legislature empowered clerks to enter judgments by default and inquiry as indicated in the sections referred to, it no doubt intended thereby to expedite litigation. This provision was in the nature of an enabling act and we apprehend was never intended to deprive the Superior Court in term of its jurisdiction to render judgments by default final or by default and inquiry, and it cannot reasonably be construed as effective for such purpose.

The statute further provides that when pleadings are made up and issues are joined the clerk shall forthwith transmit the original papers in the cause to the court at term for trial upon the issues, when the case shall be proceeded with according to the course and practice of the court. Subsection 13. If this statute were interpreted as providing that original papers can be transferred to the docket for trial in term only after an answer is filed, some difficulty might be encountered in assessing damages in cases similar to the one under consideration. A judgment by default and inquiry admits that the plaintiff has a cause of action and is entitled to nominal damages, but the burden of proving any damages beyond such as are nominal still rests upon the plaintiffs. *Osborn v. Leach,* 133 N. C., 428, 432; *Stockton v. Mining Co.,* 144 N. C., 595, 600. Though the cause of action be admitted the damages must be determined by the jury, and for this purpose the case must go to the trial docket. In *Brown v. Rhinehart,* 112 N. C., 772, 776, *McRae, J.,* said: "We think the case was properly placed upon the civil issue docket, although no issues had been joined, for not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court, are to be put upon this docket." The case before us was put upon the civil issue docket and remained there more than fifteen months, and was then put upon the calendar and duly called for trial. The contention that the case should be treated as if before the clerk and not before the judge cannot, therefore, be upheld.

The question next to be considered is whether the lower court committed error in submitting the issues to the jury. In support of its contention that there was error the defendant relies on *Brown v. Rhinehart, supra.* In that case the summons was issued 21 July, 1891, was made returnable to the August term, and was served more than ten days

prior thereto; but no complaint was filed. At the next (December) term the plaintiff filed his complaint, but took no further action. At the March Term, 1892, the case was put upon the calendar and when it was reached and before the jury was empaneled the plaintiff made a material amendment to his complaint. Issues were submitted to and answered by the jury. A final judgment was entered upon the verdict. At the August Term of 1892 one of the defendants moved to set aside the judgment on the ground of irregularity. This Court held that the term at which the complaint was amended was to be regarded as the return term, and as the defendant had the right to answer during the term the issues were improperly submitted to the jury. True, *McRae, J.*, said: "We nowhere find that the inquiry may be executed at the same term as that at which judgment by default was rendered, unless it is expressly allowed to be done by statute"; but the learned *Justice* evidently referred either to the term to which the summons is returnable or to a term which, as in case of amendment or failure to file a complaint, should be treated as the return term. *Roberts v. Allman,* 106 N. C., 391.

When the summons is served and the complaint duly filed, and several terms intervene before the case is called for trial, what satisfactory reason can be given for declaring a judgment fatally irregular simply because an issue as to the cause of action has been answered by the jury? If an answer denying the complaint had been filed the same issues would have been raised. Shall the defendant's refusal or negligent failure to file an answer place him in a more favorable position than he would have occupied if he had answered the complaint and raised the very issues which were submitted to the jury?

Instead of submitting the two issues to the jury the plaintiff could have taken a judgment by default and inquiry and called for an assessment of damages at the succeeding term; but as this was not the return term the course pursued was at most a technical irregularity which did not affect the merits. By submitting the issues—upon each of which the judge charged the jury "fully and at length"—the plaintiff assumed, not only the risk of an adverse verdict on the first issue, but a burden not imposed by the law. We are unable to see that the defendant has thereby suffered material prejudice.

It should be noted, too, that the lower court held that the defendant has no meritorious defense to the plaintiff's action. Ordinarily a judgment, even if irregular, will not be set aside unless there is a "reasonably probable show of merits." *Gough v. Bell,* 180 N. C., 268, 271; *Rawls v. Henries,* 172 N. C., 216; *Glisson v. Glisson,* 153 N. C., 185.

The plaintiff is entitled to a judgment upon the verdict and the order setting aside the verdict is therefore

Reversed.

STATE v. T. C. JOHNSON.

(Filed 19 November, 1924.)

1. **Schools—Criminal Law—Statutes — Indictment—Compulsory Attendance.**

For a conviction under the provision of C. S., 5758, it is necessary for the indictment to allege, and the State offer evidence tending to show not only that the parent or guardian of the children within the described age had failed or refused to send them to the public school within the district, but also that such child or children had not been sent to attend school periodically for a period equal to the time which the public school in the district in which they reside shall be in session.

2. **Indictment—Amendment—Courts—Schools—Statutes.**

Where the indictment in the court of a justice of the peace does not sufficiently allege the failure of the parent or guardian to send the child to another than the public school in the district, as required by C. S., 5758, an amendment may be allowed by the judge of the Superior Court to cure the defect and proceed with the trial: but such amendment may not be allowed in the Supreme Court on appeal over an error committed in the instructions of the trial judge to the jury to the defendant's prejudice. C. S., 1500 (12), (13).

3. **Same—Evidence—Burden of Proof—Appeal and Error—Instructions.**

Where the indictment is defective in failing to charge that a parent or guardian had also failed to send the child or children to another than the district school, etc., under the provisions of C. S., 5758, and the State offers no evidence in respect to it, it is not required that the parent or guardian offer evidence to show that he had complied with this proviso of the statute: and an instruction of the court to the jury placing the burden upon the defendant to so show, is reversible error.

CRIMINAL ACTION heard on appeal from a justice's court before *Shaw, J.*, and a jury, at April Term, 1924, of ANSON.

The action is intended as a prosecution under the compulsory school attendance law, C. S., 5758, etc., and thus far the only charge appearing in the record against defendant, and on which he was convicted, is contained in the justice's warrant, which is as follows:

"To the constable or other lawful officer of Anson County, Greeting:

Whereas, complaint has been made to me this day, and on the oath of Miss Mary Robinson, that T. C. Johnson, did, on the fall day of 1923, January, 1924, unlawfully and willfully, with force and arms, at and in the county aforesaid, T. C. Johnson being the father of certain children between the ages of seven and fourteen has failed or refused to send the same to the public school of his district as required by the laws of North Carolina, contrary to the statute made and provided, and

against the peace and dignity of the State. Vivian Johnson, aged 7 years, Fannie Johnson, aged 9 years, Rachel Johnson, aged 11 years, Flora Johnson, aged 13 years, *these are therefore to command you* to forthwith apprehend the said T. C. Johnson and him have before me at my office in Wadesboro Township, on the 29th day of January, at 3 p. m., 1924, then and there to answer to the said charge, and be dealt with according to law.

Given under my hand and seal this 25th day of January, 1924.

J. E. GRAY, J. P. (Seal)

Cause having been removed on affidavit, was heard before M. W. Gaddy, J. P., in the county. Defendant convicted and appealed to the Superior Court. On calling cause, defendant demurred to the warrant and moved to quash same in that it failed to charge criminal offense, motion overruled, and defendant excepted. On plea of not guilty and evidence submitted, defendant was convicted in the Superior Court, and from judgment thereon excepted and appealed assigning errors, among them:

1. The refusal to sustain his demurrer and motion to quash.
2. Several exceptions made by him to the charge of the court.

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

Brittan & Brittan, M. C. Lisk, A. A. Tarlton for defendant.

HOKE, C. J. The statute on which the prosecution is based, C. S., 5758 is as follows:

"Parent or guardian required to keep child in school; exemptions. Every parent, guardian, or other person in the State having charge or control of a child between the ages of eight and fourteen years, shall cause such child to attend school continuously for a period equal to the time which the public school in the district in which the child resides shall be in session. The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse the child from temporary attendance on account of sickness or distance of residence from the school, or other unavoidable cause which does not constitute truancy as defined by the State board of education."

And the penalty imposed contained in sec. 5761, is a fine of not less than five dollars nor more than twenty-five dollars.

It will be noted that the statute does not make the failure to cause the attendance of children in the public schools a crime, but defines the offense as the failure on the part of the parent or guardians having

control of children of the specified ages to cause them to attend "school" continuously for a period equal to the time the public schools of the district shall be in session.

In the warrant defendant is charged only with a failure to cause attendance in the public schools, and does not therefore contain the charge of a criminal offense, and should have been quashed or amended so as to state properly and sufficiently the charge insisted upon by the State.

In Clark's Criminal Procedure, page 359, the principle is stated as follows:

"It is the rule that all indictments upon statutes must state all the facts and circumstances which go to make up the offense as defined in the statute, so as to bring the defendant precisely within it. 'I take it for a general rule,' it is said by Hawkins, 'that, unless the statutes be recited, neither the words *"contra formam statuti"* nor any periphrasis, intendment, or conclusion will make good an indictment, which does not bring the fact prohibited or commanded, in the doing or not doing of which the offense consists, within all the material words of the statute.' Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in the indictment. It is a universal rule that no indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all the ingredients of which the offense is composed."

Even under a statute containing a proviso or an exception if the terms of the proviso are but a part of the description of the offense itself, they must be negatived in the indictment or warrant, and as a general rule, such negative averments must be proved by the prosecution. *S. v. Connor,* 142 N. C., pp. 700-704.

Under the broad powers of amendment, as to justice warrants, both in criminal and civil matters, C. S., 1500, subsecs. 12 and 13, the defect might have been cured by amendment on motion made in the Superior Court. It may be in cases when the evidence is all set forth giving proper assurance as to the offense established against a defendant, an amendment might be allowed here, but the difficulty in the instant case, is that the same objection appears in the charge of the court on the trial of the issues before the jury. Thus the court instructed the jury, among other things, "Now, if you find the facts to be as shown by the evidence, gentlemen, you will find that under the law as to public schools the defendant was required to send his children to school, the public school in his district." And again. Defendant excepts.

("If the defendant relies upon his having sent his children to some other school than the school in question (a public school) the burden

is upon him to show that, or if he relies upon his children's being out of school on account of any legal excuse the burden is upon him to show that.")

To the foregoing charge the defendant excepts.

"That is a matter peculiarly within his knowledge, and the burden is not upon the State to show that the defendant sent his children to any other school and that is a matter of defense for the defendant to show. (If the State has shown that there was a public school being conducted in his district, an eight months term, and that he has failed to send his children to this school and has violated this statute, nothing else appearing, then the defendant would be guilty." Defendant excepts.

As we have heretofore shown in criminal prosecutions it is required that the charge should state the essentials of the offense and what it is necessary to allege as a general rule, must be proved and that beyond a reasonable doubt. *S. v. Connor,* 142 N. C., *supra; S. v. Crowder,* 97 N. C., 432; *S. v. Wilbourne,* 87 N. C., 529.

True it is recognized that in certain instances when a statute creates a distinct and substantive criminal offense, the description of the same being complete and definite and by a proviso in the same or subsequent clause a certain case or class of cases is withdrawn from the effect and operation of the statute—a defendant who seeks protection by reason of the exemption and as to matters relating to him personally or peculiarly within his personal knowledge, has the burden of showing that he comes within the same. But in the case before us no such conditions are presented. There is no proviso or exception in this law. On the contrary the statute makes it an offense when there is a failure on the part of parents or guardians to cause children of specified ages under their control to attend school for a period equal to the time the public schools are taught in the district where the children reside, and in such cases all of the authorities are to the effect that the substantial features of the offense must be set forth in the warrant or bill of indictment, and must be proved as alleged beyond a reasonable doubt.

There was error therefore in the portions of the charge above specified for a defendant is not put on explanation by mere proof of a failure of children under his control to attend a public school and until there are facts in evidence permitting the inference of a failure to attend any properly conducted and recognized school for the time required and during a scholastic year there could be no valid conviction of the offense.

On the record the Court is of opinion that the defendant is entitled to a new trial and it is so ordered.

New trial.

STATE v. CHARLIE BEAVERS.

(Filed 19 November, 1924.)

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

The appellant must at the time call the attention of the trial judge to errors he is alleged to have committed in stating the contentions of the parties to the jury, and an exception after verdict comes too late to be considered on appeal.

2. Evidence—Interest—Instructions—Criminal Law.

The testimony of defendant if accepted as true by the jury, is given the same credibility as that of a disinterested witness, and a charge to that effect, after a proper instruction as to interest, is not error.

3. Constitutional Law—Criminal Law—Punishment—Intoxicating Liquor.

A sentence for two years for violating the Turlington Act will not be held as inhibited by our State Constitution as cruel and unusual, by reason of the fact that the judge after the trial and before sentence, made inquiry into the character of the defendant, the sentence imposed being in conformity with the provisions of the statute. Constitution, Art. I, sec. 14.

APPEAL by defendant from *Sinclair, J.*, and a jury, July Term, 1924, of DURHAM.

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

J. W. Barbee and R. M. Gantt for defendant.

CLARKSON, J. The defendant was originally tried before the recorder in Durham for violation of the Turlington or Conformity Act for possessing and transporting liquor, was found guilty and sentenced to the roads and appealed to the Superior Court.

The law in regard to the possession and transportation of liquor is fully considered in *S. v. McAllister*, 187 N. C., p. 400.

The defendant's first contention is that in the court below he did not have a fair and impartial trial. That the court below, in violation of C. S., 564, in the charge to the jury, contrary to the statute, gave an opinion whether a fact was fully or sufficiently proven—that being the true office and province of the jury.

From a careful reading of the evidence in the record, there was conflicting evidence in several respects. The court below told the jury: "The rule is that where there is a direct conflict of evidence it is the duty of the jury to try to reconcile before saying anybody has intentionally testified to falsehood, if you can do it on the ground that somebody is reasonably mistaken, that the person's memory is at fault.

But if you are unable to reconcile the testimony which is conflicting, it is your duty to say what evidence you will accept and what you will reject. It is entirely a matter for you to say what you will accept and what you will reject." The court below then mentioned the conflict in the evidence and spoke of them as contentions: "It is contended that in all these respects there is a direct conflict of evidence. It is your duty to say how much weight you give to each part of this conflicting evidence. You must use your common sense and judgment and conscience. It is your problem and yours entirely. *You must (not) regard anything I say as an expression of opinion about what the truth is, because it does not come into my province, gentlemen of the jury, to express my opinions about the facts as that is entirely a matter for the jury.*"

If calling attention to the discrepancies in the evidence is treated as giving a contention and were inaccurate, it was the duty of the defendant to bring it to the notice of the court at the time so that correction could be made. It is too late on appeal. *S. v. Ashburn,* 187 N. C., p. 723. We do not think on the whole this objection to the charge can be held as prejudicial.

The next contention is to the weight that should be given to the defendant's testimony. The court below gave the following charge: "It is proper in all criminal cases that you should scrutinize the evidence of the defendant himself before you accept it as being true because the law says that a defendant, in all criminal cases, is tempted to testify so as to shield himself and it is your duty to take this principle of the law into consideration and use your common sense in giving the defendant's testimony such weight as it is entitled to. *If you find that he is testifying to the truth, it will be your duty to give it just as much weight as you would the testimony of a disinterested witness.*"

We think this charge is fully sustained by our authorities, and the latter part of it is almost in the exact language in *S. v. Fogleman,* 164 N. C., p. 462.

In *S. v. Barnhill,* 186 N. C., p. 451, it was said: "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."

In his brief, the defendant attacks the judgment of the court below sentencing the defendant to two years on the public roads as cruel and unusual punishment, prohibited by the Constitution, Article I, sec. 14.

The evidence, from the record, showed that the general reputation of the defendant, Beavers, was that of handling whiskey. His own admission was that he did not know how often he had been in court. The week

before he was indicted for vagrancy, and he had been in court for assault and battery and speeding.

On the question of punishment after conviction, it is the custom for the court below to hear evidence as to character. This evidence is not a part of the record proper. Although his conviction was for three pints of liquor, it is to be presumed that the court below took the record evidence into consideration, as to defendant's general reputation as being a liquor seller, vagrant, etc. All this is a matter of sound discretion in the court below. We do not find any case, however, in our Supreme Court Reports from *S. v. Driver,* 78 N. C., 423, to *S. v. Smith,* 174 N. C., 804, which holds that such punishment in a flagrant case of misdemeanor is prohibited by the Constitution.

We can find from the record no prejudicial or reversible error. The jury returned a verdict having been charged by the court below: "Before you can convict him you will have to find from the evidence that he is guilty beyond a reasonable doubt."

No error.

LEAKSVILLE LIGHT & POWER COMPANY v. GEORGIA CASUALTY COMPANY.

(Filed 19 November, 1924.)

1. Insurance—Indemnity—Employer and Employee — Contracts—Ambiguity—Provisions.

While a policy of indemnity against damages to other persons than employees of insured for personal injuries, etc., in case of ambiguity of the language employed is resolved against the company by a reasonable interpretation, the principle does not obtain when the policy by plain language expresses the contract of the parties thereto upon the subject.

2. Same—Electric Companies—Linemen—Drivers of Automobile Trucks.

Where a policy of indemnity to an employer against damages to other than employees explicitly excepts those caused by the operation of vehicles, trucks, etc., engaged in the employer's business, or the negligence of the drivers thereof, the provision clearly expressed, will be given effect in favor of the insurer, though the driver at the time was classified in the policy as an employee, in this case a lineman of an electric power and light company regularly engaged in the service of his employer at the time such injury was caused to another than an employee, as a part of his employment, and classified as an employee whose negligent acts the policy of indemnity covered.

CIVIL ACTION heard on case agreed before *Shaw, J.,* and by consent decided by him in chambers at Greensboro.

It appears that plaintiff is a corporation duly chartered under the laws of North Carolina, with the principal office at Leaksville in said State and as such is engaged in maintaining and operating an electric light and power company furnishing current and power to the communities of Leaksville, Spray, Draper and vicinity. That the action is to recover of defendant on an insurance policy agreeing to indemnify plaintiff to amount of $5,000 against loss resulting from claims for damages on account of bodily injuries suffered during the life of the policy, including death resulting at any time from such injuries by any person or persons not employees of the assured by reason of the operation of the work of the assured described in an annexed schedule, etc.

It appears that one John T. Robertson, not an employee of plaintiff, while traveling on the highway in said county was severely injured by the negligent operation of an automobile truck of plaintiff, while being driven along the highway in the county, loaded with poles to be used at some point and in some way in the plaintiff's work.

That said Robertson made claim for $20,000 and plaintiff settled same for $5,000, which is agreed to be a fair adjustment of the matter.

Some of the relevant facts attendant upon the injury and present claim therefor are stated in the case agreed as follows:

"That the estimated compensation of employees upon which the said policy was based and premium paid included linemen as employees in charge of the defendant's business. That the plaintiff had no regular automobile drivers, but the linemen and other employees of the company drove its service car from time to time, and that said employees in charge of the service car at the time of the injury complained of, were carrying a load of poles in an automobile truck from Leaksville to Spray, along the highway, for the purpose of repairing a portion of plaintiff's transmission lines, and while so driving along the highway negligently permitted certain material so being handled, to wit, an electric light pole, to violently strike the said John T. Robertson, who was coming along the highway from the opposite direction, and to inflict upon him serious bodily injury. That the electric light pole which did the injury was loaded upon the service car which was being driven by the said employees.

"That it is agreed that if the court shall be of opinion that the plaintiff is entitled to recover upon the foregoing admitted facts, that the court shall enter judgment for the plaintiff in the sum of $5,000 and the costs, and that if the court shall be of opinion from the foregoing admitted facts that the plaintiff is not entitled to recover, that the court shall enter judgment that the plaintiff recover nothing and pay the costs of the action."

Recovery was resisted on the ground that the claim did not come within the terms and stipulations of the policy sued on, and on consideration of the pertinent facts presented there was judgment for defendant and plaintiff having duly excepted appealed.

Brooks, Parker & Smith for plaintiff.
Wilson & Frazier for defendant.

HOKE, C. J., after making the above statement: The policy sued on as stated, contains an agreement to indemnify plaintiff against claims on account of bodily injuries, etc., suffered by any one not an employee of the company by reason of the operation of the work of the assured, with stipulations among others as follows:

"Subject to the following conditions which are to be construed as conditions precedent:

"Condition A: This policy does not cover loss arising from injuries or death (1) caused by persons whose compensation is not included in the estimated compensation set forth in the said schedule." And referring to this schedule it appears that same contains an enumeration of nearly all plaintiff's employees including linemen, but closes with the following:

"Except Drivers—And Secretary and Treasurer (5) and does not cover loss arising from injuries or death caused by any draught or any driving animal or any vehicle, or by any person while in charge thereof."

We are inclined to concur in defendant's position that though the truck that caused the injury was being, at the time, driven by a lineman whose compensation appears in the schedule, the case is withdrawn from the policy under the closing clause, which excepts "Drivers"—from the schedule—and more especially as it appears from the facts agreed that the automobile trucks of plaintiff company were habitually operated by linemen or other employees of the company. But conceding that this might present an ambiguity to be resolved in favor of the insured, there can in our opinion be no question as to the effect and operation of subsection (5) of Exhibit "A" that withdraws from the policy, among others, all claims for injuries caused by "any vehicle or any person in charge thereof."

It will be borne in mind that this is a policy designed and intended to indemnify plaintiff against damages for injuries caused to third persons in the operation of the work in which the company is engaged, usually localized, and clearly is not intended to afford indemnity for injuries caused by operation of the company's vehicles in moving from place to place. So careful is defendant to stipulate against liability

of the latter kind that it appears in the two places. Excepting drivers from the enumerated schedule—thus bringing them under the effect of subsection (1), and again excepting claims for injuries caused by any vehicle or by "any person while in charge thereof."

We are not inadvertent to the position urged upon our attention by appellant that a policy, in case of ambiguity, should be construed more strongly against the company, but the principle does not extend to cases such as this, where a policy, explicit in terms and plain of meaning, withdraws a claim from its stipulations. As said by our late *Associate Justice Walker* in *R. R. v. Casualty Co.*, 145 N. C., 118:

"But while this salutary rule is well established, it is never enforced except in those cases to which it is strictly applicable, and which comes within its reason and purpose; and while we generally favor the insured, when the company, by the language of its own selection, has created a doubt as to what was meant, the rule will never be carried so far as to make a contract for the parties, different from what they have made for themselves; and it is not applicable when the intent and purpose has been clearly expressed, and their rights can, with certainty, be ascertained from the language as used. *Durand v. Insurance Co.*, 63 Vt., 437; Vance on Insurance, p. 593."

We find no error in the judgment of the court below and the same is Affirmed.

S. W. CARSON v. W. E. FLEMING AND WIFE.

(Filed 19 November, 1924.)

Mortgages—Foreclosure—Sale—Posting of Notice—Presumption—Purchaser—Deeds and Conveyances.

Where the mortgagee or trustee in a deed of trust has posted notice of foreclosure sale in conformity with the power contained in the instrument, and according to law, and has sold the lands therein described at the courthouse door of the county in conformity with the provisions thereof, in the absence of notice or knowledge to the contrary, he has a right to assume that the notices remained posted continuously during the required period, and nothing else appearing, the sale and the deed accordingly made will not be declared invalid against the rights of the purchaser at the foreclosure sale.

APPEAL by defendant from *Daniels, J.*, at March Term, 1924, of PITT.

This is an action of ejectment. It is admitted that on 9 December, 1921, defendants executed their deed of trust to S. J. Everett, conveying lands described therein to secure the payment of their note for $1,500

to plaintiff; and that said deed was duly probated and recorded. Default having been made in the payment of the note at maturity, Everett, trustee under the power of sale contained in the deed of trust, and after having advertised the same, conveyed the lands to the plaintiff, the last and highest bidder. Plaintiff demanded possession of the lands, and upon defendant's refusal to surrender possession, the plaintiff brought this action.

The only issue submitted to the jury, at the trial, was as follows:

"Was the land advertised in accordance with the deed of trust and the judgment?"

The jury having answered this issue "Yes," judgment was rendered in favor of plaintiff and against defendants. Defendants appealed.

Julius Brown for plaintiff.
Louis W. Gaylord for defendants.

CONNOR, J. Defendants complain that there was no evidence from which the jury could find that the sale of the land was advertised *continuously* for thirty days prior to the date of sale. The trustee is required before executing the power of sale "to advertise at the courthouse door and in three other or more public places in Pitt County for a period of not less than thirty days, and also by publication once a week for four consecutive weeks in some newspaper published in said county, the day and place of sale." There is evidence that the land was sold on Monday, 1 October, 1923, and that on 1 September, 1923, the trustee prepared and posted or caused to be posted notices complying with the requirements of the deed of trust at the courthouse door and at four public places, and also caused notice to be published in "The Reflector," a newspaper published in Pitt County, once a week for four successive weeks before 1 October, 1924.

There is also evidence that on 1 October, the day of the sale, defendants signed and delivered to the trustee, a paper reciting that the land conveyed in the deed of trust had been advertised for sale, at noon, that day, and requesting the trustee to offer the land, in subdivisions as well as a whole. Defendants expressly state in this paper, that this request is made not for the purpose of complicating the sale or causing any embarrassment to the trustee, or of interfering in any way with him or questioning his right as trustee to sell the land, but solely with the hope of procuring the best price for the land.

The court instructed the jury that if the trustee posted the notices as required in the deed of trust, it would not be necessary for him to show that the notices remained posted continuously for the required period of time; that the fact that he had so posted the notices was sufficient

in the absence of evidence that he knew that they had been destroyed and that proper notice had not been given of the sale.

Defendants' exception to this instruction cannot be sustained. Having posted or caused to be posted the notices required by the deed of trust, the trustee has a right to presume that they remained posted during the required period of time. There can be no presumption that the notices have been wantonly and maliciously torn down or destroyed, in violation of C. S., 4503 or 4504. There is no evidence in this case that the trustee knew that any of the notices had been destroyed or torn down, if such were the fact. He had fully discharged his duty in causing the advertisements to be made as required by the defendants, in their deed of trust to him, and had a right to presume, on the day of sale, that the notices had remained posted.

There is no error in the instruction of his Honor as to the effect of the paper which defendants admit they signed and delivered to trustee on day of sale. The law was stated correctly by him and as so stated was correctly applied to the facts as the jury might find them from the evidence.

Section 35 of Article I of the Constitution provides:

"All courts shall be open; and every person for *an injury* done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." This salutary principle does not justify the use of the courts, by the assertion of fanciful rights or by complaints based upon imaginary wrongs to hinder or delay others in the enjoyment of rights founded upon the law and in accord with justice and fair dealing among men.

No error.

STATE v. RUTH BELL HAMMOND.

(Filed 19 November, 1924.)

1. Criminal Law—Indictment—Several Counts—Verdict.

Where a bill of indictment contains two or more valid counts, for offenses of the same grade and permitting like punishment, a general verdict of guilty will be construed as a conviction on each and every count contained in the bill, and an exception thereto will not be allowed for reversible error unless it extends to and vitiates the entire verdict.

2. Intoxicating Liquor—Spirituous Liquor—Statutes—Federal Law.

The State has the power through legislation to further regulate and control the manufacture, sale, etc., of intoxicating liquor beyond the restrictions contained in a Federal statute upon the subject, the latter

prevailing in interstate regulations in case of conflict; and the State statute may consistently give further effect or efficiency to the Federal statute upon the subject as it relates to State regulation.

3. Same—Possession—Prima Facie Case.

Chapter 1, Laws 1923, generally known as the Turlington Act, with certain reservations as to existing State laws, establishes the rule now prevailing on the subject of prohibition and it applies to the extent that it is inconsistent with former legislation and is in conformity with valid Federal statutes on the subject where interstate regulation is concerned.

4. Same—Turlington Act.

Under the provisions of the Turlington Act, (sec. 2), it is made unlawful to manufacture, sell, barter, transport or possess intoxicating liquor except as therein authorized, these provisions to be liberally construed to prevent the use of such liquor as a beverage; and the possession of such liquor is made prima facie evidence of the violation of the law, but allowing the possession thereof for the personal consumption of the owner and bona fide guests, etc.: *Held*, the possession of a large quantity of whiskey in the home of the defendant raised the prima facie case of her guilt, permitting the inference from the method of its being bottled, etc., that it was for the purpose of an unlawful sale, or that it had been received for unlawful purposes, defendant's motion as of nonsuit thereon was properly denied.

5. Issues—Receiving.

Where a quantity of liquor is found in the possession of defendant sufficient to raise a prima facie case of her guilt of having unlawfully received it in violation of our statutes, the prima facie case so established may be rebutted by her showing that her possession was lawful under the statutory qualification, the burden remaining with the State to show guilt beyond a reasonable doubt.

CRIMINAL ACTION tried before *Lane, J.*, and a jury, at August Term, 1924, of MOORE.

In the bill of indictment, found at April Term, 1920, there were four counts:

1. For unlawful possession of intoxicating liquors for the purposes of sale.
2. Unlawful transportation.
3. For unlawful receiving such liquor.
4. Unlawful purchasing, etc.

On plea of not guilty, the following evidence was offered by the State:

"F. T. Currie testified for the State: I am a deputy sheriff and was acting as such on or about 6 April, 1924, at Pinehurst, in Moore County. On said date I had a search warrant to search the home in which the defendant, Ruth Bell Hammond, lived, and searched the house where she lived under that authority. When we made the search, we found the defendant away from her home, she having gone to

Carthage at that time. I found a darky by the name of George Fowler and his wife at her home and we proceeded to search the house. We found between four and five gallons of corn whiskey. The whiskey was in bottles inside the closet. We took a pin out of the hinges and went in. The door was locked. The whiskey was in bottles from a quart down to a half a pint.

"The bottles were of different kinds; some had paper stoppers and some had cork. I would say that there were about thirty-two or more bottles. Mr. Knight and Mr. McDonald searched the cellar. I saw what they brought up. It was three five-gallon oil cans. I examined the oil cans and found they had had whiskey in them. We destroyed the whiskey. We found in that closet also a hand-bag which had defendant's name on it, and this was full of these bottles. The bottles in the hand-bag had whiskey in them. Her name was on the outside of the grip or suitcase in which we found the bottles. When we arrested the defendant, she said she thought she was allowed whiskey for her own personal use; she said the whiskey was hers. She made this statement to me at her house the next morning. No one lived in this house with her at that time that I know of. She had been living there in this house all the summer.

Cross-examination: "This was all the summer just immediately preceding my finding the whiskey that the defendant lived in the house. I think maybe she had been there longer than that, using this house as a dwelling, taking care of it for Mrs. Hall and living there. She had been living there some time. This whiskey was found in a closet in the house in which she lived and in the part of the house she occupied. Some of the bottles were quart bottles. I think there was something like half of it in quart bottles. The other was pints and half pints. It was a grip we found in the closet and it was full of bottles of whiskey. I do not recollect how many. She was not at home at the time we made the search."

Defendant moved for a judgment of nonsuit, and this being overruled, offered no evidence. The cause was submitted to the jury, who rendered a general verdict of guilty. Judgment on the verdict and defendant excepted and appealed, assigning errors. These assignments as presented in the argument and maintained in the brief being:

1. The refusal of defendant's motion for nonsuit.

2. Refusal to give defendant's prayer for instructions: "If the jury find from the evidence that the house in which the intoxicating liquors in question were found was at the time used and occupied as the dwelling only of defendant and such liquors were for her personal consumption

only and her bona fide guests, when entertained by her therein, the jury will return a verdict of not guilty."

3. To the charge of the court on the count for receiving.

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

U. L. Spence for defendant.

HOKE, C. J. It is recognized in this State that where a bill of indictment contains two or more valid counts for offenses of same grade and permitting like punishment, a general verdict of guilty will be construed as a conviction on each and every count contained in the bill, and an exception will not be allowed for reversible error unless it extends to and vitiates the entire verdict. *S. v. Switzer,* 187 N. C., p. 88; *S. v. Strange,* 183 N. C., p. 775; *S. v. Toole,* 106 N. C., p. 736.

Again, it is held that the power of a State to enact statutes in regulation of the manufacture, sale and disposition of intoxicating liquors is not rested alone or dependent upon the Eighteenth Amendment to the Federal Constitution, the Prohibition Amendment, but by virtue of its sovereignty and in the reasonable exercise of its police powers, the State may if it sees proper establish more stringent regulations on this subject than are contemplated by the amendment referred to, with the limitation that the State may not authorize or sanction that which the National Amendment prohibits, and that if, in case of concurrent legislation as therein authorized, designed to enforce the amendment, there is conflict between the Federal and State law, the provisions of the Federal statute shall prevail. *S. v. Harrison,* 184 N. C., p. 762; *S. v. Barksdale,* 181 N. C., p. 621; *S. v. Fore,* 180 N. C., p. 744; *Rhode Island v. Palmer,* 253 U. S., p. 350.

Considering the record in view of these accepted principles, both of which will be found pertinent to some of the questions presented, our State statute containing the general regulations on the subject appears in chapter 1 of the Laws of 1923, commonly spoken of as the Turlington Act. Although entitled "An act to make the State law conform to the national law in relation to intoxicating liquors," it is in some respects both more searching and more stringent than the Federal legislation, and contains also a saving clause as to any local acts prohibiting the manufacture, sale or other disposition of intoxicating liquors. With this exception, however, and as to the State generally, the statute is clearly intended to and does establish the rule now prevailing on the subject where it applies and to the extent that the same is inconsistent with former legislation. The case of *S. v. Foster,* 185 N. C., p. 674, apparently to the contrary, is decided and should be properly made to

rest on the ground that the Turlington Act being prospective in its operation, and the act charged in *Foster's case* having occurred prior thereto, the same should be dealt with under the law as it formerly existed and under the principles approved in *S. v. Perkins,* 141 N. C., p. 797, and *S. v. Mull,* 178 N. C., p. 748.

As applied to the facts of the instant case, the sections of the statute referred to and more directly relevant to the questions presented, are as follows:

"Sec. 2. No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor, except as authorized in this act; and all the provisions of this act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented," etc.

"Sec. 10. From and after the ratification of this act, the possession of liquor by any person not legally permitted under this act to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of, in violation of the provisions of this act. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and of his bona fide guests when entertained by him therein."

Except where changed or modified in other portions of the law expressly providing for the manufacture, acquirement and sale, or other disposition of intoxicating liquors for nonbeverage, sacramental, or medicinal purposes, and the modification as to possession of such liquors in the closing part of section 10, this law contains an absolute inhibition of the acts specified in section 2; and as to the possession of such liquors, it is provided in section 10 that the mere possession of the same by persons not legally permitted under this act to possess liquor shall be prima facie evidence that the same is kept for the purpose of being sold, etc., in violation of the provisions of the act, except that the possession of liquors in a man's private dwelling shall not be unlawful if only for the personal consumption of the owner and his family residing therein, and of his bona fide guests when entertained by him.

It is entirely competent for the Legislature to establish a rule affecting the probative force of pertinent evidence, as it has done in this section 10 (*S. v. Barrett,* 138 N. C., p. 630), and under our decisions applicable the artificial weight thus imparted by the statute to the evidence of possession, in our opinion, applies, as his Honor ruled, to the possession of liquors at any place, in the home or elsewhere, and will suffice to carry the cause to the jury, and to uphold a conviction

with or without additional evidence if they are thereby satisfied beyond a reasonable doubt of defendant's guilt. *Speas v. Bank, ante,* 524; *S. v. Wilkerson,* 164 N. C., p. 431; *S. v. Falkner,* 182 N. C., p. 793; *S. v. Bean,* 175 N. C., p. 748; *S. v. Wilbourne,* 87 N. C., p. 529.

Under the principles declared and approved by these decisions, the motion for nonsuit was therefore properly and necessarily overruled. Under the statute, the mere possession of the liquor presented a prima facie case, carrying the issue to the jury; and in addition, on the facts in evidence, without reference to the effect and influence of the statute, there would be a permissible inference of guilt from the quantity of the liquor, its evident concealment, and the manner in which it was found, bottled and stored, part of it being already in a valise or hand-bag of defendant.

On the second assignment of error, as above set out, to the effect that if the jury should find from the evidence that the intoxicating liquor was in the home of the defendant only for the personal use and consumption of herself or her bona fide guests when entertained by her, they would render a verdict of not guilty. We think the prayer embodies a correct proposition, so far as the charge of unlawful possession is concerned, and should have been given if restricted to that count, but the failure or refusal to give the instruction may not be held for reversible error because such refusal does not necessarily or probably affect the verdict on the other counts in the bill. As heretofore stated, there is a general verdict of guilty, amounting to a conviction on each and every count in the bill, and the prayer could not have been properly given because of the requested direction therein of a general verdict of not guilty.

And so in reference to the assignment of error as to the charge of the court on the count for unlawfully receiving. Such charge was, in part, as follows: "There is also a provision in the law which says that one shall not receive any liquor in their possession, and there is a count in this bill charging this defendant with receiving it unlawfully. If a person is found in possession of a quantity of liquor, that is prima facie evidence that they received it unlawfully." And again, "The only way they can have any (liquor) lawfully is to have received it prior to the first of March, last year. Now, if a person had some on hand before that time, in possession of it, and had it in their possession for their own personal use, then it would not be a violation of the law to continue to keep it in their possession, but to have received any since the first of March, last year, even though for their own personal use, would be a violation of the law against receiving, and to have it in possession is prima facie evidence that they have it in possession for the offense charged—that is, for sale, barter, exchange, and so on."

On careful perusal of the act known as the Turlington Act, we find no provision which in express terms prohibits one from receiving intoxicating liquors. Except as embraced and included by the acts which are prohibited in the statute, the mere receiving of intoxicating liquors is not forbidden. As shown in section 2 of the act, one is not allowed "to manufacture, sell, barter, transport, export, deliver, furnish, purchase, or possess intoxicating liquors," except as heretofore explained and modified, but if received only in one's home (without violation of the acts as specified and prohibited in the statute), and is kept there only for the consumption of the owner and his family and the bona fide guests entertained by him, this constitutes no breach of the present statute, though received since the same was enacted. It is, to our minds, therefore, bad pleading to make the mere receipt of liquor the subject of a separate and independent count; and the charge that the mere receipt of same, though only in the home of the recipient, and kept there only for a lawful purpose, is forbidden, is not warranted by any proper construction of the statute that has been suggested to us.

As heretofore stated, however, the instruction complained of, being only on the count for unlawful receiving, does not effect a vitiation of the entire verdict, and may not therefore be held for reversible error. See, generally, *S. v. McAllister,* 187 N. C., p. 400.

On careful consideration of the entire record, we are of opinion, and so hold, that the judgment below should be affirmed.

No error.

STATE v. R. CARL MITCHEM.

(Filed 19 November, 1924.)

1. Criminal Law—Judgments—Motions in Arrest—Motion to Quash—Plea in Abatement—Grand Jury.

The remedy in a criminal action for a finding of a true bill by the grand jury is either by motion to quash, made before plea, or by plea in abatement, and may not be taken advantage of by motion in arrest of judgment after verdict.

2. Same—Indictment—Memorandum of Witnesses—Appeal and Error—Record.

The names of witnesses endorsed on the bill of indictment by the solicitor is for his own convenience and aid of the officers of the court concerned therein, and is not properly a part of the record on appeal to the Supreme Court.

STATE *v.* MITCHEM.

3. Evidence—Photographs.

Where a photograph of the scene of the crime, the subject of the action, has been testified to as being correct, an exception that a witness was permitted to use it in illustration of the facts he was competent to testify to, cannot be sustained on appeal.

APPEAL by defendant from *Stack, J.*, at April Term, 1924, of GASTON.

Criminal prosecution, tried upon an indictment charging the defendant with murder in the first degree.

From a conviction of manslaughter, and judgment pronounced thereon, the defendant appeals, assigning errors.

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

Clyde R. Hoey, Ernest R. Warren, Carl E. Carpenter, and Henry L. Kiser for defendant.

STACY, J. There is no valid exception appearing on the record in this case.

The defendant complains at the action of the trial court in permitting one of the State's witnesses to use a photograph of the premises, where the homicide occurred, in explaining his testimony. It was in evidence that the photograph correctly represented the scene of the killing. The court expressly refused to permit the photograph to be introduced in evidence, but allowed the witness to use it in illustrating his testimony. The evidence as to the correctness of the photograph was sufficient to render it competent for the purposes of its use. *S. v. Jones,* 175 N. C., 709, and cases there cited. *Hampton v. R. R.,* 120 N. C., 534. See, also, 22 C. J., 913; 10 R. C. L., 1153 *et seq.*

The exception stressed on the argument, and chiefly relied upon in defendant's brief, is the one addressed to the refusal of the court to arrest the judgment on the ground that the indictment was found by the grand jury solely upon the evidence of Lanie Mitchem, wife of the defendant herein. If this be a fact, which is not apparent on the face of the record, the defendant's objection should have been made, in apt time, by motion to quash or by plea in abatement. *S. v. Coates,* 130 N. C., 701; *S. v. Oliver,* 186 N. C., 329. A motion in arrest of judgment, to be allowed, must be based on some matter which appears, or for the omission of some matter which ought to appear, on the face of the record. *S. v. Jenkins,* 164 N. C., 527; *S. v. Douglass,* 63 N. C., 500.

Speaking to the question, in *S. v. Roberts,* 19 N. C., 540, *Ruffin, C. J.,* 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,* 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. A memorandum of the witnesses intended to be used is generally made on the bill by the prosecuting officer for his own convenience, that he may know whom to call; and the clerk usually avails himself of it and marks the names of such as are sworn, in aid of his memory, if the fact should be disputed. But none of those endorsements are parts of the bill or are proper to be engrossed in making up the record of a Superior Court, which merely states that it was presented by the jurors for the State upon their oaths." See, also, *S. v. Lanier,* 90 N. C., 714; *S. v. Sultan,* 142 N. C., 569; *S. v. Frizell,* 111 N. C., 722; *S. v. Horton,* 63 N. C., 595.

There is nothing on the face of the record in the instant case to show that Lanie Mitchem is the wife of the defendant, or that she alone testified before the grand jury. *S. v. Roberts, supra.* The endorsement by the grand jury on the bill of indictment forms no part of the record proper. *S. v. Sheppard,* 97 N. C., 401; *S. v. Hines,* 84 N. C., 810.

It has been held in at least two cases in this jurisdiction that where an indictment is found by the grand jury upon the testimony of a single witness, who is disqualified, it should be quashed. *S. v. Ivey,* 100 N. C., 542; *S. v. Fellows,* 3 N. C., 340. And in *S. v. Coates, supra,* it was said: "When an indictment is found upon testimony, all of which is incompetent, or of witnesses, all of whom are disqualified, the bill will be quashed." But a motion in arrest of judgment after verdict, upon this ground, comes too late. *S. v. Houston,* 50 Iowa, 512. The defendant may not take his chance before the jury and then complain that the indictment was found upon incompetent evidence. This would be giving him "two bites at the cherry." *S. v. Harrison,* 104 N. C., 728. "It seems that if a bill is found solely on incompetent evidence, it will be quashed before plea, though the objection will be too late after conviction." Wharton's Cr. Pl. and Pr. (9 ed.), sec. 363.

It has been held that a variance between indictment and proof may not be taken advantage of by motion in arrest of judgment. *S. v. Jarvis,* 129 N. C., 698; *S. v. McLain,* 104 N. C., 895; *S. v. Craige,* 89 N. C., 475.

No reversible or prejudicial error having been made to appear, we must sustain the validity of the trial.

No error.

STATE v. A. W. GEORGE.

(Filed 19 November, 1924.)

Banks and Banking—Officers—False Entries—Criminal Law—Evidence—Questions for Jury—Statutes.

Upon a trial of an officer of a bank for willfully and fraudulently making a false entry on its books, etc. (chapter 4, section 83, Public Laws 1921), evidence is sufficient to sustain a verdict of conviction which tends to show that the officer charged therewith made out a certificate of deposit for about $2,000, and the stub was made out in his own handwriting, leaving a blank for the amount, which was filled out by another, in pencil, for $20, and that the officer and a subordinate were in exclusive control of the bank at the time, permitting a reasonable inference that he was aware of the false entry on the stub of the amount of the certificate.

APPEAL by defendant from *Lyon, J.*, at April Term, 1924, of SURRY.

Criminal prosecution, tried upon an indictment charging the defendant, an officer of the Farmers and Merchants Bank of Elkin, with willfully and feloniously making a false entry in the books of said bank, with intent to defraud or injure the corporation and to deceive its officers and agents or other persons, in violation of chapter 4, section 83, Public Laws 1921.

From an adverse verdict, and judgment pronounced thereon, the defendant appeals, assigning errors.

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

J. H. Folger for defendant.

STACY, J. The indictment contains but a single count. and this relates to certificate of deposit No. 1781, for $2,060, issued 10 April, 1921, and the stub of said certificate of deposit, showing only $20. The alleged false entry consists in the erroneous amount of "$20" appearing on the stub, whereas in truth and in fact the certificate of deposit was for $2,060, and the same amount should have been shown on the stub.

Defendant concedes that there is ample evidence on the record to show other false entries made by him during the years 1919 and 1920, and the competency of this evidence is not questioned, as it was offered and admitted only as tending to establish the necessary element of intent, but he stressfully contends there is no sufficient evidence in the case to show that the alleged false entry of $20, as charged in the bill of indictment, was made by him or entered on the stub in question with his

knowledge and consent or at his direction. Exception is taken to the court's refusal to instruct the jury to this effect in response to a prayer of the defendant.

The State concedes that the amount shown on the stub is not in the handwriting of the defendant; but it is established that the defendant made out the certificate of deposit, No. 1781, and filled in the stub, in ink, except the $20 on the stub, which is written in pencil. It is in evidence that the defendant was president and cashier of the bank at this time; that the books and records were under his control; that Mr. Bodenheimer, assistant cashier, was away on account of sickness, and that the defendant and Miss Marjorie Chatham, who held the position of bookkeeper, were the only persons in the bank who knew or could have known the correct amount to be entered on the stub, and there is no evidence that Miss Chatham had any personal knowledge of the transaction. From these facts and circumstances the State contends that if the entry in question was not made by the defendant, it must have been entered on the stub with his knowledge and consent and at his direction. He alone of those in the bank could have furnished the information. Upon this disputed question of fact, the jury, under a clear and pointed charge, directed to the issue, found that the entry was false and that it was entered on the stub in question with the knowledge and consent of the defendant or at his direction, and that it was done with a felonious intent on the part of the defendant to defraud or injure the bank and to deceive its officers and agents or other persons.

The trial resulted in a conviction of the defendant. We are unable to see any error in the particulars assigned. The prayer for a directed verdict of acquittal on the evidence was properly refused.

This position is not at variance with the rule, universally observed in the administration of the criminal law, that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. *S. v. Wilkerson,* 164 N. C., 444. It has been repeated so often as to become an axiom that "proof without allegation is as unavailing as allegation without proof." *S. v. Snipes,* 185 N. C., 743; *S. v. McWhirter,* 141 N. C., 809; *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. But here the defendant has been convicted of the particular offense charged in the bill of indictment. The evidence, it is true, may not be as direct and positive as it would have been on other counts, had the State seen fit to incorporate them in the bill, but there is ample evidence on the record to afford a permissible inference of all the elements of the crime as charged and to support the verdict.

The remaining exceptions are untenable. The validity of the trial must be sustained.

No error.

MRS. OTELIA CUNNINGHAM ET AL. v. MRS. LAURA LONG ET AL.

(Filed 19 November, 1924.)

Actions—Parties—Bankruptcy—Statutes—Motions.

The trustee in bankruptcy, or the creditors he represents acting with him, may waive a doubtful claim in favor of a bankrupt's estate by having notice thereof in the schedule or otherwise and not pressing the claim for a period of time; and where the trustee has thus proceeded to settle the estate in accordance with the proceedings prescribed by the act, and he has long since been discharged by the court, after having filed his final account, a motion to dismiss the action of his heirs at law as not being the real parties in interest will be denied. C. S., 446. This principle especially applies where the deceased and the plaintiffs in the action were beneficiaries in a trust, the subject of the action.

APPEAL by defendants from *Sinclair, J.*, at April Term, 1924, of DURHAM.

From a verdict and judgment in favor of plaintiffs, the defendants appeal, assigning error.

Brawley & Gantt, Pou & Pou, J. W. Hinsdale, and Douglass & Douglass for plaintiffs.

W. D. Merritt, Luther M. Carlton, and Fuller, Reade & Fuller for defendants.

STACY, J. This case was before us at a former term (186 N. C., 526), and it is conceded that the second trial was conducted in accordance with the opinion heretofore rendered. There is no error assigned in this respect. But it is contended on the present appeal that the action should have been dismissed upon the ground that the same was not being prosecuted by the real party in interest, as required by C. S., 446. *Chapman v. McLawhorn*, 150 N. C., 166.

This suit was originally instituted by Col. J. S. Cunningham, who died pending the action. His widow and heirs at law have been made parties plaintiff, and the matter has been, and is now being, prosecuted by them in their own right and for their own benefit. The terms of the trust were that the lands in question should be purchased at a foreclosure sale, held and reconveyed to the original plaintiff or to his family upon his or their paying the purchase price, with interest thereon. It appears that the date of the alleged parol trust, upon which plaintiffs have recovered, was 4 December, 1909. Two days thereafter, 6 December, 1909, Colonel Cunningham made and filed in the District Court of the United States for the Eastern District of North Carolina a voluntary petition in bankruptcy, and was in due course thereafter

adjudged a bankrupt. A trustee in bankruptcy was duly appointed, who took charge of the estate, and an order of discharge was later entered on 7 September, 1910. The final report and account of the trustee was filed 21 March, 1917; this was approved 29 May, 1917, and the trustee discharged. The present suit was instituted 27 March, 1920.

It is the contention of the defendants that whatever right, title, interest and estate Colonel Cunningham had in and to the lands in controversy, by virtue of the alleged parol trust, subsisted at the time the petition in bankruptcy was filed, and passed by operation of law to the trustee in bankruptcy at the time of his appointment. Hence the defendants say that the present suit must be prosecuted, if prosecuted at all, by the trustee in bankruptcy, the real party in interest, for and on behalf of the creditors of Colonel Cunningham's estate. For this position they cite section 70, Bankruptcy Act of 1898; *Thomas v. Sugarman,* 218 U. S., 129; *Knapp v. Milwaukee Trust Co.,* 216 U. S., 545; *Security Warehousing Co. v. Hand,* 206 U. S., 415; *Buckingham v. Buckingham,* 36 Ohio St. Rep., 68; *Bank v. Lasater,* 196 U. S., 115.

The trustee in bankruptcy had notice of the trust, or the plaintiffs' right to demand a reconveyance of the lands in question upon the payment of the purchase price, with accrued interest, for the same was listed by the bankrupt under Schedule B (4) of his voluntary petition in bankruptcy, and there is other evidence on the record of both actual and constructive notice. See, on this point, *R. R. v. Comrs., ante,* 267, and *Wynn v. Grant,* 166 N. C., 45. Fifteen years have elapsed since the filing of the petition, and four years since the institution of this action, and neither the trustee nor the creditors have made any effort to redeem the property. This right was considered of little or no value in 1910, except as a matter of sentiment to the plaintiffs, and it is a permissible inference, from all the facts and circumstances appearing on the record, that the trustee, together with one of the largest creditors who discussed the matter with some of the parties, elected to abandon the bankrupt's right to redeem as being of no pecuniary value to his estate. This was sufficient to deprive the defendants of the right to have the case dismissed on demurrer to the evidence or on motion to nonsuit, especially as the matter was not put in issue by the pleadings, and there was no request to have it determined by the jury.

Speaking to the question, in *Dushane v. Beall,* 161 U. S., 513, *Chief Justice Fuller* said:

"It is well settled that assignees in bankruptcy are not bound to accept property which, in their judgment, is of an onerous and unprofitable nature, and would burden instead of benefiting the estate, and can elect whether they will accept or not after due consideration and within

a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course. (Citing authorities.) The same principle is applicable also to receivers and official liquidators. (Citing authorities.)

"If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of *Ware, J.,* in *Smith v. Gordon,* he, with such knowledge, 'stands by without asserting his claim for a length of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto."

Again, it will be observed that the alleged parol trust was for the benefit of Colonel Cunningham "or his family upon his or their paying the purchase price, with interest thereon." Plaintiffs therefore contend that as the trustee in bankruptcy failed to exercise this right, it inured to them, as well as to Colonel Cunningham, in their own right under the original trust.

The case having been tried in accordance with the law as declared in our former opinion, the verdict and judgment will be upheld. The motion to nonsuit was properly overruled.

No error.

W. S. MARKHAM, AGENT, ETC., v. H. L. CARVER, LIGGETT & MYERS TOBACCO COMPANY, ET ALS.

(Filed 26 November, 1924.)

Taxation—Boards of Equalization—Notice to Taxpayers—Constitutional Law—Due Process—Mandamus—Municipal Corporations.

Where, in pursuance of the provisions of statute, the local authorities for the assessment of personal property of corporations, etc., have approved the reports of the owners of the value thereof for taxation, reported the same to the State board designated for the purpose, and no appeal taken from the local board, the State Tax Commission, who were the Corporation Commission, without notice or hearing given the owner, may not informally increase the assessment and order the increased taxes to be collected by the local authorities, the same being contrary to the due-process clause of our Constitution, though the increased value has been included in the report by the State Board to the Legislature and the report adopted by statute; and mandamus will not lie to compel the collection thereof by the local county or municipal authorities.

MARKHAM *v.* CARVER.

APPEAL by defendants from *Devin, J.*, from mandamus, heard, October, 1923. From DURHAM.

This is an action instituted by plaintiff as agent, on his own behalf, and on behalf of all other taxpayers of the county and city of Durham who might make themselves parties, against the defendants, H. L. Carver, W. D. Turrentine, Monroe Crutchfield, T. O. Sorrell, and E. A. Hughes, Board of Commissioners of the County of Durham, John F. Harward (sheriff of Durham County), the City of Durham, a municipal corporation, Liggett & Myers Tobacco Company, and American Tobacco Company, corporations.

The action is for a mandamus to enforce the collection of unpaid taxes alleged to be assessable for the year 1920, due and owing by defendants, Liggett & Myers Tobacco Company, and the American Tobacco Company.

The findings of the court below are as follows:

"This cause coming on upon the application of plaintiff for a writ of mandamus, before the undersigned, W. A. Devin, judge presiding and holding the courts of the Tenth Judicial District, and the hearing having been continued, by consent of all parties, to be heard before the undersigned, at Durham, N. C., on 17 September, 1923, and being then heard upon the pleadings; and the court, after hearing the pleadings, being of the opinion that issues of fact were raised by the pleadings which should be passed upon by a jury, and all parties thereupon consented and agreeing that issues of fact raised by the pleadings should be answered and found by his Honor instead of a jury after hearing the evidence; and the matter having been further continued, by consent of all parties, to be heard before the undersigned, at Hillsboro, N. C., on 5 October, 1923, when and where all parties appeared, and the same was heard, after hearing the evidence and argument of counsel, the court finds from the evidence the following:

"1. Plaintiff W. S. Markham is now, and was at the time of the commencement of this action and proceeding, a citizen and resident and taxpayer of the city of Durham, North Carolina, and at the January meeting, 1923, of the Board of Commissioners of Durham County the following resolutions were adopted, to wit:

"'*Resolved,* That pursuant to authority contained in section 7923 of the Consolidated Statutes, the commissioners of Durham County employ a competent man, whose duty it shall be to spend such time as may be necessary in making a diligent search for property not listed for taxes, and to put such property on the tax books.

"'*Resolved further,* Such person as employed shall receive as his entire compensation an amount not in excess of 10 per cent of the revenue so derived from said unlisted property, which said expense shall be

divided pro rata between the State and county: *Provided,* that on those cases where the State does not receive any part of the revenue derived from said unlisted property, said expense shall be borne by the county.'

"Pursuant to said resolutions, upon motion duly made and adopted, W. S. Markham, plaintiff, was employed to check the tax books of Durham County for the year 1922, and to get all previously unlisted property upon the tax books. That plaintiff undertook his duties as such, and among other things made written reports (attached as exhibits to the complaint) concerning the assessments and valuations of the property of defendants, the American Tobacco Company and the Liggett & Myers Tobacco Company, for the year 1920; that the commissioners of Durham County refused, and still refuse, to take any action on the report of plaintiff, or to order the sheriff of Durham County to proceed to collect the taxes therein referred to, with interest thereon.

"2. That the General Assembly of North Carolina, at its Session 1919, by chapter 84, Public Laws, enacted and required that all property (including the property of the two defendants, tobacco companies) in the State of North Carolina, for the year 1920, should be assessed for taxation at its true value in money; that defendants, American Tobacco Company and Liggett & Myers Tobacco Company, made, returned and filed with the tax authorities of Durham County statements of valuations of their respective leaf tobacco on hand in the city of Durham and in the county of Durham for the taxable year 1920.

"3. That prior to 10 August, 1920, to wit, on 7 August or 8 August, the State Tax Commission for the State of North Carolina, in its investigation of the value of the total taxable property in the State of North Carolina, which included the city of Durham and the county of Durham and the property of the two defendants, tobacco companies, increased, in addition to the values as reported and returned by said defendants, tobacco companies, in the city of Durham and in the county of Durham, the values of their leaf tobacco in the following amounts:

"The leaf tobacco of the defendant, the American Tobacco Company, was increased in value in the sum of $4,298,390, and the leaf tobacco of defendant Liggett & Myers Tobacco Company was increased in value in the sum of $9,657,111, which said increased amounts in values so fixed and determined and made by the State Tax Commission were included in the report of said State Tax Commission to the Governor of North Carolina in their report of 10 August, 1920, and was approved and confirmed by the Extra Session of the General Assembly of North Carolina, 1920, by chapter 1, ratified 26 August, and the tax supervisor of Durham County was notified by said State Tax Commission (by letter, dated 25 August, 1920) of said increased values of said two defendants, tobacco companies, and the same, by order of said State Tax

Commission, were added to the taxable property of said two defendants, tobacco companies, and placed upon the 1920 tax books of Durham County. That no other changes in valuation of personal property in Durham County were made by said State Tax Commission.

"The tax rate for Durham County for 1920 was 45 cents upon the $100 of valuation of property, and the tax rate for the city of Durham for 1920 was 55 cents upon the $100 of valuation of property.

"That said increases were not entered in tax books of Durham County until after 26 August, 1920.

"No other affirmative evidence of notice to defendant companies of such increases in valuations, or that same were being considered, appears, save as disclosed by the testimony.

"4. That after the General Assembly for the State of North Carolina, at its Extra Session, 1920, had adjourned, and after the tax books for the year 1920 of Durham County had been placed in the hands of the sheriff of Durham County for collection, with said increased values added thereto by the State Tax Commission, as aforesaid, the State Tax Commission instructed the county auditor of Durham County to strike said increased valuations aforementioned of $13,955,501 from the taxable property of said defendants, tobacco companies, which was done, and portion of tax on said increased valuations which had been paid were refunded.

"5. That defendants, commissioners of Durham County, John F. Harward (sheriff of Durham County), and defendant, the city of Durham, have declined and refused, and still decline and refuse, to collect the taxes on the aforementioned $13,955,501.

"6. The defendant, the American Tobacco Company, for the year 1920, is due and owing the county of Durham the taxes on $4,298,390 in value of property, at the rate of 45 cents on the $100, with interest thereon until paid; and defendant, the American Tobacco Company, is also due and owing the city of Durham the taxes on $4,298,390 in value of property, at the rate of 55 cents on the $100, with interest thereon until paid.

"7. The defendant, Liggett & Myers Tobacco Company, for the year 1920, is due and owing the county of Durham the taxes on $9,657,111 in value of property, at the rate of 45 cents on the $100, with interest thereon until paid; and the defendant, Liggett & Myers Tobacco Company, is also due and owing the city of Durham the taxes on $9,657,111 in value of property, at the rate of 55 cents on the $100, with interest thereon until paid.

"It is now considered, ordered, adjudged and decreed as follows:

"1. That the reduction in tax valuations of property of said defendant companies for the year 1920 attempted to be made by the State Tax

Commission and the Commissioner of Revenue (as set forth on fourth finding of fact) are adjudged to be without authority of law, and the tax valuations of said companies, as included in the report of the State Tax Commission to the Governor and adopted by the General Assembly by chapter 1, Extra Session 1920, are adjudged to be the lawful tax valuations upon which the taxes of said companies for said year should be computed, levied and collected.

"2. The defendant, the American Tobacco Company, is due and owing the county of Durham the sum of $19,342.75, with interest thereon until paid, on account of unpaid taxes for the year 1920; and defendants county commissioners and the sheriff of Durham County are hereby ordered and directed to proceed according to law to levy and collect the same.

"The defendant, the American Tobacco Company, is due and owing the city of Durham the sum of $23,641.15, with interest thereon until paid, on account of unpaid taxes for the year 1920; and defendant city of Durham and its tax collector are hereby ordered and directed to proceed according to law to collect the same.

"3. The defendant, Liggett & Myers Tobacco Company, is due and owing the county of Durham the sum of $43,456.99, with interest thereon until paid, on account of unpaid taxes for the year 1920; and defendants, county commissioners and the sheriff of Durham County, are hereby ordered and directed to proceed according to law to levy and collect the same.

"The defendant, Liggett & Myers Tobacco Company, is due and owing the city of Durham the sum of $53,114.11, with interest thereon until paid, on account of unpaid taxes for the year 1920; and defendants, city of Durham and its tax collector, are hereby ordered and directed to proceed according to law to levy and collect the same.

"4. The court does not now pass upon the question of allowances to plaintiff, W. S. Markham, or to plaintiff's counsel, for services as prayed for in the complaint; and the question of the allowances is continued, to await the final determination of this action upon any appeal to the Supreme Court of North Carolina which may be had or taken by defendants.

"5. Plaintiff will have and recover of defendants the costs of this action, to be taxed by the clerk."

Brawley & Gantt and W. B. Guthrie for plaintiff.

E. S. Parker, Jr., and Fuller & Fuller for the American Tobacco Company and Liggett & Myers Tobacco Company.

Brogden, Reade & Bryant for Board of Commissioners of the County of Durham.

CLARKSON, J. The Legislature of North Carolina (Public Laws 1919, ch. 84) passed what is known as the Revaluation Act, "An act to provide for the listing and valuing of all property, personal and mixed, at its real money value."

Part of section 19 is as follows: "All personal property, unless herein otherwise provided, shall be listed and assessed as of the first day of January of each year. Between the first day of January and the fifteenth day of May every person who is liable for the listing of any personal property shall furnish to the county supervisor, or his assistant, a full and correct description of all personal property of which he was the owner on the first day of January of the current year, which the taxpayer is required by law to list, fixing what he deems to be a true and actual value of each item of personal property, for the guidance of the county supervisor, or his assistant, who shall finally settle and determine the actual value of each item of such property by the rule prescribed in section four of this act."

The findings of fact and record show that the defendants, Liggett & Myers Tobacco Company, and the American Tobacco Company, in accordance with the above section, furnished the county supervisor and his assistants of Durham County statements of valuation of their respective leaf tobacco. The statute required these defendant corporations to make oath that the statement contains a true, full and correct list of all personal property owned on 1 January, 1920; that no property had been converted for evasion; that the property had been fully and fairly described and its true condition represented; that it had not sought to mislead the officials as to the entire quantity, quality or value of the property; that, to the best of its knowledge and judgment, the corporation had valued its said property at its true and actual value—that is, the price that could be obtained at private or voluntary sale for cash. This return was made to officials appointed, not by local authorities, but, under the Revaluation Act, by the State Tax Commission, who were the Corporation Commission, a court of record—State officials, elected by the people. After the returns of personal property are sworn to, as above indicated, and filed with the county supervisor or his assistants, the supervisor then placed these sworn statements before the county board of appraisers and review. This was a nonpartisan and nonpolitical board.

Laws 1919, ch. 84, part of sec. 8, is as follows: "The two members of the county board of appraisers and review, other than the county supervisor, who is to be chairman of such board, shall be nominated, one from each political party, by the board of county commissioners of each county, at their regular meeting in the month of April, one thou-

sand nine hundred and nineteen, such nomination to become effective when approved by the State Tax Commission."

Section 27 is as follows: "The officers created under this act shall be nonpolitical and nonpartisan in character, and any undue political activity by any officer provided for under this act shall be sufficient cause for removal by the State Tax Commission or by the Governor of the State."

The duty of this board, as set forth in section 22, *supra,* is as follows: "When the county supervisor and his assistants have completed their taking of the lists of personal property in all townships in the county, the lists so taken shall be placed before the county board of appraisers and review, and it shall be the duty of the said board to review carefully the list as returned by each taxpayer, to ascertain if in each case a complete return has been made, and if the property returned has in each case been valued at its value in money, as required by this act; and it shall be the duty of the said board to revise such valuations wherever necessary to make the valuations conform in all respects to the rule required by this act, and, if any property has not been returned, to cause the same to be properly entered on such lists at the true value in money of such property."

Under section 23, full and ample power is given the supervisor and his assistants to make every investigation necessary, production of books, examination of witnesses, etc., if they have reason to believe that property listed is not true and complete.

Section 25 provided that the listing of all property, real and personal, should be completed in each county not later than the first day of May of each year, and complete abstracts of such lists should be mailed to the State Tax Commission by the county supervisor not later than 15 May, 1920, and of each year thereafter.

It appears from the entire record, and from the facts found by the court below, that the supervisor and assistants were under oath; the county board of appraisers and review, a nonpartisan, nonpolitical board, were under oath, and the defendants were under oath; that in making their returns defendant corporations returned its leaf tobacco in accordance with the requirements of the statute, and made oath as to its real money value.

Section 26 is headed, "Equalization or Revaluation." It provides that the State Tax Commission shall have authority as a State Board of Equalization, given in chapter 234, Public Laws 1917, "and it shall have authority to make such investigation, through its district supervisors, county supervisors, or special examiners, as may be necessary to determine if the list returned for each county is a complete list, and if the valuations returned have been made as required by this act. If prop-

erty is found that has not been returned, it shall order such property placed on the list, and if it is found that the property in any county had been valued either higher or lower than required by this act, it may order a revaluation in such county, or require by general order that a percentage increase or decrease be made for the year in which such order is made, but shall in that case order a complete revaluation of all such property at some time during the next ensuing year, to the end that any possible injustice that may have been done by the percentage increase or decrease may not be continued. If it is found necessary to order a revaluation in any county, the State Tax Commission shall designate both the county supervisor and the county board of appraisers and review, by whom the reassessment shall be made, and the expense of such revaluation shall be borne by the county, and is hereby declared to be a necessary expense of such county."

It will be noted that in the Revaluation Act, in the case of real estate, provision was made for a hearing before the county board of appraisers and review in cases where a taxpayer should be dissatisfied with the valuation placed upon his real estate by the county supervisor, with the right to appeal to the State Tax Commission, whose decision should be final. Any member of the county board of appraisers and review had also the right to appeal from the value fixed upon the real estate of a taxpayer in his county. It seems, and may be, that there is no provision in chapter 84 of the Public Laws of 1919, or chapter 234 of the Public Laws of 1917, which, by section 1 of the Revaluation Act, was continued in full force and effect for the listing and valuing of property, for appeals from values fixed by the county supervisor, or his assistant, upon personal property.

In the case at bar the county board of appraisers and review of Durham County approved the return of the American Tobacco Company, that the true and actual value that it made under oath was $9,141,005, and likewise approved the return of Liggett & Myers Tobacco Company of $15,202,151; that this was the valuation of the two corporations' leaf tobacco fixed by the proper authorities of Durham County, and which was included in the abstracts of property for Durham County, and which was sent to the State Tax Commission by the supervisor of Durham County, as provided by law. The State Tax Commission increased the value of the leaf tobacco of the defendant and the American Tobacco Company in the sum of $4,298,390, and that of the defendant Liggett & Myers Tobacco Company $9,657,111—a total of $13,955,501 for the two companies. The two companies had returned $24,343,156, which the supervisor and the county board of appraisers and review of Durham County had passed on and determined as its true and actual real money value. The report of State Tax Commission on revaluation to the Gover-

nor, and adopted by the General Assembly, has this increased valuation of $13,955,501 on the leaf tobacco of the defendants—more than one-third increase from the valuation put on it by the local authorities of Durham County, where the property was situate.

The problem, and the only one in this case, is whether the State Tax Commission, sitting in Raleigh, can, without notice to defendant corporations and without a hearing, increase the valuation of its property, which amounts to an increase tax. This is the crux of this case. The power to tax is the power to destroy. The principle here involved is fundamental and goes to the very root of our institutions.

It is contended by plaintiff that defendants had notice. The learned judge who tried this case found all the facts but this all-important one—*notice.* As to this, he says: "No other affirmative evidence of notice to defendant companies of such increases in valuation, or that same was being considered, appears, save as disclosed by the testimony." This was tantamount to finding that no sufficient notice was given, as the record discloses none. Does the testimony in the record disclose any notice to defendant corporations? The only witness examined on this aspect in the case was J. S. Griffin, the clerk of the State Tax Commission, who testified substantially that the county supervisor's report, as to the value of all the personal property in Durham County, to the State Tax Commission showed $53,000,000, and it had been increased to $66,000,000—the difference, about $13,000,000, being added to the valuation put on the defendants' leaf tobacco by direction of the chairman of the State Tax Commission. No permanent record was kept by the State Tax Commission showing the facts in connection with this matter. There was no meeting of the State Tax Commission as a body in their official capacity. The witness further testified: "That the increase in the value of personal property of Durham County for the year 1920, as shown by the difference in such value in the report of the county supervisor, S. P. Mason, made to the Tax Commission, and the report of the State Tax Commission to the Governor, were made before 10 August, the date of said report to the Governor, and that at the time he did not think any appeal by the defendant tobacco companies was pending from any other value that had been fixed; that it was determined on Sunday afternoon before the convening of the extra session of the Legislature of 1920 to throw this value into the report; it may have been Saturday, and we were trying to get our report finished by the time the Legislature met. I think they met on Tuesday, and the question came up Sunday afternoon, I think. It may possibly have been Saturday. Mr. Maxwell and myself had direct charge of the compilation of this report—as to whether or not we would throw this total into the report. There was

no appeal pending at that time, and we discussed it right much, and finally Mr. Maxwell sent for Mr. Lee, or Mr. Lee came in the office, and we decided to put it in the total for Durham County. I am pretty sure that was Sunday afternoon. We closed up the report Sunday night. That increase was put in Sunday before the Legislature met on Tuesday. No appeal was pending by these tobacco companies for the valuation at the time it was reported to the Governor. After this was done, the letter of 25 August was written to Mr. Mason and that was the first letter that went down to anybody about the increased valuation of the property of the defendant tobacco companies, but I do not know whether the letter was mailed—and I did not mail it myself. It was mailed in due course of business, I take it, but I do not know the date."

From the record evidence, we can find no sufficient testimony that the defendant companies had notice of the increase before it was made. In fact, no evidence, nor was there any appeal to the State Tax Commission on either side pending to fix the Tobacco Company with notice. If the State Tax Commission increased the valuation without notice or a hearing, it follows, as a matter of course, that the Legislature's approval based on the report was perfunctory, *proforma* and without notice, and there could be no presumption under the facts here that the defendants had notice, when the record shows clearly they had no notice. The record shows that on a Sabbath evening—no meeting of the State Tax Commission, consisting of the Corporation Commission, W. T. Lee, chairman, A. J. Maxwell and Geo. P. Pell, but the clerk of the State Tax Commission, Mr. J. S. Griffin, a man careful in his testimony, a witness for plaintiff states that he and Mr. Maxwell, who had direct charge of the compilation of the report to his Excellency, Governor T. W. Bickett, "as to whether or not we would throw this total into the report." No appeal pending. They discussed it right much and finally Mr. Maxwell sent for Mr. Lee who came and "we decided to put it in the total for Durham County"—the report was closed Sunday night. No other tax-payers' property for Durham County, except the defendant corporations' were increased.

It may not be amiss to call attention to the fact that by subsequent legislation, the State Tax Commission ceased to exist, and certain powers like unto the State Tax Commission were given the Board of Equalization, composed of the Chairman of the Corporation Commission, Commissioner of Revenue and the Attorney-General. Mr. W. T. Lee, who was chairman of the Corporation Commission, was on the Board of Equalization, and the board, after hearing evidence, unanimously found and declared that the value settled and determined by the County Supervisor and reviewed by the County Board of Appraisers and Review, to wit, $9,141,005, of the American Tobacco Co., and $15,-

202,151 ($15,575,271) of Liggett & Myers Tobacco Co., were the full actual value of the said tobacco as of 1 January, 1920, and thereupon ordered that the said valuation be restored, thus nullifying the action taken on the Sabbath evening. Although Mr. Lee was temporarily in the Sabbath conference, he thought it just afterwards to reduce the assessment. We do not go into the matter of the Board of Equalization taking off the increase, as we think it unnecessary for the consideration of this case. We cite this matter as this board, sitting as officials under oath, heard evidence and nullified the Sabbath evening action.

Cooley on Taxation, Vol. 3 (4 ed.) chap. 18, part of sec. 1123, p. 2272, says: "Where a statutory board of review holds stated meetings, with power to increase assessments, everybody is notified of the fact, and is warned to attend if he deems it important; and it is often held that under such circumstances special notice of the raising of a particular assessment, or of the adding of omitted property, need not be given. But as an increase in an assessment is not frequent, and will seldom be anticipated by the taxpayer, who will not be likely to attend upon the review except to seek a reduction, it seems safer and more just to hold, as has generally been done, that the taxpayer should have personal notice of any purpose to increase the assessment made against him. *The general rule is that after an assessment has been made by an assessor, it cannot be increased by the assessor or by a reviewing board without notice to the taxpayer or opportunity to be heard,*" (italics ours), citing numerous cases from U. S. Court, Alabama, California, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, South Carolina, South Dakota, Wisconsin, Texas and Washington.

Cooley, *supra,* sec. 1123, p. 2275, further says: "This rule is almost universal either because so declared by statute or because of the due process clause or for other reasons. Absence of notice or opportunity to be heard violates the due process of law provision." To support the latter proposition, he cites the case of *Lumber Co. v. Smith,* 146 N. C., p. 199, written by the late learned former *Associate Justice H. G. Connor,* of this Court, and afterwards District U. S. Judge. We think that case, in the terminology of the lawyer, on "all-fours" with the case at bar. The facts in that case were: The Board of Commissioners of Caldwell County had placed upon the tax lists, as a solvent credit, certain notes owned by the plaintiff, which the commissioners valued at their face value and so assessed them for taxation. No notice was given the plaintiff of listing, valuing or assessing the notes. The tax list was placed in the hands of the sheriff for collection and he advertised plaintiff's real estate for sale in order to collect the tax. The plaintiff sued out an injunction and this Court affirmed the judgment of the

judge of the Superior Court continuing the injunction to the hearing. The Court's unanimous opinion said: "The power to tax, it has been said, and the truth of the saying too frequently exemplified, is the power to destroy. While the power is essential to the life of the State, its enforcement by constitutional methods and within constitutional limitations is essential to the safety of the property of the citizens. 'Proceedings for the assessment of a tax being *quasi* judicial, it follows that, in order to give validity to the assessment, notice thereof should be given to the owner of the property to be assessed.' 27 A. & E. Enc., 704. . . . 'It is, therefore, a matter of utmost importance to the person assessed that he should have some opportunity to be heard and to present his version of the facts before any demand is conclusively established against him; and it is only common justice that the law should make a reasonable provision to secure him, as far as may be practicable, against the oppression of unequal taxation *by making the privilege of being* heard a legal right.' Cooley on Taxation, 625. . . . 'Provision for notice is, therefore, part of the "due process of law," which it has been customary to provide for these summary proceedings; and it is not to be lightly assumed that constitutional provisions, carefully framed for the protection of property rights, were intended or could be construed to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion without giving him the opportunity to contest the justice of the assessment.' Cooley, 628."

In *Bankers Life Ins. Co. v. County Board of Equalization,* 89 Neb., 469, N. W., 1034, it was said: "It seems clear from the authorities that such change or addition made without notice and without an opportunity for a hearing somewhere along the line of procedure is void, for it amounts to 'taking the property of the citizen without due process of law.' *Stuart v. Palmer,* 74 N. Y., 183; *Central of Georgia R. Co. v. Wright,* 207 U. S., 127; *Horton v. State,* 60 Neb., 701; *Dixon County v. Halstead,* 23 Neb., 697."

The Supreme Court of the U. S., speaking of the phrase "due process of law" holds before a person can be deprived of his property, notice must be given. In *Traux v. Corrigan,* 257 U. S., 312, the Court holds, in general, what is due process of law in the respective state is regulated and determined by the law of each state, and this amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided. The courts will interfere with state action on the ground that it is

repugnant to this clause only where fundamental rights have been denied. Const. of U. S., anno. (1923) p. 633, 634, citing numerous authorities.

In *McGregor v. Hogan,* U. S. Superme Court advanced opinions (decided 12 November, 1923) p. 27, it is held: "It is not essential to due process of law that the taxpayer be given notice and hearing before the value of his property is originally assessed, it being sufficient if he is granted the right to be heard on the assessment before the valuation is finally determined. *Pittsburgh C. C. & St. L. R. Co. v. Backus,* 154 U. S., 421, 426; 38 L. Ed., 1031, 1036; 14 Sup. Ct. Rep., 1114. And see *McMillen v. Anderson,* 95 U. S., 37, 42; 24 L. Ed., 335, 336; and *Turpin v. Lemon,* 187 U. S., 51, 58; 47 L. Ed., 70, 74; 23 Sup. Ct. Rep., 20. The requirement of due process is that after such notice as may be appropriate, the taxpayer have opportunity to be heard as to the amount of the tax by giving him the right to appear for that purpose at some stage of the proceedings before the tax becomes irrevocably fixed. *Turner v. Wade, supra,* p. 67. And see *Londoner v. Denver,* 210 U. S., 373, 385; 52 L. Ed., 1103, 1112; 28 Sup. Ct. Rep., 708."

In *R. R. v. Comrs., ante,* 266, the following is said: "Plaintiff takes the position that the increased valuation of its property was made by the list-taker without any proper notice and that the same was approved by the board of commissioners, sitting as a board of equalization on the second Monday in July, (C. S., 7938) without giving plaintiff an opportunity to be heard. The facts are, however, as found by the court below, that the plaintiff's agent did have notice of the action of the list-taker in making the change in question and the matter was reported by him to the legal department of plaintiff company for attention." In that case the list-taker made a personal investigation of the property and increased the valuation to the sum as it had been listed the year before and notified plaintiff company what had been done. The Board of Equalization, under the statute, met on the second Monday in July, of the same year, to consider these tax matters, but plaintiff failed to take advantage of the notice and appear before the Equalization Board to make its objection before the proper tribunal, although having been notified, sometime before, on the 29th of May of that year. The Equalization Board approved the report of the list-taker. Notice was required to be published, etc., under the statute, of this July meeting so that all dissatisfied tax-payers could be heard as to the valuation of their property, and have the same corrected or equalized if found to be unjust or unequal. In that case, it will be seen that it was conceded that notice had to be given, and notice was given, and the statute provided the time and manner in which objections could be heard and a hearing provided for. In fact, the statute (C. S., 7938, *supra*) says: "They shall have

power, *after notifying the owner or agent,* to raise the valuation of such property as they shall deem unreasonably low." Method is provided in the statute how the hearing shall be conducted. If local boards may not act without notice, then *a fortiori* a board sitting in Raleigh, far distant from where the property is located, should not act without notice.

The tax, if legal, in this case would go to Durham County and the city of Durham. The Board of Commissioners of the county of Durham in their answer say: "That these defendants admit that they have taken no action upon said report filed by the plaintiff and have taken no steps to collect the tax referred to in paragraph 10 of the complaint for the reason that these defendants, after investigation, were of the opinion that the value placed by the defendants, Liggett & Myers Tobacco Company and the American Tobacco Co., upon their property represented the true value of said property as of 1 January, 1920."

The city of Durham in its answer says: "This defendant admits that its tax collector has taken no steps to collect the tax referred to in paragraph 10 of the complaint, for the reason that said property has never been placed upon the tax books of the city of Durham."

In *Mfg. Co. v. Comrs.* (of Cabarrus County), 183 N. C., p. 553, the assessment was on industrial plants—real estate. The value as finally fixed was done after the Cannon Mills *had notice* and a *hearing* on appeal before the State Tax Commission, and its findings of assessment was incorporated in the State Tax Commission's report to the Governor, which was approved by the Legislature. When this was done, the State Tax Commission had no authority to change it. Laws 1919, chap. 84, sec. 15, gave right of appeal by either side in real estate assessments to the State Tax Commission, and its findings were final. In the present case, the increase was made of personal property without *any notice or a hearing;* and, perhaps, without any statutory authority, the finding of the local authorities being the forum. This we do not pass on, as we think the assessment could not be increased without notice or a hearing.

In giving the facts as taken from the record, we do not mean to criticise the action of any official. If mistakes have been made and the law not properly administered, their conduct should not be weighed in "gold scales." The revaluation measure was new and untried. The work was a tremendous undertaking, and the report of 10 August, 1920, of the Corporation Commission, which was the State Tax Commission, to his Excellency, Governor T. W. Bickett, before the extra session of the Legislature of 1920, was a revolution in the taxing system of the State. It is but human that errors and injustices in so large an undertaking must of necessity have arisen. The whole tax structure could not be completed in so short a time. In the present case the assessment of the

leaf tobacco by the State Tax Commission was not made in accordance with law. Whatever may be the desire to collect tax, we have no right to take a copper from the rich or poor except through and by the law of our land. Any other course would in time affect our whole social structure. The facts and the justice in this case are not hard to comprehend. Under the new Revaluation Act the defendants, under oath returned their leaf tobacco as of 1 January, 1920. This was approved and agreed to by the local authorities of Durham County—nonpartisan and nonpolitical officials, all under oath. On a Sabbath evening, 8 August, 1920, just before the Revaluation report was made to the Governor, this assessment, made under oath by defendant corporations agreed to and accepted by the local authorities, *without notice or hearing* to the defendant corporations and without a regular meeting of the State Tax Commission, was increased in an informal manner over one-third more than it was returned at under oath. In the language of the witness "to throw this value into the report." If $13,000,000, increase in assessment can be thrown into the "melting pot" of taxes without notice or a hearing and we should sustain this, we would be blinded like Samson and perhaps some day pull the pillars of the house down to fall on the poor as well as the rich. We can find no authority to take property without notice or a hearing—this is due process of law.

The chairman of the State Tax Commission, who afterwards by virtue of his office became a member of the Board of Equalization, informally had agreed the Sabbath evening to the increase and after mature consideration with the other members of the Board of Equalization, they unanimously took the increase off. The Board of Commissioners of Durham County in their sworn answer admit that the original returns were correct and the returns were the true value. The city of Durham takes no affirmative position in its answer asking for the increase. These are the two bodies most vitally interested. The defendant corporations have paid the tax on the assessment fixed by the proper local authorities. The only active contest is by plaintiff, who was employed and "whose duty it should be to spend such time as may be necessary in making a diligent search for property not listed for taxes, and to put such property on the tax books." For this he is to get not in excess of 10 per cent of the recovery. He has performed the duty imposed and brought this case. The fathers who founded this republic built it on the Rock of Ages—Justice to the rich and poor alike. *Fiat justitia, ruat cœlum.*

From the facts and circumstances of this case, any other view taken would make the law a "rope of sand."

For the reasons given, there was error in the judgment of the court below.

Error.

STATE v. JIM KNIGHT.

(Filed 26 November, 1924.)

Intoxicating Liquor—Spirituous Liquor—Statutes—Turlington Act—Possession.

Evidence tending to show that the defendant had intoxicating liquor in his possession before the efficacy of the Turlington Act, is not a defense under the provisions of this act for the defendant's possession a year thereafter, upon the trial for violating the prohibition law.

APPEAL by defendant from judgment of *Lane, J.*, at September Term, 1924, of ANSON.

Defendant was tried upon an indictment containing three counts, each charging a violation of the prohibition laws of the State. He testified, as a witness in his own behalf, as follows: "The half-pint of whiskey is mine. I had it for three years or more before March, 1924. It has been in this grape-juice bottle on the shelf in my store all the time. It has been nearly four years since I drank any, and I had this when I quit, and decided to keep it. I do not remember from whom I bought the half-pint of liquor, but I had it when I quit drinking. I knew it was there all the time."

The court instructed the jury as follows: "If you believe the evidence, gentlemen of the jury, beyond a reasonable doubt, the defendant's own evidence, you will find him guilty of possessing liquor. You can render your verdict where you are, if you want to."

Defendant excepted to the charge of the court. There was a verdict of guilty. From the judgment defendant appealed, assigning as error the instruction of the court.

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

McLendon & Covington for defendant.

CONNOR, J. By section 2 of chapter 1, Public Laws 1923, the Turlington Act, it is provided that no person shall possess any intoxicating liquor except as authorized in this act. This act was ratified on 1 March, 1923. Defendant contends that possession by him of intoxicating liquor in March, 1924, which he had in his possession prior to the ratification of the Turlington Act, is not unlawful, and that therefore there was error in the instruction to the jury. There is no provision in the Turlington Act authorizing any person to retain in his possession, after its ratification, intoxicating liquor which he had in his possession prior to its ratification. The defendant has not been convicted of having intoxicating liquor in his possession prior to the ratifi-

cation of the Turlington Act. He testified that he had the half-pint of whiskey in his possession in March, 1924. There is no evidence that such possession was authorized by any provision of the act of 1923.

There was no error in the instruction of the court. *S. v. McAllister*, 187 N. C., 400; *S. v. Hammond, ante*, 602.

No error.

C. R. JONES v. J. I. COLEMAN AND N. D. HARRIS.

(Filed 26 November, 1924.)

1. Deeds and Conveyances—Execution—Evidence—Burden of Proof—Instructions.

Where the validity of a destroyed deed is attacked upon the ground that it was not executed or the seal affixed, etc., the registration apparently being correct in these particulars introduced in evidence is prima facie taken to be correct, and the burden of the issue is on the party attacking its validity to sustain his contention by the greater weight of the evidence, and an instruction that he is required to do so by clear, strong and convincing proof, is reversible error.

2. Same—Seal—Prima Facie Case—Directing Verdict.

Where the original deed to lands has been lost or destroyed, and the record in the office of the register of deeds has been put in evidence, without the scroll or seal placed after the grantor's name, but the registration reciting that the grantor has affixed his seal, this recital raises the presumption that the seal had been affixed, and an instruction directing a verdict to that effect is correct in the absence of evidence to the contrary.

APPEAL by plaintiff from *Brown, J.*, at Special Term, 1924, of PERSON.

The two actions brought by plaintiff against J. I. Coleman and N. D. Harris were consolidated by consent and tried together. Issues submitted to the jury with the answers thereto are as follows:

1. Was the deed dated 24 July, 1894, from Mollie L. Jones to W. A. Jones, her husband, executed and delivered by the grantor to her said husband during her lifetime and probate duly taken by the justice of the peace during her lifetime? Answer: "Yes."

2. Was her seal duly affixed to said deed by Mollie L. Jones, the grantor? Answer: "Yes."

3. Is plaintiff's cause of action barred by the statute of limitations? Answer: "No."

From judgment upon this verdict, that plaintiff take nothing by his action, plaintiff appealed. Errors assigned are set out in the opinion.

John R. Hood, Geo. E. Hood, L. D. McCullen and Cooper Hall for plaintiff.

F. O. Carver and William D. Merritt for defendants.

CONNOR, J. Mollie L. Jones was seized in fee and in possession of the land described in the complaint during her lifetime, after her marriage to W. A. Jones. There was in evidence the record of a deed from Mollie L. Jones conveying this land to W. A. Jones, dated 24 July, 1894, acknowledged by the grantor on 15 August, 1894 and recorded on 7 October, 1895. There was evidence that Mollie L. Jones died intestate on 27 November, 1894, leaving surviving her husband, W. A. Jones, and her only child, C. R. Jones, an infant, about one year of age, the plaintiff in this action.

Defendants claim the land described in the said deed under a deed of trust executed by W. A. Jones to A. L. Brooks, trustee, on 14 November, 1895, defendants having purchased the said land at the sale made by the said trustee, upon default in the payment of note secured therein. There was evidence that the deed from Mollie L. Jones to W. A. Jones was signed by her but not delivered to the grantee or to any one for him; and that the certificate of the justice of the peace was not on the deed at the date of her death. The plaintiff seeks in this action to have said deed declared null and void, alleging that his mother, Mollie L. Jones, did not sign, seal or deliver the same.

Upon the trial, the court instructed the jury that, upon the first issue, the burden was on the plaintiff to fully satisfy the jury by clear, strong and convincing evidence that the deed was not executed and delivered by Mollie L. Jones, his mother, and that her acknowledgment and privy examination were not made or taken during her lifetime; that whether the evidence offered by plaintiff was clear, strong and convincing was for the jury to determine but that in considering the evidence to determine their answer to the first issue, the jurors should bear in mind that the burden of proof was upon the plaintiff to establish the truth of his contentions by such evidence; that the law attaches great importance to the solemn judicial acts of judicial officers such as a justice of the peace and that when an officer has solemnly certified that the execution of a deed was acknowledged before him by the grantor and that the grantor, if a married woman, was privately examined by him and the deed probated by the clerk of the Superior Court and recorded by the register of deeds, the law requires that a jury should be fully convinced before the deed can be set aside.

Plaintiff excepted to these instructions and assigns same as error. We are unable to reconcile these instructions with the opinion of this Court in *Belk v. Belk*, 175 N. C., 69, written by *Justice Walker*, wherein it is

said: "We are of the opinion that owing to the nature of a probate and registration, and having regard to the language of the statute with respect thereto, when a registered deed is introduced it raises such a presumption of its due execution, including in this term both signing and delivery, that in the absence of any contest as to the execution of the deed, and where no evidence is introduced to assail it, the presumption thus raised as to its due execution will warrant the Court in directing the jury to find in favor of the validity of the deed; but when its execution is denied and evidence is introduced which tends to show that it was not executed, the burden of proof is on the party claiming under the deed, but he is entitled to the full benefit of the presumption, as evidence in his favor, and whether the opposing evidence is sufficient to overcome the presumption and to call for more evidence from the plaintiff is a question for the jury, because they must pass upon the credibility of the evidence and its weight. The burden of proof, sometimes called the burden of the issue, is upon the plaintiff, who alleges the existence of the fact but who, however, in such a case has the advantage of a presumption in his favor." In that case plaintiff claimed title to land and under a deed which had been duly probated and registered. Defendant denied that the grantor had executed the deed as alleged and averred that the deed was a forgery. The burden of proof upon the issue thus raised as to the execution of the deed was held to be on the plaintiff throughout the trial. The court held that the deed, duly probated and registered, offered in evidence, was sufficient proof of its execution and genuineness. The contention of plaintiff, claiming under the deed, however, that the probate and registration raised a presumption of law or fact that required defendant to rebut it by a preponderance of the evidence, was not sustained. The court says that this contention places too great a burden on the defendant in regard to the execution of the deed. *Justice Brown,* being of opinion that the charge of the judge upon the burden of proof is strictly correct and in accord with the decisions of this Court, concurred in the result.

In the instant case a deed duly probated and registered is offered in evidence by the plaintiff who, however, attacks the validity of the deed upon the ground that the grantor named therein, from whom, but for the deed, the land described therein would descend to him, did not sign, seal or deliver the same. This registered deed raised a presumption of its due execution, including in this term both its signing and delivery. But the execution of the deed is denied and evidence was introduced which tends to show that it was not executed by Mollie L. Jones. There was evidence, also, tending to show that the certificate of the justice of the peace was not on the deed at date of her death. The defendants claim under this deed and rely upon the presumption which arises from the

probate and registration of the deed to sustain its validity. The question as to whether the deed was executed and delivered was necessarily submitted to the jury that they might pass upon the credibility of the evidence and its weight. The plaintiff contends that the instruction to the jury that the burden of proof upon this issue was upon him, not only to sustain the affirmative of the issue by evidence, but also that the jury should find that such evidence was clear, strong and convincing, was error.

In a civil action ordinarily the party upon whom the burden of proof is cast must sustain such burden by the greater weight or preponderance of the evidence; *Speas v. Bank, ante,* 524, and cases there cited by *Stacy, J.* Where the party to an action seeks to engraft a trust on a written instrument or to annex a condition to one or to establish a mistake therein he is required to make good his allegation by clear, strong and convincing proof. In such cases he admits the execution of the written instrument and takes upon himself the burden of altering or changing the written instrument and this, this Court has held, can be done only by evidence that is clear, strong and convincing. When the execution of a certificate of a judicial officer is admitted but its legal effect according to its tenor is denied, the same rule is applied. The affirmative of an issue involving only the question as to whether a written instrument has been executed may be sustained by the greater weight or preponderance of the evidence; when, however, the execution of the instrument is admitted and its integrity or legal effect is attacked, the party who carries the burden of the issue must establish his contentions by evidence clear, strong and convincing.

In *Lumber Co. v. Leonard,* 145 N. C., 339, and in *Smithwick v. Moore,* 145 N. C., 110, the execution of the deeds by the grantors was admitted. In the former case the grantor, a married woman, admitted that she signed the deed and acknowledged the execution of the same before a justice of the peace; she denied, however, the legal effect of her act as certified by the justice of the peace. Her attack was upon the integrity of the judical act, which itself was admitted. The Court held that this attack could be sustained and the legal effect of the certificate overcome only by evidence clear, strong and convincing. In the latter case it was held that there was no evidence to rebut the presumption of delivery arising from the registration of the deed, and that therefore, the court erred in refusing to charge the jury that upon the evidence they should answer the issue "No."

In *Benedict v. Jones,* 129 N. C., 470, cited in *Lumber Co. v. Leonard, supra,* the married woman who attacked the certificate of the clerk admitted the execution by her of the deed, and this Court approved an

instruction that upon such an admission the law raised a presumption from the certificate that the facts were as set out therein and that this presumption could be rebutted only by evidence, clear, strong and convincing, holding in this case that there was no evidence to rebut the presumption.

In *Odom v. Clark,* 146 N. C., 545, plaintiffs alleged that defendants had given them a verbal mortgage on certain personal property. This was denied by defendants. The jury having answered the issue as contended by plaintiffs, defendants appealed, assigning as error the failure of the judge to instruct the jury that the burden was upon plaintiffs to sustain their allegation by evidence clear, strong and convincing. This Court said: "No reason occurs to us why such a contract should be required to be established by clear, strong and convincing proof rather than by the greater weight of the evidence, the rule stated in the charge."

In *Fortune v. Hunt,* 149 N. C., 358, this Court held that there is a presumption that a deed duly proven and registered was executed and delivered at the time it bears date. The burden of proof is upon the party attacking its validity to show the contrary and where there is evidence tending to show that the deed was not in fact executed or delivered, the issue as to whether or not it was executed must be submitted to a jury. Nothing is said in this opinion as to the intensity of the proof required. The clear implication is that under the rule ordinarily obtaining in civil actions, only the greater weight of the evidence was required.

The instruction of his Honor that the burden of proof upon the first issue was upon the plaintiff and that such burden could be borne by him only by evidence clear, strong and convincing is not sustained as the law by the decisions of this Court.

In a civil action where the issue submitted to the jury admits the execution of the written instrument and the rights of the parties attacking it depend upon a successful attack upon the integrity of the instrument itself, the rule stated in *Lumber Co. v. Leonard supra,* has been approved and followed by this Court; but where the execution of the instrument is the fact put in issue by the pleadings, this fact like any other fact alleged, may be established by the greater weight of the evidence.

We must therefore hold that there was error in the instruction of the court upon the first issue. The burden of establishing the fact of the execution of the deed by the grantor was upon the defendant who claims under the deed; the record of the deed, made upon a prima facie correct certificate of the justice of the peace and the probate of the clerk is sufficient evidence to sustain this burden; whether upon all the evidence

the presumption arising from the registration of the deed is rebutted must be determined by the jury.

Upon the second issue the court instructed the jury as follows: "It appears from the evidence that the deed from Mollie L. Jones to her husband, W. A. Jones, has been burned and the original of it is not in evidence. The record of it is in evidence and there is no scroll or seal after Mrs. Jones' name on the record, but the record recites 'In testimony whereof the said Mollie L. Jones has hereunto set her hand and seal.'

"I charge you that the recital of these words raises a presumption that there was a seal affixed by Mollie L. Jones to her signature on the original deed.

"I further charge you that no evidence has been offered or introduced in this case to rebut that presumption and therefore you are directed to answer the second issue 'Yes.'"

Plaintiff's exception to this instruction cannot be sustained. The instruction is supported by the opinion of this Court in *Hopkins v. Lumber Co.*, 162 N. C., 533, and cases cited therein.

We do not deem it necessary to discuss assignments of error based upon his Honor's refusal to give instructions requested. There must be a

New trial.

SAM GOLDSTEIN v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 26 November, 1924.)

1. Carriers—Railroads—Negligence—War.

Where under war control an excavation was made on railroad lands near a publicly used road, which without a protecting rail, was a menace to travel, and after the release of the carrier from such control, the railroad company left this dangerous condition for an unreasonable length of time, and proximately caused damages to the plaintiff's automobile and personal injuries to himself, without contributory negligence on his part, the fact that the excavation was made while the railroad was under war control does not prevent a recovery.

2. Same—Notice—Evidence.

Where a railroad company has maintained a menacing and dangerous condition on its own land near a publicly used street of a city, and is sued for alleged negligent damages by one injured thereby, it is competent for the plaintiff to show that the mayor of the town had previously called this condition to the attention of the defendant company, and requested the defendant to properly safeguard the public from the danger.

3. Same—Roads and Highways—Permissive User—Nonsuit—Questions for Jury.

Evidence tending to show that defendant railroad company had continuously maintained a menacing and dangerous condition on its land near a road used by the public, and that the plaintiff received injuries caused thereby, is sufficient under the facts of this case to take the case to the jury upon the issue of defendant's actionable negligence, though the road had not been dedicated by the owner to the public.

APPEAL by defendant from *Long, J.*, at March Term, 1924, of CLEVELAND.

This is an action for damages resulting from personal injuries and injuries to an automobile alleged to have been caused by the negligence of defendants in maintaining on their right of way, adjacent to a road used by the public, a deep hole or excavation and failing to erect around or about the same a fence, railing or other guard for the protection of travelers on the said road. Evidence offered by plaintiff tended to show the following facts:

On 24 April, 1922, the automobile in which plaintiff was driving along a road leading from a street in the town of Kings Mountain to the plant of a lumber company, situate some distance from the street, skidded, ran off the road and onto defendant's right of way. There was on the right of way, near the road, a large hole caused by excavations made during the construction of a concrete bridge over defendant's right of way connecting two streets in the said town. The bank on the right of way immediately adjacent to the road was caved or hollowed out, like a shell and the soil from the road to the hole was soft and muddy. From the center of the road to the bank of the railroad was about eight feet. The dirt taken from this hole was used in the construction of the concrete bridge while defendant's property was under Federal control during the years 1918 and 1919. This property had been returned to defendant on 1 March, 1920. The hole or excavation had been permitted by defendant to remain upon its right of way and no fence, railing or other guard had been erected around or about the hole, so that on 25 April, 1922, there was no protection for a traveler on the said road who for any cause was diverted from the road to the right of way.

The plaintiff was driving on the road at a rate of speed not exceeding four miles per hour; there was nothing wrong with the brakes or steering apparatus of plaintiff's car. The road was slippery and this caused the car to skid. Plaintiff cut off the gas and put on his brakes but notwithstanding his efforts, he lost control of the car which, leaving the road and going upon defendant's right of way, fell into the hole or excavation, with the result that the car was demolished and the plaintiff sustained serious personal injuries.

The road upon which plaintiff was driving was not maintained by the town of Kings Mountain as a street. It had been used for more than five years by persons who had occasion to go to the plant of the lumber company or to a public gin located near said plant. This road was about 25 feet wide and was generally used by the public. The mayor of the town of Kings Mountain had called the condition upon defendant's right of way caused by the maintenance of said hole or excavation to the attention of the division superintendent of the defendant and also to the attention of defendant's agent at Kings Mountain and had requested them to put up a rail or other guard about the hole for the protection of persons traveling on the said road.

At the conclusion of plaintiff's evidence defendant's motion for nonsuit was overruled and defendant excepted. Defendants did not offer evidence. Upon the verdict returned by the jury, judgment was rendered that plaintiff recover of the defendants the sum of $150 as damages for injury to his automobile and $500 as damages for his personal injuries. From said judgment defendants appealed. Assignments of error appear in the opinion.

O. Max Gardner for plaintiff.
Ryburn & Hoey and O. F. Mason for defendants.

CONNOR, J. Defendants assign as error the refusal of the court to sustain their objection to the testimony of the mayor of Kings Mountain, that he had notified the defendants of the conditions on their right of way and requested them to erect a fence, rail or other guard about the hole for the protection of the public and of the town. This assignment is not sustained. Defendants, as a defense to plaintiff's action, in their answer had denied that they excavated the hole or constructed the concrete bridge, alleging that this was done by the Director General of Railroads during the period of Federal control. Plaintiff alleged negligence not only in the original excavations of the hole, but also in the continued maintenance of it without sufficient guard. It was competent for plaintiff to show that defendants maintained the condition after 1 March, 1920, with express notice of the situation given by the town within whose corporate limits its property was included; *Bunch v. Edenton,* 90 N. C., 431.

Nor was there error in refusing defendant's motion for nonsuit. This Court held in *Bunch v. Edenton, supra,* that a town is liable in damages to one who receives an injury by falling into an excavation near the sidewalk (made by the owner of a lot for a cellar) when it appears there was no concurring negligence and the municipal authorities failed to cause to be erected a railing to prevent accidents to passersby. The

question as to the liability of the owner of the lot upon which the excavation had been made was not presented in this case but the court strongly intimates that such owner was also liable for the damages resulting from the injury.

In *Monroe v. R. R.*, 151 N. C., 374, the owner of a lot, on which was a hole or pit, was held not liable to one who came upon the lot as a trespasser or as a mere licensee; but *Manning, J.*, citing *Bunch v. Edenton*, expressly distinguishes the law as applied in that case from the law as applied to the facts in *Bunch v. Edenton*. In *Monroe v. R. R.*, plaintiff went upon defendant's property as a mere licensee and the court held that the owner of the property was under no duty to keep his premises in a suitable condition for those who came upon them solely for their own convenience or pleasure or who were not either expressly invited or induced to come upon the property. In *Bunch v. Edenton*, the plaintiff was walking upon the sidewalk at night and being unable to see the pit, missed the sidewalk, stumbled and fell into the pit, and was thereby injured.

In the instant case, the plaintiff did not go upon defendant's right of way as a wrongdoer or as a licensee. He was there as the result of an accident. He was rightfully on the road which, although not dedicated as a public road by the owner of the land over which it passed, nor maintained by the public authorities as a public road, had been used by the public for more than five years with the permission of the owner. Defendants, of course, are not liable for the slippery condition of the road nor for the skidding of plaintiff's car. The proximate cause, however, of plaintiff's injury was his falling into the hole on defendant's right of way. If the hole or excavation had not been there or if a fence or rail had been erected between the road and the hole, the plaintiff would not have been injured.

In *Autrey v. Southern R. R.*, the Court of Appeals of Georgia, in an opinion filed 13 March, 1924, 123 S. E., 752, holds the defendant liable in damages to the plaintiff who was injured by falling into a deep and dangerous hole on the defendant's property as a result of his automobile being deflected from the road on which he was driving.

We fail to discover in the evidence offered by the plaintiff any facts upon which the jury could have found that plaintiff was guilty of contributory negligence. There was no concurring negligence, and no railing, fence or other guard to prevent accidents to travelers on the road. The town had requested the defendants to place a railing or other protection along the edge of the road. This defendants had failed to do. Their negligence was the proximate cause of plaintiff's injury and they are liable to plaintiff for the damages assessed by the jury.

No error.

ALICE PRICE v. T. J. PRICE.

(Filed 26 November, 1924.)

Marriage—Divorce—Alimony Without Divorce—Statutes.

In the wife's application for alimony without divorce (C. S., 1667, and amendments thereto) it is not required that the judge hearing the matter shall find the facts as a basis for his judgment, as in proceedings for alimony *pendente lite* (C. S., 1666), though it is necessary that she allege sufficient facts to constitute a good cause of action thereunder. *Semble*, the better practice is for the court to find the facts when the same are in dispute, as was done in this case.

APPEAL by defendant from *Lane, J.*, at chambers, in Albemarle, 7 July, 1924. From UNION.

Civil action for alimony without divorce.

From an order awarding an allowance in accordance with plaintiff's application the defendant appeals, assigning errors.

Vann & Milliken for plaintiff.
John C. Sikes for defendant.

STACY, J. This is an action instituted in the Superior Court of Union County, the county in which the cause of action arose, to have a reasonable subsistence and counsel fees allotted and paid or secured to the plaintiff out of the estate or earnings of her husband; such action being authorized by C. S., 1667, as amended by ch. 123, Public Laws 1921, and ch. 52, Public Laws 1923.

On the hearing, defendant interposed a demurrer *ore tenus* to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, in that it fails to set forth specifically the things of which plaintiff complains. This was overruled. There is a further exception, directed to the failure of his Honor to find sufficient facts to support his order.

The demurrer was properly overruled, and the exception to the judgment cannot be sustained.

Under the express terms of the statute, as amended, if any husband (1) shall separate himself from his wife and fail to provide her and the children of the marriage with necessary subsistence according to his means and condition in life, or (2) shall be a drunkard or spendthrift, or (3) shall be guilty of any misconduct or acts which would be or constitute cause for divorce, either absolute or from bed and board, his 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: *Provided*, it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony; and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony or for her support, but only her reasonable counsel fees.

The plaintiff alleges at least two causes of action for divorce—one, that the defendant has committed adultery (C. S., 1659); and the other, that he has offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome (C. S., 1660). The defendant's remedy was not by demurrer, but by motion to make the allegations of the complaint more specific, if he considered them too indefinite or uncertain. C. S., 537; *Bank v. Duffy*, 156 N. C., 83; *Womack v. Carter*, 160 N. C., 286. Or he might have asked for a bill of particulars. C. S., 534; *Turner v. McKee*, 137 N. C., p. 254.

"A complaint will be sustained as against a demurrer if any part presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it under a liberal construction of its terms." *Hartsfield v. Bryan*, 177 N. C., 166; *Foy v. Foy, ante*, 518.

With respect to the sufficiency of his Honor's findings, it should be observed that this is not an action for divorce, with application for alimony *pendente lite*, under C. S., 1666, but it is an application for alimony without divorce, under C. S., 1667. The two statutes are dissimilar in several respects. There is no specific requirement in the latter section (*Allen v. Allen*, 180 N. C., 465), as in the former (*Easeley v. Easeley*, 173 N. C., 530), that the judge shall find the facts as a basis for his judgment, except, when put in issue, which is not done here, the alleged fact of the wife's adultery is required to be found against her, when she would otherwise be entitled to the relief sought, and the application is denied on this ground. This, of course, would not dispense with the necessity of alleging sufficient facts to constitute a good cause of action under the statute.

However, in keeping with the general rule, which would seem to be the better practice where the facts are in dispute, his Honor did find the facts. It is set out in the judgment that "the defendant has offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome, and has assaulted, mistreated, humiliated and abandoned the plaintiff, forcing her to leave his home; and it further appearing that the plaintiff has no separate estate or means of subsistence on which to live or prosecute her action, it is therefore con-

sidered, ordered, adjudged and decreed," etc.; and the fact of marriage is expressly admitted. These facts, it would seem, are amply sufficient to support the judgment. *Barbee v. Barbee,* 187 N. C., 538.

There is no contention that the amount awarded is excessive or unreasonable, under the facts disclosed by the present record. The judgment will be sustained.

Affirmed.

CAVENESS PRODUCE COMPANY v. C. E. WILKINSON.

(Filed 26 November, 1924.)

Pleadings—Issues—Appeal and Error.

Where the purchaser of a carload of potatoes only alleges damages against the seller, due to the bad condition of the potatoes, it may not be successfully contended by the plaintiff that he had been deprived, on the trial, of his position as to grade, etc., by the submission of the issue alone raised by the pleadings.

STACY, J., dissenting.

APPEAL by plaintiff from judgment rendered by *Grady, J.,* at April Term, 1924, of WAKE.

Defendant, a farmer, residing in Beaufort County, N. C., sold and shipped to plaintiff, engaged in business as a produce merchant, at Raleigh, N. C., on 25 July, 1922, two hundred barrels of Irish potatoes, grown by him. The car containing the potatoes arrived at Raleigh on 26 July. The potatoes had been resold by plaintiff to a customer at Greensboro, N. C. The car was rebilled at Raleigh to the customer at Greensboro, and arrived there on 1 August. The customer accepted and paid for 125 barrels, and refused to accept 75 barrels, contending that the potatoes refused were rotten and unsalable. The sole ground for such refusal was the condition of the potatoes when they arrived at Greensboro and were delivered to the customer.

The jury having found that the potatoes were in good condition when the car arrived at Raleigh on 26 July, 1922, judgment was rendered that plaintiff recover nothing of defendant. Plaintiff appealed.

J. M. Broughton for plaintiff.
Armistead Jones & Son and W. B. Snow for defendant.

PER CURIAM. Plaintiff complains that the issues submitted by the court did not permit it to present to the jury, nor the jury to pass upon, the vital matters in this action, as alleged in the complaint. A careful reading of the complaint, however, shows that the damages were alleged

to be due to the condition of the potatoes when delivered at Greensboro, and not to their failure to grade No. 1. This was also the contention of plaintiff during the trial. The controversy was as to the condition of the potatoes at Raleigh, the plaintiff offering evidence tending to show that the potatoes were in bad condition when they reached Greensboro, on 1 August, and the defendant offering evidence tending to show that they were in good condition when they left Beaufort County, on 25 July. They were not inspected at Raleigh, nor was there any direct testimony as to their condition on the 26th, when the car arrived, or on the 31st, when the car was delivered to plaintiff at Raleigh. Plaintiff rebilled and shipped the car from Raleigh on 31 July, and same was received by the customer at Greensboro on 1 August. The customer made no complaint of the grade of the potatoes, and therefore plaintiff suffered no damages by reason of breach of warranty, if any, as to their grade.

We have examined the other exceptions, and find no error for which a new trial should be ordered. There is

No error.

STACY, J., dissenting.

STATE v. R. L. WEDDINGTON.

(Filed 26 November, 1924.)

Sunday — Sale of Merchandise — Soft Drinks — Ordinances — Cities and Towns.

An ordinance regulating the sale of merchandise, drinks, etc., on Sunday is a valid exercise of the police powers of an incorporated city or town; and while the service of meals within the town at restaurants, etc., is a necessity, permitting the sale of coffee, tea, etc., the sale of coca-cola as a part of the meals is not included, and a sale thereof as a part of the meal may be prohibited by ordinance. C. S., 2787 (6), (10), (27).

APPEAL by defendant from *Stack, J.*, at September Term, 1924, of ROWAN.

Criminal prosecution, tried upon a warrant charging the defendant with the sale of a bottle of coca-cola on Sunday, 3 August, 1924, in the incorporated town of Faith, N. C., in violation of an ordinance of said municipality.

From an adverse verdict, and judgment that the defendant pay a fine of a penny and the costs, he appeals.

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

Linn & Linn for defendant.

STACY, J. This prosecution was commenced in the mayor's court of the town of Faith, N. C., and tried *de novo* on appeal to the Superior Court of Rowan County. From the latter court the case is brought here for the purpose of testing the validity of the following ordinance:

"That it shall be unlawful for any person or persons, merchants, tradesmen or company to sell or offer for sale on Sunday any goods, wares, drinks or merchandise of any kind or character, except in case of sickness or absolute necessity, in the town of Faith."

The facts are these: On Sunday, 3 August, 1924, the defendant, who owns and operates a restaurant in the town of Faith, Rowan County, N. C., sold and furnished to one Council Ward, for the price of five cents, a bottle of coca-cola as a part of and in connection with a midday meal or lunch. In consequence of said sale he was charged with a violation of the above ordinance. The defendant did not keep his restaurant open during the entire day of 3 August, 1924, and he has not regularly kept the same open on other Sabbath days, except at stated hours, reasonably adapted to the sale and service of meals and lunches.

The validity of the ordinance in question is conceded, as applied to a place of business dealing solely in soft drinks, sold as beverages, or as applied to the sale of a soft drink as a beverage, and no more; but it is the position of the defendant that in so far as it prohibits him, in good faith, from selling a coca-cola on Sunday as a part of and in connection with a meal or lunch, it is unreasonable, oppressive, in derogation of common right, and to this extent, he contends, the ordinance should be declared void and of no effect, as transcending the bounds of a reasonable exercise of the police power of said town. C. S., 2787, subsecs. 6, 10, and 27; 6 R. C. L., 192. He says that as it is lawful for him to sell a meal or lunch on Sunday as a work of necessity, it ought to be lawful to include in such meal or lunch, as a bona fide part thereof, any legitimate soft drink which his customer may desire, so long as it can fairly be considered a component part of the meal or lunch. See *McAfee v. Com.*, 173 Ky., 83, as reported in L. R. A., 1917 C., 377, and note.

The defendant's position is not without force, because the suggested exception strongly appeals to the common judgment of men as being meet and proper under such conditions, but it must be remembered that we are dealing with the exercise of an unquestioned police power, and whether it transcends the bounds of reason—not with its wisdom or impolicy. *S. v. Vanhook*, 182 N. C., 831; *S. v. Austin*, 114 N. C., 857. The peculiar conditions and evils to be remedied in the town of Faith can best be understood by the commissioners of that town, and the courts are permitted to check their acts only when they are palpably unreasonable and oppressive. *S. v. Burbage*, 172 N. C., 876.

It will be observed that the ordinance in question contains but two exceptions. It makes it unlawful for any person or persons, merchants, tradesmen or company to sell or offer for sale on Sunday in the town of Faith any goods, wares, drinks or merchandise of any kind or character, except in case of sickness or absolute necessity. His Honor instructed the jury that the word "drinks," as used in the ordinance, had a well-known meaning, and that it would include any soft drink usually sold as a beverage, such as coca-cola, but that it would not embrace water, coffee, tea, milk or anything not ordinarily classed as a beverage. Under this definition, which seems to be a fair interpretation of the word, it is clear that the sale of the coca-cola in question, though made in connection with a meal or lunch, comes squarely within the condemnation of the ordinance, and we cannot say that it is an unreasonable and unwarranted exercise of the police power in the town of Faith. It is primarily a question addressed to the good judgment and common sense of the commissioners of that town. *S. v. Austin,* 114 N. C., 855; *Humphrey v. Church,* 109 N. C., 132; *S. v. Summerfield,* 107 N. C., 895.

The decision in *S. v. Blackwelder,* 186 N. C., 561, is not at variance with our present position, for there the prohibition extended to the sale of a meal in the town of Landis on Sunday, and this was held to be unreasonable. It is not unlawful in this country to eat on Sunday, nor even "to pull the ox out of the ditch," but it is unlawful, under the above ordinance, to sell drinks on Sunday in the town of Faith.

The power to enact ordinances, similar to the one before us, has been upheld in *S. v. Pulliam,* 184 N. C., 681; *S. v. Burbage,* 172 N. C., 877; *S. v. Davis,* 171 N. C., 809; *S. v. Medlin,* 170 N. C., 682.

The record presents no reversible error, hence the verdict and judgment must be upheld.

No error.

L. A. McFARLAND v. W. F. QUINN.

(Filed 26 November, 1924.)

Injunctions—Contracts—Subcontractor—Appeal and Error—Evidence—Findings of Fact.

Where a contractor is obligated under his contract to complete a certain work, under certain conditions, by a certain date, and subcontracts it to another, who has failed therein, and the original contractor is threatened with irreparable damages, and the subcontractor, by his acts and conduct in interfering with the possession and progress of the work, prevents its completion by the original contractor: *Held,* upon the hearing as

to continuing a temporary order restraining the subcontractor to the final hearing, an order so doing was properly entered, the findings of the court being only conclusive when supported by evidence as to the issuance of such further order.

APPEAL by defendant from an order made by *Cranmer, J.*, at August Term, 1924, of ALAMANCE.

Plaintiff entered into a contract with the Burlington Mills, Inc., by which plaintiff agreed to move certain cotton-mill machinery from Gastonia, N. C., to Burlington, N. C., and to erect and install said machinery in a building owned by said Burlington Mills, Inc., at Burlington. Said contract was to be completed on or before 25 August, 1924. Plaintiff bound himself to do the work in an efficient and workmanlike manner, and to be responsible for all loss sustained by said Burlington Mills, Inc., by reason of broken or lost parts of said machinery or of delay or loss of time by said mills, incorporated.

In the performance of this contract plaintiff made a subcontract with the defendant, by which defendant agreed to erect, install and adjust certain parts of said machinery to the satisfaction of the plaintiff and the superintendent of the Burlington Mills, Inc.

Plaintiff alleges that on 7 August, 1924, defendant had performed only about one-third of the work which he had contracted to do, and that this work was unsatisfactory to the plaintiff and to the superintendent of the mills; that the same had been done in a negligent and careless manner; that important parts of the machinery had been lost or broken, and that defendant throughout his employment had acted in an arbitrary manner and not in good faith; that the time for the completion of the work by plaintiff, under his contract with the Burlington Mills, Inc., was about to expire, and that the mills, incorporated, had notified him that it would hold him liable for the penalty prescribed in his contract for failure to perform the same in accordance with its terms, and that plaintiff is thereby about to suffer great loss on account of the conduct of the defendant, who is insolvent; that the defendant has refused to arbitrate the matters in difference between himself and plaintiff in accordance with their contract, and has refused to accept a reasonable settlement for the work thus far performed by him, but persists in conduct which makes it impossible for plaintiff to assume control of the work and complete it in accordance with his contract with the Burlington Mills, Inc.

Upon these allegations a temporary restraining order was issued and made returnable before his Honor, Judge Cranmer. At the hearing, on 14 August, 1924, Judge Cranmer found that the plaintiff was under obligation to complete his contract with the Burlington Mills, Inc., by 25 August, 1924; that plaintiff had been and was being hindered and

delayed in completing said work by willful acts on the part of the defendant in violation of his contract obligations to the plaintiff. Upon such findings his Honor signed an order enjoining and restraining the defendant from entering upon the premises where the machinery was being installed, and from interfering with, hindering or molesting in any way the plaintiff from completing his contract with the Burlington Mills, Inc.; that said order should continue until the final hearing on the action.

To the foregoing order the defendant excepted and assigned same as error.

Carroll & Carroll for plaintiff.
Coulter & Cooper for defendant.

PER CURIAM. Plaintiff was under contract with Burlington Mills, Inc., to install certain machinery in a building owned by the said Burlington Mills, Inc., by a date fixed by the contract. The performance of this contract made it necessary for plaintiff to go upon the premises of the Burlington Mills, Inc., and to have control of the machinery which he had contracted to install. Plaintiff contends that the subcontract which he had made with defendant had been broken by the willful and arbitrary refusal of defendant to perform the same in accordance with its terms, and that by reason of such breach defendant had no right to go upon said premises or to interfere with plaintiff's possession and control of the said machinery. Plaintiff further contends that the defendant's persistence in going upon the said premises and interfering with his possession of the said machinery is wrongful and unlawful. The judge, upon the hearing, finds the facts to be in accordance with the plaintiff's contention. He further finds that defendant threatens to go upon the said premises and to interfere with the plaintiff's possession of the machinery thereon, and that such conduct on the part of the defendant will work irreparable damage to the plaintiff, who is under contract to complete his work by 25 August, 1924.

The order of the judge continuing the restraining order to the final hearing of the action is sustained by the facts, which are admitted in the pleadings and found by the judge upon the hearing. These findings are not conclusive upon the parties, but are for the purpose of disposing of the motion for continuance of the restraining order only. These findings and the order of the judge do not prejudice the rights of the parties at the final hearing of the action.

There was no error in continuing the restraining order.

Affirmed.

JAMES S. MANNING, ATTORNEY-GENERAL OF NORTH CAROLINA, v. ATLANTIC AND YADKIN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 December, 1924.)

1. Carriers—Railroads—Merger—Connected Lines — Statutes—Unlawful Combinations—Presumptions.

A railroad company operating in this State, when expressly or impliedly authorized by State statute, may purchase and absorb within its system another such corporation physically connected with its lines within the State when the latter corporation is likewise authorized to sell; and the presumption obtains, nothing else appearing, that the legislative intent was not to thereby authorize a monopoly or any act on the part of the railroads against the public policy of the State.

2. Same—Intent.

The legislative intent is to be gathered from the language used in the statute, and not by the debates upon the floor during its passage, or the understanding of those concerned therein who are not members.

3. Statutes — Knowledge — Presumptions — Carriers — Railroads—Geographical Divisions.

In the passage of an act permitting a railroad corporation operating in this State to purchase or acquire connecting lines of railroads, it will be presumed that the Legislature had knowledge of the direct physical connection of the buying and the selling corporations.

4. Pleadings—Demurrer—Fraud.

Where the complaint generally alleges a fraudulent intent on the part of railroad corporations in acquiring and absorbing their connecting lines under statutory authority, and from its other allegations it appears that the consolidation was lawfully effected, a demurrer thereto does not admit the fraud vaguely alleged, it being required that the particularities of the fraud relied upon be sufficiently stated in the complaint.

5. Carriers—Railroads—Entire System — Mortgages—Foreclosure—Purchasers—Laches—Estoppel—Counts—Judgment.

Where the State and localities along the route of a railroad have acquired an interest therein by subscription to its shares of stock under statutory requirement that the road be operated or sold as an entirety, and in foreclosure proceedings the court has so ordered the sale, and the road has been purchased by another railroad company authorized by statute to sell, and which does thereafter sell to two separate corporations, which divide and separately operate it, each as a part of its own system: *Held*, the corporations so purchasing and independently operating the separate portions are not in violation of the statutory provisions that the road should be operated or sold as a whole, and the Federal requirements as to interstate carriers in such matters become immaterial. As to whether the State, under the facts of this case, had lost its rights by its laches, *quere?*

CLARKSON, J., concurring.

THE plaintiff appealed from a judgment rendered by *Grady, J.*, at February Term, 1924, of WAKE, sustaining the defendants' respective demurrers to the complaint and dismissing the action.

The plaintiff's material allegations, as they appear in the complaint, the exhibits, and the references, are substantially as herein stated. In 1852 the General Assembly incorporated the Western Railroad Company, which was authorized to build a railroad between the town of Fayetteville and the coal region in the counties of Moore and Chatham (Laws 1852, ch. 147); and at a subsequent session it passed an act under which the county of Cumberland and the town of Fayetteville each subscribed $100,000. Laws 1856-57, ch. 71. There were also individual subscriptions to the amount of $134,400. Under a later act the State donated to the enterprise more than $600,000, and in 1868 subscribed in bonds the additional sum of $500,000.

In 1879 the name of the Western Railroad Company was changed to the Cape Fear and Yadkin Valley Railway Company, and the latter succeeded to all the rights, powers, privileges, immunities and franchises of the former, and was authorized to consolidate with the Mount Airy Railroad Company and to complete the roads. Public Laws 1879, ch. 67.

By virtue of an act passed by the General Assembly in 1883, there was a reorganization of the system, and the Cape Fear and Yadkin Valley Railway Company was authorized to extend its main line from Wilmington through the central part of the State to the Virginia line and to build certain branch lines as provided in the act. Public Laws 1883, ch. 190. Under such authority, this company operated as its system, at the time it was sold, its main line, extending from Wilmington to Mount Airy, a distance of 284.28 miles; a branch line extending from Fayetteville to Bennettsville, South Carolina, a distance of 57.75 miles; four branch lines in North Carolina having a trackage of 34.15 miles; and certain sidetracks aggregating 27.17 miles. In the construction and equipment of the road, over $7,000,000 were spent—the State, towns, townships and counties having donated and subscribed more than $1,000,000 of this amount.

The South Carolina Pacific Railway, extending from Bennettsville, South Carolina, to the North Carolina line, was leased by the Cape Fear and Yadkin Valley Railway for thirty years and was merged in it and operated as a part of its system, which constituted a continuous line from Mount Airy to Wilmington. All the franchises, privileges and rights of the latter company were held under its charter as an entirety, and as constructed it was an important artery of commerce, extending through the central part of the State from Mount Airy to Wilmington, and from Fayetteville to Bennettsville. Its western extension crossed the Norfolk and Western Railroad, running to Roanoke, Virginia, open-

ing up the coal region of West Virginia and doing a large interstate and intrastate business, thus competing with the Seaboard, the Southern and the Atlantic Coast Line railroads.

On 1 June, 1886, the Cape Fear and Yadkin Valley Railway Company executed to the Farmers Loan and Trust Company, of New York, as trustee, a deed of trust upon its property and franchise to secure bonds known as Series "A," Series "B," and Series "C," the aggregate amount of which was $3,054,000; and on 1 October, 1889, it executed to the Mercantile Trust and Deposit Company, of Baltimore, as trustee, a consolidated mortgage on its property and franchise to secure an additional bond issue of $1,848,000. In March, 1894, default was made in the payment of interest, and the Farmers Loan and Trust Company brought suit in the Circuit Court of the United States for the Eastern District of North Carolina to foreclose the first mortgage, and the Mercantile Trust and Deposit Company was made a defendant, and, when it resigned its trust, William A. Lash was substituted as trustee and made a defendant to the suit. On the day the bill was filed in the Circuit Court, John Gill was appointed receiver of the Cape Fear and Yadkin Valley Railway Company and took possession of its property. In the suit an attempt was made to force a sale of the property in division, and thereby to dismember the system, but the court refused to permit such sale, and ordered that the property be sold as an entirety. (The case was decided in the Circuit Court, 31 March, 1897. 82 Fed. R., 314.) In the complaint is an extended quotation from Judge Simonton's decision, which it is not necessary to repeat here. There was a rehearing; and on 15 June, 1897, Judge Simonton, adhering to the position that the mode of sale was within the discretion of the court, affirmed his former ruling. Among the reasons given for this mode of sale was the passage of an act amending section 698 of The Code. (Section 698 provided that a corporation created by or in consequence of a sale or conveyance of corporate property under a deed of trust should succeed to the franchises, rights and privileges of the first corporation; and the act of 1897 provided that the purchasing corporation should succeed to such rights, privileges and franchises only in case the first corporation (railroad) was sold as an entirety. Public Laws 1897, ch. 305.) From the decree of the Circuit Court there was an appeal to the United States Circuit Court of Appeals, and the decree appealed from was affirmed on 3 May, 1898. *Low v. Blackford,* 87 Fed. Rep., 392. (Quotation omitted.) The effect was to direct the sale of the property of the Cape Fear and Yadkin Valley Railroad Company as an entirety, thus giving effect to the act of 1897.

The commissioners appointed under a decree of the United States Court sold the property, at Fayetteville, on 29 December, 1898, and, as

reported by the commissioners, H. Walters, V. F. Newcomer, Mitchell Jenkins, and Warren G. Elliott became the purchasers, at the price of $3,110,000, with $15,000 additional for the equipment. The purchasers were officers of the Wilmington and Weldon Railroad Company (now Atlantic Coast Line), and at their request the commissioners, on 31 January, 1899, executed a deed for the property as an entirety to the Atlantic and Yadkin Railway Company. This company was incorporated by an act of the General Assembly ratified on 23 February, 1899, the preamble reciting that in the deed conveying the property to them, and otherwise, under the statutes of the State, the purchasers had declared themselves a corporation by the name of the Atlantic and Yadkin Railway Company, having elected officers and performed other acts as a corporation. (Excerpts from act omitted.)

It is alleged that on 13 May, 1899, the directors of the Atlantic and Yadkin Railway Company, contrary to the provisions of its charter and in violation of the decree of the Federal Court, undertook by resolution to dismember the property of this company, formerly owned by the Cape Fear and Yadkin Valley Railway Company, by selling and conveying to the Wilmington and Weldon Railroad Company, whose name had then been changed to the Atlantic Coast Line Railroad Company, that portion of the Atlantic and Yadkin Railway Company lying east of Sanford and extending through Fayetteville to Wilmington, and from Fayetteville to Bennettsville, South Carolina, including the leasehold estate of the Bennettsville division. The resolution is made a part of the complaint. The Southern Railway Company acquired all the stock of the Atlantic and Yadkin Railway Company, and by virtue thereof became the owner of all that part of this railroad lying between Mount Airy and a designated point in Sanford, including all branches and sidetracks between these *termini*. It is alleged that in this way the dismemberment of the property was brought about.

In 1913 the General Assembly passed a resolution reciting the alleged dismemberment of the Atlantic and Yadkin Railway Company, directing the Corporation Commission to investigate any matters pertaining to a sale of any part of said road to the Wilmington and Weldon Railroad Company and to the Southern Railway Company, and empowering the commission to subpœna and examine witnesses and to cause the production of books and documents. Pursuant to this resolution, the commission began an investigation on 8 September, 1913, and examined H. Walters, one of the purchasers named above, who testified as set forth in Exhibit D, which is attached to the complaint. This was the first communication, concerning the sale, made to any board or body representing the State. (Excerpts from testimony of Walters omitted.) It is alleged that the said purchase and dismemberment of the property

of the Cape Fear and Yadkin Valley Railway Company was contrary to law, was conceived in fraud and for the purpose of evading the decree of the court, which authorized the sale of said property as an entirety, deceiving and misleading the Legislature of the State of North Carolina, and evading the act of 1897, chapter 305, for the purpose of committing and working a great injury to the people of the State of North Carolina, and especially those people living in the sections of the said State traversed by said road. It is alleged that the acts of the Southern Railway Company and the Wilmington and Weldon Railroad Company, through its officers and agents, constituted a conspiracy to violate the antitrust laws of the United States and to violate the laws of the State of North Carolina; that the said deed of the Atlantic and Yadkin Railway Company to the Wilmington and Weldon Railroad Company was fraudulent and contrary to law, and was executed in violation of the laws of this State; that the same is void and should be surrendered and canceled, and the said property formerly composing the Cape Fear and Yadkin Valley Railway Company and purchased by the Atlantic and Yadkin Railway Company should be operated and its franchises enjoyed as an entirety. Following is the prayer for judgment:

"Plaintiff prays that the deed dated 13 May, 1899, by the Atlantic and Yadkin Railway Company to the Wilmington and Weldon Railroad Company or the Atlantic Coast Line Railroad Company be canceled and all of the property conveyed therein be surrendered to the said Atlantic and Yadkin Railway Company; for the costs of this action, to be taxed by the clerk of this court, and for such other and further relief as the plaintiff may be entitled to, at law or in equity."

In 1923 the Legislature adopted the following resolution: "That the Attorney-General is hereby authorized and empowered and directed to proceed without delay, and report progress to Governor and Secretary of State, to institute such action or actions as may be desirable or necessary to dissolve the alleged illegal dismemberment of said road, in order that it may be restored as a continuous east and west line, as contemplated by the State in the granting of original charter." Res. 47, p. 641, Laws 1923.

The action was brought in pursuance of this resolution.

Each defendant filed a separate demurrer to the complaint, and in each demurrer are assigned substantially the following grounds:

1. The complaint shows upon its face that James S. Manning is not the real party in interest, etc.

2. It does not appear from the allegations of the complaint that either the named plaintiff or the State of North Carolina has any interest in the alleged cause of action attempted to be set up by the complaint.

3. The complaint does not allege any facts showing any violation of law or public policy of the State, but on the contrary alleges facts showing authority under the law of North Carolina for the doing of all the acts complained of therein.

4. The complaint does not set up any facts which show or tend to show that "the said purchase and dismemberment of the property of the Cape Fear and Yadkin Valley Railway Company was contrary to law, was conceived in fraud and for the purpose of evading the decree of the court which authorized the sale of said property as an entirety, deceiving and misleading the Legislature and evading the act of 1897, chapter 305, and of committing and working a great injury to the people of the State, and especially those people living in the sections of the State traversed by said road."

5. The complaint does not allege any facts which tend to show a conspiracy to violate any law of the State or the United States.

6. It appears from the complaint that the plaintiff is attempting to sue in the Superior Court on behalf of the State, through its Attorney-General, to enforce the provisions of the antitrust laws of the United States, being an act of Congress of 2 July, 1890, and the said action can only be brought in the name of the United States, through the Attorney-General of the United States and in the United States Court, and this court has no jurisdiction of the subject-matter of said action.

7. The complaint shows that the railroad referred to is operated in interstate commerce, and it is not alleged that there has been obtained from the Interstate Commerce Commission of the United States, as required by paragraph 18 of section 1 of the Interstate Commerce Act, as amended, a certificate that the present or future public convenience and security require or will require the acquiring and operation by the Atlantic and Yadkin Railway Company of that part of the old Cape Fear and Yadkin Valley Railway Company, now owned and operated by the Atlantic Coast Line Railroad Company.

8. The complaint does not allege that the Interstate Commerce Commission of the United States has, after a hearing, as required by section 8 of the Interstate Commerce Act, approved and authorized the acquisition by the Atlantic and Yadkin Railway Company of that part of the Atlantic Coast Line Railroad Company which was formerly the Cape Fear and Yadkin Valley Railway Company, lying to the east of Sanford.

9. It appears from the complaint that the granting of the relief prayed for therein would involve the merger of that part of the old Cape Fear and Yadkin Valley Railway Company east of Sanford with the railroad owned by the Atlantic and Yadkin Railway Company, and the complaint does not allege that such merger has been authorized or

approved by the Interstate Commerce Commission, as required in case of interstate railroads by the Transportation Act of 1920, amending section 5 of the Interstate Commerce Act by adding thereto paragraphs 4, 5, 6, 8, by which Congress has taken exclusive jurisdiction of the merger of railroads engaged in interstate commerce, and under which no consolidation may be made, except upon approval of the Interstate Commerce Commission, as therein provided.

10. The plaintiff has not shown good faith and due diligence:

(a) For that it appears from the allegations of the complaint that the Cape Fear and Yadkin Valley Railway Company was sold under foreclosure proceedings, as directed by a decree of the Circuit Court of the United States for the Eastern District of North Carolina, which sale was confirmed by an order of said court in December, 1898, from which an appeal was taken, and said decree of sale was confirmed by the Circuit Court of Appeals of the United States for the Fourth Circuit, on 5 May, 1899, and it does not appear that any action or proceeding was instituted by any party to said decree, or any person whatsoever, or by the State of North Carolina, or the Attorney-General of North Carolina, until May, 1923, although it appears from the complaint that the General Assembly of North Carolina of 1913, by joint resolution, authorized an investigation by the North Carolina Corporation Commission of all matters pertaining to the sale of any part of the Atlantic and Yadkin Railway Company to the Wilmington and Weldon Railroad Company and to the Southern Railway Company, and that such investigation was had and all of the information in possession of this defendant, and other parties, concerning the sale of the Cape Fear and Yadkin Valley Railway Company and the sale of that portion of the same by the Atlantic and Yadkin Railway Company lying east of Sanford, North Carolina, was then obtained and made known, and this defendant avers, therefore, that there has been such gross laches as would bar and estop the plaintiff from now maintaining this action.

(b) For that it appears from the allegations in the complaint that the purchasers of the said Cape Fear and Yadkin Valley Railway Company at said foreclosure sale acquired title to said property under and in strict conformity with the terms and provisions of said decree of the Circuit Court of the United States and of the statutes of the State of North Carolina, and said line of railroad and property taken was legally vested in said purchasers and their successors in title, including the defendant, as set out in the complaint, and that bonds secured by mortgages upon the said property were issued and sold to the public, and additions and betterments placed upon the said property, and the rights of third parties have intervened, and it does not appear that any action was instituted by the Attorney-General of North Carolina, or the State

of North Carolina, or any other person or persons, until 1923, although investigation was made under the direction of the Legislature of North Carolina in 1913 and all of the facts in connection with said transaction obtained by the Corporation Commission at that time, during all of which long time this defendant and its predecessors in title and the holders of said bonds so placed upon said property have been in the enjoyment of their rights acquired under and through said decree, and the mortgage foreclosure sale, and the acts confirmatory thereof, and the mortgage bonds issued thereon, and this defendant says that plaintiff has been guilty of such gross laches as would bar him from maintaining this action.

The Atlantic Coast Line Railroad Company demurred on the following additional grounds:

11. The relief prayed for is the cancellation of a deed from the Atlantic and Yadkin Railway Company to the Wilmington and Weldon Railroad Company and the surrender of the property conveyed by the Atlantic and Yadkin Railway Company, and the complaint contains no prayer requiring the Atlantic and Yadkin Railway Company to return to the Atlantic Coast Line Railroad Company or the Wilmington and Weldon Railroad Company the consideration paid by those companies to the Atlantic and Yadkin Railway Company for the railroad property conveyed in said deed, which is sought to be canceled, and there is no offer in the complaint on the part of the plaintiff to place the purchaser *in statu quo*.

12. It appears from the complaint that the court is without jurisdiction of the subject of the action, so far as there may be involved any violation or departure from the terms of the decree of the Circuit Court of the United States, in that it appears therefrom:

(a) That the sale was made pursuant to and in conformity with the terms of said decree conveying said property as an entirety.

(b) That the said sale was submitted to, considered by, and confirmed by the said United States Circuit Court.

(c) That said sale and conveyance, made pursuant to said decree, were specifically confirmed and ratified by the General Assembly of North Carolina, aforesaid.

13. The Southern Railway Company demurred on the further ground: The complaint does not allege any facts which show any such interest of this defendant as to make it a proper party to the controversy. This defendant is not a necessary party to a complete determination of the questions involved. The complaint does not, therefore, state a cause of action against this defendant.

At the hearing the lower court sustained the demurrers and each of them, and dismissed the action. The plaintiff excepted and appealed.

Pending the appeal the General Assembly, at the Special Session of 1924, adopted a joint resolution in reference to the Atlantic and Yadkin Railway Company, and appointed a committee to investigate the matters therein referred to. By permission of the court, the committee filed a supplemental brief, which was considered in connection with the other briefs filed in the cause.

Attorney-General Manning, Assistant Attorney-General Nash, John D. Bellamy, J. Lathrop Morehead, and A. L. Brooks for plaintiff.

George B. Elliott, V. E. Phelps, Murray Allen, and Thomas W. Davis for the Atlantic Coast Line Railroad Company.

S. R. Prince and Manly, Hendren & Womble for the Atlantic and Yadkin Railway Company.

L. E. Jeffries and W. B. Snow for the Southern Railway Company.

ADAMS, J. The Attorney-General is authorized to bring an action in the name of the State against a corporation for the purpose of annulling its charter on the ground that it was procured by fraud or the concealment of a material fact by the persons incorporated, or by some of them, or by others with their knowledge or consent. He may bring such action for the purpose of annulling the existence of a corporation, other than municipal, when such corporation offends against the act creating, altering, or renewing it, or violates any law by which it has forfeited its charter by abuse of its power, or has forfeited its privileges or franchises by failure to exercise its powers, or has done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises, or has exercised a franchise or privilege not conferred upon it by law, or when it has done certain other acts not germane to the present investigation. C. S., 1187.

The plaintiff's argument, at least in part, is predicated on the theory that the action is prosecuted under this section to procure a forfeiture of the charter granted by the General Assembly to the Atlantic and Yadkin Railway Company; but the defendants combat this position. They contend, as alleged in the complaint, that the action was instituted pursuant to the resolution adopted by the General Assembly of 1923; that the object therein contemplated is merely to set aside the alleged illegal sale of a part of this company's property; that the allegations of the complaint are addressed to this purpose, and that the relief prayed is the cancellation of the deed executed on 13 May, 1899, by the Atlantic and Yadkin Railway Company to the Wilmington and Weldon Railroad Company. The defendants urge the further argument that the action is not in the nature of *quo warranto;* that it does not relate to the usurpation or unlawful exercise of a franchise; and that neither

the plaintiff nor the State has a legal or justiciable interest in the cause of action set up in the complaint.

All these divergent contentions need not now be considered, for the defendants take certain positions which, if sound, will render unnecessary our determination of any question relating to the parties in interest or to the form of the action. Two of the propositions which the defendants undertake to maintain are these: (1) The sale of a part of the Atlantic and Yadkin Railway Company to the Wilmington and Weldon Railroad Company was authorized by law and is therefore valid. (2) The plaintiff has not shown good faith and reasonable diligence, and is estopped by laches from maintaining this action. Each proposition will be considered in its order.

The act incorporating the Atlantic and Yadkin Railway Company is made a part of the complaint. So likewise is the resolution adopted both by this company, as seller, and by the Wilmington and Weldon Railroad Company, as purchaser, in reference to the sale of that part of the system lying to the east of Sanford. The charter of the Atlantic and Yadkin Railway Company has this section: "The said company shall have the right to consolidate with any other railroad company organized under the laws of this State with which it may connect, directly or indirectly, on such terms and conditions as may be agreed upon by and between the stockholders of this and any other such company: *Provided,* that any corporation or company consolidated under the provisions of this act shall be a domestic corporation and subject to the laws and jurisdiction of North Carolina." Private Laws 1899, ch. 98, sec. 6. The resolution referred to, hereinafter set out, embodies a part of the act of 1899 (Private Laws, ch. 105) amending a former act (Private Laws 1893, ch. 284), which authorized the consolidation of the Wilmington and Weldon Railroad Company with any other railroad company with which it was directly or indirectly connected.

It is obvious, then, that the immediate question is whether the General Assembly, by the passage of these several acts, authorized the Atlantic and Yadkin Railway Company to sell and the Wilmington and Weldon Railroad Company to purchase the property described in the resolution and in the deed which was executed in pursuance of it.

On several grounds the plaintiff denies that the Legislature conferred such authority, or at any rate denies the efficacy of such alleged grant of power. His first position is that these private acts are void, because they purport to authorize a single railroad company to purchase, in whole or in part, all the connecting lines within the State, or any of them; that such pretended grant of power is against public policy, contrary to the common law and the bill of rights, and invalid as an unlawful attempt to suppress competition.

Pretermitting the question whether an act of the General Assembly should be construed as against public policy or the common law, we are not disposed to controvert the force of an argument based as a general rule on the grounds assigned by the plaintiff; but we do not understand that the Legislature granted to the Wilmington and Weldon Railroad Company the extensive and sweeping powers attributed to it in the plaintiff's brief. The right to consolidate or merge its railroads with others and to buy or lease other railroads may not be exercised by the company in its unrestrained discretion; for such consolidation or merger and such sale or lease may be made with or by those railroads only which are authorized by the Legislature to make such consolidation, merger, sale, or lease. It may reasonably be presumed in these circumstances that the General Assembly, which has the power to grant or withhold the right, will neither permit the creation of a monopoly nor authorize nor approve an act which would be illegal or against public policy; for the Legislature, out of due regard for the public welfare, may declare that the charter of a corporation shall not be used for the purpose of stifling competition and building up monopolies. *Pearsall v. Great Northern Railway Co.*, 161 U. S., 646; 40 Law Ed., 839, 848. In any event, we think such apprehended danger is not inherent in the act under which the sale is alleged to have been made, or that the act is reasonably susceptible of the construction insisted on by the appellant.

The plaintiff further contends that in the enactment of chapter 105 of the Private Laws of 1899 it was not the purpose of the Legislature to sever the Atlantic and Yadkin Railway, but to authorize the Wilmington and Weldon Railroad Company to purchase connecting lines within the State in order to establish an unbroken system between Virginia and South Carolina. On the hearing before the Corporation Commission, H. Walters, one of the purchasers at the commissioners' sale, testified substantially that the bill was originally intended by the purchasers to accomplish this purpose. It is contended, therefore, that the act should be given only such meaning as the purchasers, who procured its passage, had in mind—that is, authority to purchase the Norfolk connection, a part of the Petersburg Railroad, a part of the Wilmington, Columbia and Augusta Railroad, and a part of the Cheraw and Salisbury Railroad, but no others.

It is elementary learning that neither the purpose nor the opinions of those who are not members of a legislative body can be regarded as an appropriate source from which to discover the meaning of a legislative act. In *United States v. Freight Association*, 166 U. S., 290; 47 Law Ed., 1007, 1020, it was held that even debates in Congress may not be resorted to for this purpose, the reason being that it is impossible to determine with certainty what construction was put upon an act by the

members of the legislative body that passed it by resorting to the speeches of the individual members. Those who do not speak may not agree with those who do, the result being that the only proper way to construe a legislative act is to construe the language used in the act.

The statute must be regarded, not as the creature of the purchasers, but as the will of the Legislature, and its meaning must be ascertained by applying the ordinary principles of statutory construction. The object of judicial interpretation is to determine the legislative intent, and, to this end, words should generally be given their popular meaning if they have not acquired a meaning which is technical. It is only when the terms of a statute are ambiguous or of doubtful construction that the courts may exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the lawmakers. If the language is not ambiguous and the intent is plain, there is no reason for resorting to external circumstances as an aid to interpretation, for in such case there is really no ground for construction. We must therefore ascertain the intention of the General Assembly from the language of the acts, and not from the wish or intention of the purchasers who were interested in the legislation. Endlich Interpretation of Sts., chs. 1 and 2; Lewis' Sutherland St. Con., sec. 363 *et seq.; United States v. Freight Assn., supra; Standard Oil Co. v. United States,* 121 U. S., 1; 55 Law Ed., 619; *Whitford v. Ins. Co.,* 163 N. C., 223; *Highway Com. v. Varner,* 181 N. C., 42.

That part of the statute which is incorporated in the resolution referred to and made a part of the complaint follows: "Authority is hereby given to the Wilmington and Weldon Railroad Company to consolidate or to merge its railroads with, or to buy or lease the railroad or railroads of any other railroad company with which it may connect, either directly or indirectly, organized under the laws of this State or of any adjoining State which, under the laws of this or such other State, may have power to consolidate, merge, sell or lease its road; and any such other company shall have the right to consolidate, merge, sell or lease its railroad, in whole or in part, with or to the Wilmington and Weldon Railroad Company; and such consolidation, merger, sale or lease may be made between the Wilmington and Weldon Railroad Company and any other such company upon such terms and conditions as may be agreed upon by a majority of the stockholders of each corporation entitled to vote at all stockholders' meetings." Private Laws 1899, ch. 105, sec. 1.

This amendatory act was ratified on 24 February, 1899, the day after the Atlantic and Yadkin Railway Company was incorporated and authorized to consolidate with any other railroad company organized under the laws of this State with which it was directly or indirectly

connected. The Wilmington and Raleigh Railroad Company, afterwards the Wilmington and Weldon Railroad Company, was organized under the laws of North Carolina. Laws 1833-34, ch. 78; Private Laws 1893, ch. 100. The Legislature is presumed to have had knowledge of the direct physical connection of the selling and purchasing roads, of the purpose and scope of these acts, and of the legal effect of the provisions authorizing a sale, lease, merger or consolidation by or with the connecting lines; and if it authorized the sale in question, its intention to do so must be conclusively presumed.

Did these statutes authorize a sale of the property to the Wilmington and Weldon Railroad Company?

The plaintiff contends they did not; that to support the sale the defendants must show, not only that the purchasing company was authorized to buy, but that the selling company was also expressly vested with power to sell. This proposition is upheld in *Arkansas v. Choctaw & M. R. Co.*, 134 Fed., 106, cited by the plaintiff, but the case does not decide the point before us, because the act of Congress there reviewed related exclusively to the right of purchase, not of sale, and the State law authorizing the sale presented no Federal question and was not considered. Nor do we construe the remaining cases cited by the plaintiff as conclusive upon this question.

It may be deemed the established doctrine, however, that these corporations at the time of the sale had a right to exercise only such powers as had been expressly conferred upon them by the General Assembly, either in the acts creating them or in subsequent legislation, and such implied powers as were necessary to enable them to use the powers expressly granted. *Oregon Railway v. Oregonian Railway*, 130 U. S., 1; 32 Law Ed., 837; *Thomas v. Railroad Co.*, 101 U. S., 71; 25 Law Ed., 950; *Victor v. Mills*, 148 N. C., 107; *Barcello v. Hapgood*, 118 N. C., 712; *Wiswall v. Plank Road Co.*, 56 N. C., 183. The meaning is, they had the power by implication to do whatever was necessary to carry into effect the purposes of their organization, unless the particular act was expressly prohibited; but as the contested sale was not essential to the original purposes of either organization, we must ascertain whether it was consummated by virtue of authority expressly conferred.

Conceding that such authority was necessary, we are of opinion it need not have been conferred exclusively by an express amendment of the charter of the selling corporation. It is sufficient if the power was granted, though not by way of amending the charter. The important thing is the grant of power, not the mode in which the power is granted. *Ferguson v. Meredith*, 1 Wall., 25; 17 Law Ed., 604; *Ashley v. Ryan*, 153 U. S., 436; 38 Law Ed., 773; *Vicksburg v. Vicksburg Waterworks*, 202 U. S., 453; 50 Law Ed., 1102; *Spencer v. R. R.*, 137 N. C., 107.

We concede further that a grant of power by the State is ordinarily to be construed strictly against the grantee, and that nothing will be presumed to pass unless it be expressed in clear and unambiguous language; but it should not be so construed as to defeat the manifest intention of the Legislature. *Pearsall v. Great Northern Ry. Co., supra; Black v. Canal Co.*, 22 N. J. Eq., 130.

The Legislature, as we interpret the statute, not only gave to the purchasing corporation the right to buy, but vested in the selling corporation the power to make the sale. A statute similar to the one under consideration was construed by this Court in *Spencer v. R. R., supra.* There it appeared that the Legislature had granted the Seaboard Air Line Railway the right to exercise the following powers: "With the approval of two-thirds in amount of its stockholders, given at any annual meeting or a meeting specially called for that purpose, or a meeting at which all the shares of capital stock are represented, in person or by proxy, it may from time to time lease, use, operate, consolidate with, or purchase, or otherwise acquire, or be leased, used, operated by or consolidated with the Seaboard and Roanoke Railroad Company and any railroad or transportation company now or hereafter incorporated by the laws of the United States or any of the States thereof, whether such company be formed by the consolidation of other companies or not; and from time to time it may consolidate its capital stock, property and franchises, by change of name or otherwise, with the capital stock, property and franchises of any other such railroad or transportation company, upon such terms as may be agreed upon by the respective companies, power being hereby granted to any railroad or transportation company or companies now or hereafter incorporated by or under any act or acts of the General Assembly of the State of North Carolina, with the approval of a majority in amount of its shareholders, respectively, given at a meeting specially called for such purpose, or at which all the shares of capital stock are represented, in person or by proxy, to make and carry out such contracts of consolidation or lease, sale, or other method of acquisition or disposition." Private Laws 1901, ch. 168.

One of the questions for decision was whether this act conferred any authority upon the Seaboard Air Line Railway Company to consolidate, merge with, or purchase from any railroad other than the Seaboard and Roanoke Railroad Company, which was the only other company specifically named in the act.

Speaking to this question, *Mr. Justice Connor* said: "The plaintiff says that a careful analysis of chapter 168, Private Laws 1901, fails to show that any authority is conferred upon the Seaboard Air Line Railway Company to consolidate, merge with, or purchase from any other

railroad than the Seaboard and Roanoke Railroad Company; that the statute conferring such extraordinary power upon railroad corporations should be clear and explicit, leaving nothing to construction and doubt. Why that single corporation should have been named in conferring the power, and other railroad companies referred to in general terms, does not very clearly appear. We think, however, that by a fair and reasonable interpretation of the language of the act the Raleigh and Gaston Railroad Company is included among those companies with which the Seaboard Air Line Company is empowered to consolidate—'and any railroad or transportation company now or hereafter incorporated by the laws of the United States or any of the States thereof.' In conferring power upon other companies to consolidate, the language is equally comprehensive—'power being hereby granted to any railroad or transportation company or companies now or hereafter incorporated by or under any act or acts of the General Assembly of the State of North Carolina,' etc. The Raleigh and Gaston Railroad Company certainly comes within this classification. It would seem to follow that the other provisions of the act, unless otherwise expressed, must be construed as referring to all companies thus included in the class upon which the power is conferred to consolidate. Any other construction would render nugatory the power conferred. The plaintiff next insists that no consolidation can take place unless the power to so consolidate is expressly conferred upon both consolidating corporations. This proposition is sustained by the authority cited. The reasons therefor are manifest. 10 Cyc., 293. We think that such power is conferred upon both corporations. Chapter 168, section 1, expressly confers upon the Seaboard Air Line Railway Company the power, 'with the approval of two-thirds in amount of its stockholders,' etc., 'to lease, operate, consolidate with, or otherwise acquire,' etc. As we have seen, the power is conferred upon the Raleigh and Gaston Railroad Company to enter into the contract of consolidation," etc. See, also, *Camden & Atlantic Railroad v. May's Landing,* 7 At., 523, and *Matter Prospect Park Railroad,* 67 N. Y., 377.

While not contesting the correctness of this decision, the plaintiff says that it does not apply to the instant case, because the purpose of the act therein considered was to establish a trunk system through the State, and the question of public policy was not discussed. Whether the purpose was to establish a trunk-line system does not clearly appear; but, however that may be, the statute was given a judicial construction, and that is the matter with which we are now concerned—not the alleged unlawful conspiracy, to which we shall hereafter advert.

By the express terms of the act of 1899, authority was given the Wilmington and Weldon Railroad Company to buy the railroad or railroads

of any other railroad company with which it was directly or indirectly connected, if the latter was organized under the laws of this State and authorized either to consolidate, or merge, or sell, or lease its road; and upon such other company was conferred the power to sell its road, in whole or in part, to the Wilmington and Weldon Railroad Company. It would seem not to admit of doubt that this language is broad enough to embrace both the power to sell and the power to buy. The suggestion that the charter of the Atlantic and Yadkin Railway authorized its consolidation with another railroad only as an entirety is without force, for the power to consolidate, in whole or in part, was given by the General Assembly in the amended charter of the Wilmington and Weldon Railway Company; and if the power was conferred, we cannot approve the proposition that the deed for the part of the road to the east of Sanford should be canceled on the ground that its execution was *ultra vires*.

On behalf of the plaintiff it is also urged that the defendants, by demurring, have admitted all the allegations of the complaint, one of which is that the sale of the railroad was the result of a fraudulent conspiracy to evade the State and Federal statutes and the decree of the Federal court, and to deceive the Legislature of North Carolina. The paragraph containing this allegation appears in the foregoing statement of facts.

A demurrer is the formal mode of disputing the sufficiency in law of the pleading to which it pertains. It admits only such averments as are well pleaded and such inferences as may be drawn therefrom, but it does not admit any legal inferences or conclusions of law that may be alleged. We must therefore refer to the complaint in order to determine the scope and effect of the defendants' admissions. Bliss on Code Pleadings, sec. 418, *et seq.*; C. S., 511; *Prichard v. Comrs.*, 126 N. C., 908; *Wood v. Kincaid*, 144 N. C., 393; *Ollis v. Furniture Co.*, 173 N. C., 542; *Hipp v. Dupont*, 182 N. C., 9; *Bank v. Bank*, 183 N. C., 463; *Sandlin v. Wilmington*, 185 N. C., 257.

The decree rendered by Judge Simonton applied exclusively to the foreclosure sale under the deeds of trust executed by the Cape Fear and Yadkin Valley Railway Company to the Farmers Loan and Trust Company, of New York, and the Mercantile Trust and Deposit Company, of Baltimore. *Farmers Loan and Trust Co. v. C. F. & Y. V. Ry. Co.*, 82 Fed. R., 344, 350; *Low v. Blackford*, 87 Fed. R., 392. The decree directed a sale in its entirety of the property described in these deeds of trust. The terms of this decree were complied with. Indeed, the plaintiff alleges that the property was sold as an entirety, that the sale was confirmed, and that the property was conveyed by deed to the Atlantic and Yadkin Railway Company.

As we discover no sufficient allegation of fraud up to this point, we are next to inquire into the transactions between the Atlantic and Yadkin Railway Company and the Wilmington and Weldon Railroad Company. The plaintiff alleges that in the early part of May, 1899, the directors of the former company, contrary to the provisions of its charter, and in violation of the decree of the Federal court, undertook by resolution to dismember its property by making the sale to the other company.

In what way the decree of the Federal court was violated is not specifically alleged. Judge Simonton held that the mode of sale was wholly within the discretion of the court, but his decree, as we have seen, was confined to the matters in litigation in the foreclosure suit and did not purport in any way to control or regulate the exercise of powers by the purchasing company. If the allegation should be construed to mean that the purchasers at the foreclosure sale contemplated the severance of the property acquired by the Atlantic and Yadkin Railway Company, the answer is that the property was conveyed to this company in its entirety, as the decree required; and if the deed of the Atlantic and Yadkin Railway Company was executed in pursuance of legislative authority, it cannot be deemed to have been executed fraudulently or in breach of the provisions contained in its charter. That such authority was conferred we have already pointed out. As we understand the record, the allegation that the Legislature was deceived is not sustained by the apparent facts.

In *Merrimon v. Paving Co.*, 142 N. C., 539, 552, the Court said: "It is a fundamental rule of pleading that when a plaintiff intends to charge fraud he must do so clearly and directly, by either setting forth facts which in law constitute fraud or by charging that conduct not fraudulent in law is rendered so in fact by the corrupt or dishonest intent with which it is done." *Lanier v. Lumber Co.*, 177 N. C., 200; *Galloway v. Goolsby*, 176 N. C., 635; *Mottu v. Davis*, 151 N. C., 237; *Beaman v. Ward*, 132 N. C., 66.

We are assured that the learned counsel who prepared the complaint had in mind this familiar principle, and set forth the allegations relating to fraud with all the certainty and particularity that the sources of their information justified, and that the want of more definite allegations cannot be attributed to oversight on their part; but, after an analytical examination of the record, the exhibits and the briefs, we are satisfied that the complaint does not contain such definite allegations of fraud as demand the intervention of a jury. The demurrers do not in this respect admit a cause of action. See Private Laws 1899, ch. 98, sec. 2, ratifying the action of the purchasers and their associates; *Reid v. R. R.*, 162 N. C., 355; *Satterfield v. Kindley*, 144 N. C., 455; *Bailey*

v. Morgan, 44 N. C., 353; *Goode v. Hawkins,* 17 N. C., 393; *Smith v. Greenlee,* 13 N. C., 126; *Hyer v. Richmond Traction Co.,* 168 U. S., 471; 42 Law Ed., 547.

The second proposition is that the plaintiff is estopped by laches to prosecute this action.

Whatever the rule in other jurisdictions, it seems to be established that the doctrine embodied in the ancient maxim, *"Nullum tempus occurrit regi,"* obtains with us only in exceptional cases. "The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties." C. S., 420. The Court has construed this section to mean that the maxim has been abrogated and is not in force in this State unless the statute applicable to or controlling the subject otherwise provides. *Furman v. Timberlake,* 93 N. C., 66; *Threadgill v. Wadesboro,* 170 N. C., 641. True, in the two cases of *Wilmington v. Cronly,* 122 N. C., 383, 388, there is apparently a contrary ruling. Whether a distinction may not be found in the public policy of preserving the public revenues (in *Cronly's cases* the collection of delinquent taxes), or in the statute controlling the subject, we need not decide; but it is worthy of note that in neither of the cases last cited is section 420, *supra,* referred to, and that the contrary doctrine is expressly adhered to in *Threadgill's case,* citing *Wilmington v. Cronly.* See, also, *Tillery v. Lumber Co.,* 172 N. C., 296.

With respect to this question the plaintiff's position is that courts of equity, in applying the doctrine of laches, follow by analogy the statute of limitations, and that the defendant's alleged misuser, nonuser, and usurpation of corporate powers constitute a continuing cause of action, to which no statute of limitations can apply. Independently of the statute of limitations, the doctrine of laches has existed since the beginning of equity jurisdiction. It rests upon the principle that nothing can call into exercise the powers of a court of chancery but conscience, good faith, and reasonable diligence. *Vigilantibus, non dormientibus, leges subveniunt.* While the staleness of a demand is a valid defense to the enforcement of a neglected right, there is yet no absolute rule as to what constitutes laches, and in the strict sense no one decision constitutes a precedent for another. "Each case is to be determined according to its own peculiar circumstances. In other words, the question of laches is addressed to the sound discretion of the chancellor." 21 C. J., 217; 1 Story's Eq. Jurisprudence, 71, 3 *ibid.,* 1972.

The final decision in the foreclosure suit was rendered on 3 May, 1898; the sale of the Cape Fear and Yadkin Valley Railway Company was made on 29 December, 1898; the sale was confirmed, and the deed to the Atlantic and Yadkin Railway was executed on 31 January, 1899;

the act incorporating this company and authorizing its consolidation with connecting railroads organized under the laws of this State was ratified on 23 February, 1899; the act conferring upon this road and the Wilmington and Weldon Railroad Company power to consolidate, in whole or in part, was passed 24 February, 1899; and in the early part of May, 1899, the resolution authorizing the sale of the property in question was adopted.

It will be noted that a period of twenty-four years passed by before this action was brought. It is true that, by virtue of a resolution adopted by the General Assembly in 1913, the Corporation Commission was directed to investigate any matters pertaining to a sale of any part of the Atlantic and Yadkin Railway, and the Attorney-General was authorized to bring suit if in his opinion "an action could likely be maintained," or to request the Attorney-General of the United States to bring suit on behalf of the Government for the purpose of setting aside the sale; and, though an investigation was made, no suit was brought by the State or the Federal Government. Ten years elapsed before the second resolution was adopted by the General Assembly of 1923, authorizing the present action. The sale of the property to the Wilmington and Weldon Railroad Company and the purchase of stock by the Southern Railway Company are matters which were known to the agencies of the State. The defendants' position that the prosecution of the action is barred by undue delay would therefore seem to be fortified by strong reasoning; but if the conclusion we have reached upon the first proposition is correct—the conclusion that the sale of the line east of Sanford was authorized by law—there was no unlawful misuser, non-user, or usurpation on the part of the defendants constituting a cause of action to which the doctrine of laches should be held to apply. If it were otherwise, the prosecution of the action after such long delay should not commend itself to the favorable consideration of the Court. *Spencer v. R. R., supra; Attorney-General v. R. R.*, 28 N. C., 456; *Hill v. R. R.*, 143 N. C., 539; *Arndt v. Ins. Co.*, 176 N. C., 652; *Brockenbrough v. Ins. Co.*, 145 N. C., 354; Noyes on Intercorporate Relations (2 ed.), sec. 49.

Our disposition of the propositions we have discussed renders it unnecessary to consider any of the Federal questions presented by the complaint and argued at length in the briefs of counsel.

A careful and critical examination of the record convinces us that the judgment of the lower court should be

Affirmed.

CLARKSON, J., concurring: I concur in the result reached by *Mr. Justice Adams* solely on the ground that the plaintiff is estopped by laches to prosecute this action.

Nearly a quarter of a century has elapsed since the dismemberment took place and before this suit was instituted. Innocent bondholders and others have acquired rights in this property as dismembered. The State, through its taxing power, has recognized the dismemberment. The severance of this east and west connection has, no doubt, as charged in this case, worked a great injury to the people of the section of the State through which the road operated as an entirety, but the long delay by the State in the assertion of its rights, with full knowledge of all the facts; the security of property rights acquired by innocent holders of bonds; the State, through its taxing power, having recognized all these years the dismemberment; the physical property being in the actual adverse possession of the railroad; the interest of public order and tranquillity, require diligence in the assertion of rights, and courts of equity have always refused to entertain stale claims.

The authorities fully recognize that from the lapse of time, under facts as presented in this case, courts of equity refuse to grant relief.

This Court, in *Sprinkle v. Holton,* 146 N. C., 266, said: "The security of property rights, the peace of families, and the public welfare demand that there must be an end of litigation. Courts of equity have always wisely refused to entertain 'stale claims.' "

COMMERCIAL NATIONAL BANK OF CHARLOTTE, AS EXECUTOR AND TRUSTEE, v. LILLIAN F. ALEXANDER ET AL.

(Filed 3 December, 1924.)

1. Courts—Jurisdiction—Equity—Trusts.

Our courts, in the exercise of their equitable power, have supervisory jurisdiction in the administration of trust estates, and the trustee, in cases of doubt arising in the course of his administration of the trusts imposed by the instrument, may resort to them for instruction.

2. Same—Widow's Dissent — Contracts — Trusts—Contingent Interest—Minors—Parties—Judgments—Appeal and Error.

Where a will provides for an income to the widow, and, among other things, for contingent interests to ulterior takers, minors, some of whom are not *in esse*, appointing a trustee with power to carry out the provisions of the will, and all those who are to take upon contingency are not only represented by the trustee, but by class representation, and a guardian has been appointed and is acting for all minor interests, both *in esse* and otherwise: *Held*, the courts have jurisdiction to pass upon the question as to whether a contract made between the widow and another principal beneficiary, making her an increased allowance in consideration that she will not dissent from the will, will be in the best interest of all parties; and its action confirming the contract and preserving the *corpus* of the estate for the administration of the trust imposed will not be disturbed on appeal.

BANK *v.* ALEXANDER.

APPEAL by the guardian *ad litem* of infant defendants from *Shaw, J.*, at October Term, 1924, of MECKLENBURG.

W. S. Alexander died leaving a last will and testament in which he appointed the Commercial National Bank of Charlotte as trustee and said bank and R. A. Dunn as executors of his estate. Dunn renounced his right to qualify. After the will was admitted to probate the bank, as executor and trustee, filed a petition in the Superior Court for the purpose of asking the court's advice and instructions as to the proper administration of the trust estate and the approval of a contract made between the petitioner, the widow, and the chief residuary legatee.

The provisions of the will pertinent to the controversy are the following:

"Item I. I give, devise, and bequeath unto the Commercial National Bank of Charlotte, North Carolina (hereinafter called trustee), as trustee upon the trusts and for the uses and purposes hereinafter set forth and expressed, all of my property and estate of whatsoever kind and wheresoever situate, with full power and authority to sell, convey, mortgage, exchange, control, manage, invest, reinvest, and deal with the same and every part thereof, and receive and collect the dividends, income, issues and profits thereunder, in as full and ample manner as I myself could do in my lifetime, for the use and benefit of my legatees and beneficiaries hereinafter named.

"Item II. It is my will and desire that said trustee shall renew, extend, and pay off all of my indebtedness, according to the best judgment and discretion of said trustee, dealing with the same in such manner as will best protect my estate and avoid the sacrifice of my property.

"Item III. Out of the dividends, income and profits of my estate, I direct my said trustee to pay over to my beloved wife, Lillian F. Alexander, for and during the term of her life, an annual income of six thousand dollars ($6,000), the same to be paid to her in monthly installments of five hundred dollars ($500)."

Items four and five provide for the payment of annuities to Minnie R. Alexander and Ernestine B. Alexander for the term of their natural lives, etc.

"Item VI. It is my will and desire that my trustee shall segregate from my property and estate and hold and keep separate and intact sufficient capital assets or corpus of my estate to provide for the payment of the incomes mentioned in items III, IV and V of this will.

"Item IX. I authorize and direct my trustee, after providing for and paying annually the incomes mentioned in items III, IV and V, to hold, invest, and reinvest, year by year, any surplus dividends, profits and income from my estate; upon the expiration of two years from

my death, I direct my said trustees to turn over and deliver to my son, Walter L. Alexander, ten per cent annually of the corpus of my estate, then in its hands over and above the portion thereof necessary to produce the incomes provided for in items III, IV and V. I also direct my trustee, upon the death of the respective beneficiaries under items III, IV and V, to pay over to my said son, from time to time, the assets and corpus which may be added or restored to my general estate under item VIII.

"Item XI. After the death of my said wife and my daughter and my son and his wife, I give, devise, and bequeath all of my property and estate, which shall then remain in the hands of my trustee, to my grandchildren, Ernestine L. Alexander and Preston B. Alexander, and any afterborn grandchildren, to be divided equally between them per capita, share and share alike; and if any of said grandchildren shall die leaving no issue, the share of such grandchild shall go to the survivor or survivors, and if all of my grandchildren shall die leaving no issue, then seventy-five per cent of said property and estate referred to in this item shall go to the children of my brothers, John B. Alexander and W. C. Alexander, and their issue, per capita, share and share alike, and the remaining twenty-five per cent shall go to Grandfather Orphanage at Banner Elk, North Carolina, to be held as a permanent fund for the education and maintenance of the inmates of the institution."

Soon after the probate of the will the testator's widow notified the petitioner that it was her purpose and intention to dissent from the will and demand her year's allowance and distributive share in the estate if her annuity was not increased from $6,000 to $16,000. It was thereupon agreed between the petitioner and Walter L. Alexander, the principal residuary legatee, that it would be to the best interest of said legatee and the infant contingent remaindermen that the agreement be made and that the annuity be raised to $16,000 in consideration of her renouncing her right to dissent; provided, the agreement should not be binding unless ratified and confirmed by a decree of court.

The petitioner requested the court to confirm this agreement and to give the petitioner instructions in reference to other important questions which had arisen, concerning which the petitioner was in doubt. All the material allegations of the petition were admitted.

At the hearing Shaw, J., made a full investigation and rendered judgment finding that all the material allegations of the complaint were true and that it would best subserve the interest of the widow and the contingent remaindermen to carry the contract into effect. The contract was confirmed and the petition was authorized and directed to carry it out and to proceed as pointed out in reference to the other matters

concerning which the advice of the court was sought. The guardian *ad litem* appealed, assigning for error the following grounds:

"1. That the court had no jurisdiction of the action.

"2. That said judgment is not binding upon the unborn contingent remaindermen.

"3. That the court had no power to ratify and confirm the contract between the widow and the petitioner, referred to as Exhibit 'B'; and

"4. That the court has no power to advise and instruct the petitioner of and concerning the specific matters upon which the petitioner asked the advice and instruction of the court, as set out in the petition."

Cansler & Cansler for petitioner.

Tillett & Guthrie and W. S. O'B. Robinson, Jr., for W. L. Alexander and Wife.

McNinch, Whitlock & Dockery for guardian ad litem.

ADAMS, J. The infant defendants through their guardian *ad litem* appealed from the judgment, assigning for error the matters to which their four exceptions relate. The first and fourth exceptions may be considered together.

1. Not only was the action properly constituted in the Superior Court, but the court in the exercise of its equitable powers had jurisdiction to advise and instruct the trustee as to its discharge of the duties imposed upon it by the trust. One of the most important subjects of equitable jurisdiction is that of trusts, for the interest of all parties can be protected only by a strict observance of the terms prescribed by the instrument creating the trust. It is for this reason and others that courts of equity in the exercise of their supervisory power permit trustees to come into these tribunals and ask for advice or assistance. Accordingly in *Freeman v. Cook,* 41 N. C., 373, *Nash, J.,* said: "The defendants, however, allege that they ought not to be made answerable, as they took the advice of counsel and acted on it. The answer states that they were not only advised they could not disturb the possession of Mr. Freeman, but the counsel doubted if the settlement was not void for the nonage of Mrs. Freeman, and that he was disposed to think it was void. It was very important to the defendants, not only to have good advice, but such as would sustain or remove the doubts thus expressed and protect them in their action. What course, then, ought they to have pursued? Their only safe course was to have procured the advice of a court of chancery, which they had a right to resort to. Willis on Trustees, 125; 2 Fon. Eq., 172, note c. The chancellor is the only safe and secure counsellor to trustees." And in *Alsbrook v. Reid,* 89 N. C., 151, *Ashe, J.,* approved the doctrine in this

language: "The former courts of equity entertained, and our Superior Courts still entertain application for advice and instructions from executors and other trustees, as to the discharge of trusts confided to them, and incidentally thereto, the construction and legal effect of the instrument by which they are created. But the courts of equity never exercise this advisory jurisdiction when the estate devised is a legal one, and the question as to construction is purely legal. The jurisdiction is incident to that over trusts." See, also, *Haywood v. Loan & Trust Co.*, 149 N. C., 208; *Feild v. Alexander*, 170 N. C., 303; *Fisher v. Fisher, ibid.*, 378.

The petition discloses circumstances tending to show uncertainty and doubt as to the way in which the trust should be executed, and the trustee properly applied in the words of *Nash, J.*, to its "only safe and secure counsellor."

2. The defendants excepted on the ground that the judgment is not binding upon the unborn contingent remaindermen. As we understand the record the contingent remaindermen are represented not only by the trustee, but by living members of their class, and under these circumstances the exception must be overruled. The question of law is discussed in the following cases and need not be repeated here. *Ex parte Dodd*, 62 N. C., 98; *Overman v. Tate*, 114 N. C., 571; *Springs v. Scott*, 132 N. C., 548; *McAfee v. Green*, 143 N. C., 411; *Lumber Co. v. Herrington*, 183 N. C., 85.

3. The third exception rests on the proposition that the court had no power to ratify and confirm the contract between the petitioner, as trustee, the widow, and Walter L. Alexander. The widow's right to dissent from the will and to enter into a contract with the residuary legatee is not denied, but involved in the proposed contract are the rights of the contingent remainderman. The paragraph in the judgment relating to the contract is as follows: "That it will not only be to the best interests of the beneficiaries under said will, but particularly the infant contingent remaindermen, for the petitioner to carry out the terms of the agreement heretofore entered into between it and the said Lillian F. Alexander, copy of which is attached to the petition as Exhibit 'B,' and, the court hereby expressly authorizes, empowers, and directs the petitioner to carry out the terms of said agreement in all of its particulars, and to that end hereby ratifies and confirms the same on behalf of those defendants who are under 21 years of age or are of unsound mind; the court specially finding that it will be to the best interests of said minors, etc., that said agreement, if ratified and confirmed, be carried out by the petitioner according to its tenor."

The appellants contend that the proposed contract does not involve a construction of the will, but purports to make such a disposition of

a part of the property as was not contemplated by the testator. But the question is whether a dissent from the will would not prevent the execution of the several trusts which the testator expressly created. In rendering the judgment the learned judge no doubt had in mind the equitable jurisdiction of the court over the property of infants and the preservation of the corpus of the estate for the benefit of all affected by the trusts. Indeed, he directed the petitioner to carry out the terms of the agreement in all its particulars, and he specially held that the best interests of the infants would thereby best be subserved. The object is not to destroy the trust but to preserve it. In fact the purpose of the decree is to carry into effect the testator's direction that the trustee deal with the property devised in as full and ample manner as he could have dealt with it had his life been prolonged.

It is unquestionable that courts of equity have general jurisdiction over the property of infants and that infancy alone is sufficient to sustain the right of supervision. The jurisdiction in all cases is complete and may be exercised in order to afford relief wherever it may be necessary to preserve and protect the estates and interests of those who are under age. The petition states facts and circumstances which invoke the jurisdiction of a court of equity to preserve the corpus of the estate and in this way to work out what the decree adjudges to be the best interests of the infant defendants. 3 Story's Eq. Jurisprudence, 14 ed., sec. 1742 *et seq.;* 10 R. C. L., 340, sec. 89; 31 C. J., 1035, sec. 97; *Morris v. Gentry,* 89 N. C., 248; *Tate v. Mott,* 96 N. C., 19.

We find no reason to disturb the judgment, and it is hereby

Affirmed.

SNOW HILL BANKING & TRUST COMPANY v. D. J. ODOM DRUG COMPANY, D. J. ODOM AND R. B. TYER, ET AL.

(Filed 3 December, 1924.)

1. Corporations—Statutes—Charter—Ultra Vires Acts—Partnership.

While the principles of law constituting a partnership are not readily defined as applied to all instances, they are held ordinarily to exist when two or more persons contribute either property or money, or both, to carry on a joint business for their common benefit and to own and share in the profits thereof.

2. Same—Banks and Banking—Trust Companies—Sales—Dissolution—Evidence—Questions for Jury.

Where a banking and trust company has bought out a drug business to save a debt owed to the former by the latter, and has agreed with two others for its continued operation upon a division of the profits, the bank

putting in the stock of goods and some money, and the others a certain sum each, the latter taking the active management, with privilege of buying out the interest of the bank out of the profits or otherwise, this arrangement is in effect an agreement of partnership; and where the bank has since taken a mortgage for the amount of its investment, the question as to whether the partnership had been thereby dissolved on issue raised is one for the jury under the evidence.

3. Same—Appeal and Error—Record—Burden to Show Error.

While the act of a corporation in acquiring and conducting a business distinct and separate from that contemplated or authorized by its charter is ordinarily considered void as an *ultra vires* act: *Held*, in this case, the burden of showing error being on the appellant, such error is not necessarily made to appear when the charter of a certain "banking and trust company" is not in evidence and no data given from which the powers thereby conferred may be ascertained.

4. Banks and Banking—Purchase of Bad Debt—Partnership—Ultra Vires Act.

Conceding, however, that the plaintiff company has only the ordinary powers of a banking corporation, and, as such, may not usually engage as a partner in an unrelated business enterprise, this rule is subject to the limitation that a bank that has acquired and taken over property pledged to secure an indebtedness contracted in the regular course of its business may at times enter into a separate and established business enterprise to an extent reasonably required to enable it to realize on the property with a view of converting the same into bankable asset.

5. Banking Company—Partnership—Application of Investment to Creditors.

In such case and in any event a banking corporation should be held liable to creditors at the instance of the copartner to the extent of the property put in the business, the arrangement to the amount of the investment being an executed contract giving such copartners the equitable right to have the assets so applied.

CIVIL ACTION tried before *Horton, J.*, and a jury, at December Term, 1923, of GREENE.

From a perusal of the record and case on appeal, it appears that plaintiff, holding a mortgage with power of sale for $6,500 acquired in June, 1922, on the stock of goods, fixtures, etc., of the D. J. Odom Drug Company, brought claim and delivery and took said stock in possession, and pending said suit—defendants D. J. Odom and R. B. Tyer, instituted an action against plaintiff on averments, in effect, that these two defendants and plaintiff were, in fact and in truth, partners conducting a drug business under the style of D. J. Odom Drug Company, that plaintiff having taken over goods in payment of a debt incurred by former owners of the stock to the bank for borrowed money, plaintiff and these two defendants entered into a partnership, the bank putting in said stock valued by them at $5,500 and $1,000 additional

thereto, and defendants each putting in $500, business to be under control and management of D. J. Odom according to the terms of a written agreement hereafter set out, which said agreement gave to Odom and Tyer the right to buy out said business on terms therein specified, that the mortgage was given merely as an evidence of the amount that the bank had invested in the partnership, and for no other purpose and that the goods covered by same constituted a portion of the partnership assets. That the agreement under which the bank and Odom and Tyer engaged in the business has date of 12 May, 1922, was in terms as follows:

This agreement by and between the Snow Hill Banking & Trust Company, parties of the first part and D. J. Odom and R. B. Tyer, parties of the second part:

Witnesseth: That the parties of the first part agree to furnish the "drug-store fixtures and furniture, soda fountain and all goods, merchandise, medicines," etc., now on hand in the drug store situated in the Dail Block in the town of Snow Hill and the parties of the second part agree to furnish $1,000 dollars to restock said drug store and the Snow Hill Banking & Trust Company agrees to furnish $1,000 to help restock said drug store and said parties of the second part agree to manage and run said drug store for one-half of the net profits and the parties of the second part agree not to take out of said business more than $100.00 per month which, when withdrawn, shall be charged to the parties of the second part as part of their one-half of the net profits. It is understood that the parties of the second part shall report to the parties of the first part each month the condition and state of the business, its indebtedness, etc.

It is understood and agreed that the parties of the second part shall have the right to purchase said business at any time by paying to the Snow Hill Banking & Trust Company the amount said bank has invested in said business at said time. It is agreed that the Snow Hill Banking & Trust Company has invested in said stock, fixtures, furniture, soda fountain and goods, $5,500 besides the $1,000 which they agree to furnish to help replenish the stock and it is agreed that Exhibit "A" the one-half of the profits to be received by the parties of the first part shall be applied to liquidate said amount held by the Snow Hill Banking & Trust Company, and such amounts that may be furnished to said business by the parties of the first part.

Witness our hands and seals, this the .....day of May, 1922.

C. L. BLOUNT, *Cashier,* (SEAL)
D. J. ODOM (SEAL)
R. B. TYER (SEAL).

And a subsequent agreement entered into at time plaintiff took the mortgage it now seeks to enforce, was as follows:

This is to certify that this bank is to give the Odom Drug Company extensions on their sixty-five hundred dollar note dated 5 June, 1922. The extensions to be given from time to time until finally paid, though it is also understood that reasonable payment will be made on same to the amount of at least twenty-five dollars per month, though in case some months if that amount can't be paid by the Odom Drug Company, then they will be given further consideration by accepting what payments the drug company can make. It being fully understood by the drug company and this bank that the business is to pay for the note as the profits are made on the business unless Mr. Odom decides to take up the note or balance due on same at any time and thereby own the business in its entirety.

This agreement made this the 5th day of June, 1922.

SNOW HILL BANKING & TRUST CO.
C. L. BLOUNT, *Cashier.*

It also appears of record that the firm assets, including stock of goods, fixtures, etc., having been ordered by the court placed in the hands of receiver, by consent of all parties, have been sold for a satisfactory price, and placed in the plaintiff bank to be held subject to distribution and orders of court made in the cause.

It appeared that another suit was instituted by plaintiff against Odom and Tyer on a note of $118.43 on matters growing out of controversy, judgment thereon before a justice of the peace and appeal taken by parties defendants which was pending in Superior Court. Again there were two suits against the partnership of D. J. Odom Drug Company by creditors of alleged firm, one by Powers-Taylor Drug Company and a second by the Vaughan-Robeson Drug Company.

On denial of any and all liability in the suits as described, these five causes were consolidated and tried at the term of the Superior Court stated, before his Honor, J. Loyd Horton, judge, and a jury and the following verdict rendered:

1. Did the Snow Hill Banking & Trust Company become a member of the firm of Odom Drug Company by virtue of the agreement dated 12 May, 1922? Answer: "Yes."

2. Did the defendant, Snow Hill Banking & Trust Company sell its interest in said firm, and retire therefrom on 5 June, 1922, as alleged? Answer: "No."

3. If so, was said sale of Snow Hill Banking & Trust Company and its retirement from said firm done with the knowledge and consent of the defendant, Tyer? Answer: .....

4. If not, has the defendant, Tyer, ratified said action? Answer: "No."

5. In what amount, if any, is the Odom Drug Company indebted to the Powers-Taylor Company? Answer: "$361.00, with interest."

6. Was the Snow Hill Banking & Trust Company a member of the firm of the Odom Drug Company at the time said debt was contracted? Answer: "Don't answer."

7. In what amount, if any, is the defendant, Odom Drug Company, indebted to the Vaughan-Robertson Drug Company? Answer: "$702.36, with interest."

8. Was the Snow Hill Banking & Trust Company a member of the firm of the Odom Drug Company at the time said debt was contracted? Answer: "Don't answer."

9. Is the Snow Hill Banking & Trust Company the owner and entitled to possession of the property described in the complaint? Answer: "No."

10. What was the value of said property at the time of the seizure? Answer: "$6,500."

11. Did the Snow Hill Banking & Trust Company wrongfully seize said property, under claim and delivery proceedings, as alleged? Answer: "Yes."

On said verdict the court entered the following judgment:

The above named cause coming on to be heard at the December Term, 1923, of Greene Superior Court, before Horton, J., and a jury, and by consent of all parties, the above entitled five cases having been consolidated, and tried in one case, and the jury having answered the issues submitted by the court as hereinafter set out, and it appearing to the court that the first of these actions was a proceeding in claim and delivery, brought by the Snow Hill Banking & Trust Company, against the Odom Drug Company, D. J. Odom and R. B. Tyer, for the recovery of certain personal property described in the affidavit filed in said action and following this suit, D. J. Odom and R. B. Tyer instituted an action against the Snow Hill Banking & Trust Company, asking that it be restrained from selling said property and for the appointment of a receiver, to take charge of and preserve said property.

And that pursuant to said proceedings a temporary restraining order and the appointment of a temporary receiver was made, which said temporary restraining order came on for hearing before J. Loyd Horton, resident judge of the 5th Judicial District, at chambers, in the town of Farmville, North Carolina, on the ..... day of ..... , 1923, at which time and place it was, by consent of all parties, ordered and adjudged that Walter G. Sheppard and George M. Lindsay be appointed as receivers to make sale of said property privately for the sum of $6,500, and that the funds realized from said sale be turned over to

the Snow Hill Banking & Trust Company, as trustee, until the final trial of this cause and that said action was had by said receivers and that the said sum of $6,500 is now held by the Snow Hill Banking & Trust Company, trustee, as aforesaid.

And it further appearing to the court that the Snow Hill Banking & Trust Company brought suit against D. J. Odom and R. B. Tyer, before a magistrate, for the recovery of a note for $118.63, which note grew out of the matters in controversy herein.

And it further appearing to the court that the Powers-Taylor Drug Company instituted an action entitled as above, against the Snow Hill Banking & Trust Company, D. J. Odom and R. B. Tyer, trading as the Odom Drug Company, on an open account of $361, and that the Vaughan-Robertson Drug Company instituted an action for the recovery of the sum of $500, and at the beginning of this trial was permitted, by consent, to amend their complaint to ask for the sum of $702.86. And the court having submitted the following issues, which were answered as hereinafter set out by the jury:

The court instructed the jury, as a matter of law, to answer the first issue, "Yes," and the jury having failed to answer issues six and eight, under the instructions of the court, the court thereupon, as a matter of law, answered said issues in the affirmative.

It is therefore ordered, adjudged and decreed that the Snow Hill Banking & Trust Company, D. J. Odom and R. B. Tyer, were at all times, from 12 May, 1922, up and prior to the institution of these actions, partners trading under the firm name of the Odom Drug Company and as such are jointly and severally liable for the obligations of said firm.

It is further ordered, adjudged and decreed, that the said mortgage executed by D. J. Odom to the Snow Hill Banking & Trust Company, on 5 June, 1922, together with a note for $118.63 executed on ..... March, 1923, to the Snow Hill Banking & Trust Company by D. J. Odom and R. B. Tyer, be and the same are hereby canceled and of no effect.

It is further ordered, adjudged and decreed that the proceeds of the sale of the property belonging to said firm, now held by the Snow Hill Banking & Trust Company, trustee, as aforesaid, be applied to the payment of the obligations of the firm of the Odom Drug Company, and to that end, it is ordered that Walter G. Sheppard and George M. Lindsay, receivers, hereinbefore appointed, be, and they are hereby directed to proceed to the dissolution of said firm, giving notice to all known creditors of said firm, and further notice to other creditors by due advertisement in some newspaper published in Snow Hill for once a week for four weeks, notifying said creditors to file their claims with

said receivers on or before sixty days from the date of publication of said notice, or said notice will be pleaded in bar of their recovery, and that said proceeds of the sale above mentioned be placed by the said Snow Hill Banking & Trust Company at the disposal of said receivers to be applied by them as aforesaid on the obligations of the firm and to hold the balance thereof for the further orders of this Court.

It is further ordered, adjudged and decreed that the Powers-Taylor Drug Company recover of the Snow Hill Banking & Trust Company, D. J. Odom and R. B. Tyer, trading as the Odom Drug Company, the sum of $361 with interest from 20 January, 1923, and the cost of said suit to be taxed by the clerk, and that the Vaughan-Robertson Drug Company recover of the Snow Hill Banking & Trust Company, D. J. Odom and R. B. Tyer, trading as the Odom Drug Company, the sum of $702.86, with interest from 15 February, 1923, together with the cost of said action to be taxed by the clerk.

It is further ordered and decreed that the costs of the actions above entitled between the Snow Hill Banking & Trust Co., D. J. Odom and R. B. Tyer, be, and they are hereby taxed against the Snow Hill Banking & Trust Company.

J. LOYD HORTON,
Judge Presiding.

The Snow Hill Banking & Trust Company excepted and appealed assigning for error, among others, the ruling that the agreement constituted partnership between the bank and D. J. Odom and R. B. Tyer.

J. Paul Frizzelle, George M. Lindsay for plaintiff.
Martin & Sheppard for defendant.

HOKE, C. J., after stating the case: For general application it is recognized as difficult to give an adequate and satisfactory definition of a partnership. Probably that approved by *Associate Justice Gray,* in *Meehan v. Valentine,* 145 U. S., pp. 611-623, is at once as accurate and comprehensive as any that suggests itself. Delivering the opinion in that case it was said by the learned judge: "In the present state of the law on the subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions." Other definitions in our own reports, correct as to the facts therein presented, appear in *Gorham v. Cotton,* 174 N. C., p. 727; *Fertilizer Co. v. Reams,* 105 N. C., pp. 283, 296; *Mauney v. Coit,* 86 N. C., p. 464. In *Gorman's*

case, by way of further illustration, the opinion quotes also the definition given in *Karrick v. Hannaman,* 168 U. S., p. 328 as follows: "A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or service, and having a community of interest in the profits." Within the terms and meaning of any of these definitions, we are of opinion that the contract between the bank and trust company and D. L. Odom and R. B. Tyer, has been properly held a partnership, so far as the bank and trust company are authorized to enter into such an agreement, and on the facts of this record, we find no present reason for disturbing the verdict on that issue, and the results that have been deduced from it. As we understand its position, appellant does not seriously insist but that the original agreement in form constitutes a partnership between appellant and the other two members, but it is contended that same was, in effect, put an end to in June, 1922 when, as appellant claims, the bank withdrew by selling out its interest taking the note and mortgage sued on to secure the purchase price. It will suffice in answer to this position to note that the question of whether there was a sale and consequent dissolution in June, 1922, was submitted to the jury on a separate issue No. 2, and their verdict was against the sale as claimed. The questions debated, therefore, by appellant on whether such sale had been authorized by Tyer, one of the alleged partners, or ratified by him—and whether proper notice had been given to creditors of the alleged dissolution, is no longer material. Considering the record in reference to the manner that this issue was submitted and answered by the jury, this finding of fact, in effect, determines that there has never been any dissolution of the alleged partnership, as far as same is expressed and controlled by the agreement.

It is further and very earnestly contended that appellant being a banking institution is not authorized to enter into a partnership agreement of the kind presented, and that same is so far *ultra vires* that no liability can be enforced against appellant by reason of it. It is undoubtedly the general rule that a corporation, especially a banking institution, is not allowed to enter into a separate business entirely foreign to the purposes as contemplated and authorized by its charter, and that executory agreements in such an enterprise imposing liability are not binding. *Victor v. Mills,* 148 N. C., pp. 107-111; *Wiswall v. Plank Road Co.,* 56 N. C., p. 183; *First National Bank v. Converse,* 200 U. S., p. 425; *Central Transportation Co. v. Pullman Car Co.,* 139 U. S., 24; *Harding v. Glucose Co.,* 182 Ill., 551; 3 R. C. L., p. 422, and authorities cited. In answer to this proposition it may be suggested first, that this appellant corporation bears the title of the Snow Hill Banking & Trust Company. The charter of the institution

is not in evidence, nor does the record contain any data or reference by which the court is enabled to ascertain its powers or the limitations upon it. We know that these trust companies are not infrequently possessed of very enlarged privileges extending into various kinds of enterprises—and acting on the position that there is always a presumption against error in a completed judicial proceeding, the exception here might well be disallowed because no lack of power is shown. *R. R. v. Nichols,* 187 N. C., p. 153; but conceding that in the present case the appellant by its charter has only the usual privileges of a banking institution, we are of opinion that no reversible error has thus far been shown, for though the general rule be as stated, it is fully recognized as a proper limitation upon it that when a banking corporation has acquired and taken over property pledged to it to secure an indebtedness contracted in its regular course, it may enter into a separate and established business or enterprise to the extent reasonably required to enable it to realize on the property with the view of constituting it bankable asset, a position that is assuredly true as to a State institution. Thus in the case of *Emigh v. Earling,* 134 Wis., 565, the right of a bank to take over and operate a creamery business was, to some extent, presented and the bank was held liable to account to shareholders for moneys realized in the conduct of business, the decision in that case being approved on writ of error by the Supreme Court of the United States. 218 U. S., p. 27. True that both in the State and Federal Courts the decision was made to rest on the ground that the bank, having acquired and holding the funds belonging to the shareholders, could be held to account for same regardless of the doctrine of *ultra vires* or the effect of it, but in both courts the limitation in the general rule is fully recognized, and in the State decision, *Dodge, J.,* speaking to the question among other things said: "The conclusion of the trial, is attempted to be averted by most vigorous contention that it is wholly beyond the power of a national bank to engage in creamery business, and much citation is made of Federal authority to that effect. The exact limits of the power of a bank which, being a creditor, becomes possessed of property or property rights in various forms as security, to do acts in management or improvement of such property or development of such rights, in order to render them valuable, to the end, in good faith, or thereby securing liquidation of the debts to it, is quite indefinite, and doubtless public policy requires that a bank, like an individual, should have broad powers to the exercise of discretion and judgment, to the end that property or rights so held as security be rendered as valuable as possible, so that it may not lose that which it ought to collect." The position finds further support in *Shawnee Nat. Bank v. Grocery Company,* 34 Okla., p. 34; *Reynolds v. Simpson,* 74 Ga., p. 454; *Bank v.*

Bannister, 7 Kan. App., 787; *Roebling Son's Co., v. First Nat. Bank,* 30 Federal, 744. And in our own Court the cases of *Bank v. Lacy, ante,* pp. 25-29 and *Sherrill v. Trust Co.,* 176 N. C., p. 591, are in full recognition of the principle. Considering the agreement in view of these authorities, here was a bank, that to secure a debt contracted to it in its regular course of business, had taken over the stock of goods, and fixtures of a drug store of the value of $5,500. Desiring to realize on the goods, it entered into the partnership agreement adding to the stock $1,000 in money and the other two partners put in $500 each, one of them to be in control and management of the business—it appears that the agreement, apparently drawn with care, with a view of protecting the bank and all concerned. Operating in the same town, it will be noted that the other partners were not allowed to take out more than $100 per month on their part of the profits during the continuance of the business and are required to make monthly reports to the bank, as to the condition and state of business, indebtedness, etc. Under these circumstances, we are of opinion, on the facts as now presented, the agreement was within the powers of the bank, and assuredly so as to the property put into the business. As to that it has become an executed contract giving to the other parties to the agreement the right to have the assets applied to the payment of the debts contracted in the name of the partnership. *Chemical Co. v. Walston,* 187 N. C., p. 817; *Farmer v. Head,* 175 N. C., p. 273. Possibly if, in the further development of the case, it should appear that the debts are so extensive as to threaten the solvency of the bank, it may be that on application of the stockholders, or even the directors, the claims against the alleged partnership could be restricted to the amount of the funds and property invested, on the general principles prevailing in our statutes on the subject of limited partnership, C. S., ch. 64, and constituting the bank a special partner to the extent of its investment—not under the statute referred to, for the provisions have not been complied with, but assimilated to it by reason of the limitations imposed by the charter of the bank, if existent, and when properly made to appear. But no such question is now presented, nor is there any suggestion or evidence tending to show that there are debts in excess of the assets.

The judgment of the court is, therefore, affirmed and the receivers, as directed, will proceed to an ascertainment of the debts, and to that end, the same be paid out of the assets now in the hands of the bank, and the surplus, if any, divided in proportion to the respective investments of the parties. Gilmore on Partnership, p. 394.

There is no error and the judgment below is affirmed.

No error.

J. W. JOHNSON, ADMR., OF J. P. SEAWELL, AND W. P. BENNER AND WIFE, BETTIE F. BENNER, v. C. F. LEAVITT.

(Filed 3 December, 1924.)

1. Estates—Entireties—Husband and Wife—Deeds and Conveyances—Judgments—Liens.

An estate by entireties held by husband and wife by virtue of their marriage and the right of survivorship still existing thereunder as to this relation, may be conveyed by them during their joint lives, and a good title given to the grantee against the rights of judgment creditors whose judgments have been obtained against the husband alone since the registration of the deed made by them both to the grantee.

2. Same—Rents and Profits—Leases.

The husband during their joint lives is entitled to the possession and the rents and profits of the lands held by himself and wife by entireties, and may lease the same subject to the right of survivorship of his wife at whose prior death the husband's lease becomes inoperative.

3. Same—Execution—Statutes—Priorities of Judgment.

Estates by entireties exist in this State only as an incident to the marriage relationship of husband and wife, and execution may not issue to subject it to the payment of a judgment obtained against only the one or the other of them during their joint lives, but if one of them should die leaving surviving the other against whom judgments have been obtained and the liens thereof are presently existent, the right to issue execution against the estate formerly held by them in entireties attaches as to all at the time the survivor has acquired the full title and distribution of the proceeds must be made pro rata without reference to the time the judgments may have been obtained. C. S., 614, 654.

4. Same—Homestead—Purchase Money — Mechanics' Liens — Constitutional Law—Statutory Liens.

A homestead in lands held by the husband and wife by entireties may not be claimed against a judgment rendered on their joint obligation given for the purchase of the lands so held by them, Const., Art. X, sec. 2, and the same rule applies as to mechanics' or laborers' liens, etc., under constitutional provision, but not as to liens for materials furnished, etc., which rest by statute alone.

5. Estates — Entireties — Husband and Wife — Husband's Home Site—Deeds and Conveyances—Statutes.

The wife's interest in the husband's "home site" exists by statute (ch. 123, Public Laws of 1919), and a different principle applies as to a conveyance without her valid execution. C. S., 4103.

APPEAL by defendant from *Shaw, J.*, at May Term, 1924, of MOORE.

Civil action to recover upon three promissory notes, given by defendant for the purchase price of four lots of land owned by W. P. Benner and wife as tenants by the entirety—the notes in question being assigned and transferred to J. P. Seawell for value, before maturity, and now held by his administrator, J. W. Johnson, one of the plaintiffs herein.

W. P. Benner and wife, Bettie F. Benner, in accordance with their agreement, have executed and tendered full warranty deed for the lots in question, but defendant declines to accept the same and refuses to pay his notes, upon the ground that the title offered is defective; it being agreed that since the execution of the contract to convey said lots, W. P. Benner has suffered several judgments to be taken and docketed against him in the county where the lands are situated.

Upon the hearing and on facts agreed, the court being of opinion that the deed tendered would convey a good title, free and clear of the judgment liens against W. P. Benner and, in accordance with the consent of the parties as to his opinion on this one point in dispute, entered judgment for the plaintiffs; whereupon the defendant excepted and appealed.

H. F. Seawell for plaintiffs.
R. L. Burns for defendant.

STACY, J. The single question presented by this appeal is whether W. P. Benner and wife, Bettie F. Benner, who hold lands as tenants by the entirety, can convey the same free and clear of judgment liens docketed against W. P. Benner in the county where the lands are situated. His Honor below was of the opinion that they could, and entered judgment accordingly. We are of the same opinion, and the judgment will be affirmed. The exact question was decided in *Hood v. Mercer,* 150 N. C., 699. See, also, *Harris v. Distributing Co.,* 172 N. C., 14, and *Davis v. Bass, ante,* 200, and cases there cited.

The case of *Bruce v. Nicholson,* 109 N. C., 202, cited by appellant and which has been approved in a number of later decisions, was an appeal by a judgment creditor who claimed a prior lien for his previously docketed judgment against I. A. Sugg over a subsequently executed mortgage given by I. A. Sugg and his wife on lands held by them as tenants by the entirety. The court ordered the sale under the mortgage and held that the defendant's judgment was not a lien on the land and was of no avail as against the deed of I. A. Sugg (the judgment debtor) and his wife to lands held by them as tenants by the entirety. This, in principle, also covers the question here presented, though no judgment creditor is a party to the present action.

But it has been held or suggested in a number of cases, beginning with *Topping v. Sadler,* 50 N. C., 357, and including among others *Long v. Barnes,* 87 N. C., 330; *Simonton v. Cornelius,* 98 N. C., 433; *West v. R. R.,* 140 N. C., 620; *Bynum v. Wicker,* 141 N. C., 95; *Greenville v. Gornto,* 161 N. C., 343; *Moore v. Trust Co.,* 178 N. C., 125, and *Holton v. Holton,* 186 N. C., 355, that a lease by the husband alone and without the wife's joinder, of premises held by the entirety,

is valid during coverture, because the husband is entitled to the possession, income, increase or usufruct of the property during their joint lives. Hence, it is the position of the defendant that to this extent, if no more, the property ought to be, and properly is, liable to be taken under execution for the satisfaction of judgments against the husband. Defendant says that by the terms of C. S., 677, "all leasehold estates of three years duration or more," owned by the judgment debtor, may be levied on and sold under execution, and that the right to lease an estate by the entirety during coverture is such a leasehold estate in the husband as is liable to execution under the statute. "During coverture" is an indeterminate period and may or may not last for three years or more, albeit, a lease by the husband of an estate by the entirety for 10 years was upheld in *Greenville v. Gornto,* 161 N. C., 341, subject to be defeated only by the death of the husband prior to that of the wife, but the right to lease such property enures to the husband in his capacity as a member of the marriage state and not otherwise. 30 C. J., 562; 13 R. C. L., 1114.

Without deciding whether at common law a lease by the husband, without the wife's joinder, was valid during coverture, from which a departure to this extent may have been made in the decisions so holding, it is sufficient to say that whatever paramount rights the husband had at common law, and now has, in and to the rents and profits and over the lands held by him and his wife as tenants by the entirety, did not, and do not, spring from the peculiar nature of the estate, and are not incidents thereto, but they are rights enuring to the husband from the general principle of the common law which vests in the husband, *jure uxoris,* the right to the use and control of his wife's lands during coverture and to take the rents and profits arising therefrom. The common-law rule that the husband is entitled to the rents and profits of his wife's lands is as applicable where she holds a joint title as where she holds sole title. 30 C. J., 567. The estate "still possesses here the same properties and incidents as at common law." *Bynum v. Wicker,* 141 N. C., 95. In other words, whatever superior rights the husband had at common law, and now has, in and to the use and control of an estate by the entirety were and are incidents belonging to the status of marriage, or the legal relationship of husband and wife. It is only in the capacity of husband and wife that estates may be taken and held by the entirety. *Davis v. Bass, supra.* At common law, the husband was considered the owner of the rents and profits arising from lands held by the entirety, and the properties and incidents of this particular estate have not been changed or altered in their nature or character by statute or by constitutional provision in North Carolina. *McKinnon v. Caulk,* 167 N. C., 411.

The judgments against W. P. Benner were rendered against him individually and not in his capacity as husband of Bettie F. Benner. This would seem to afford a sufficient distinction for upholding a lease, made by virtue of his right as husband during coverture, and at the same time denying liability of the estate to be taken under execution for the satisfaction of judgments rendered against him individually; but, if not, it should be remembered that law and logic are not always the best of friends. We are not called upon to say whether a judgment rendered on a debt for which W. P. Benner would be liable, only because of his husbandhood, may be collected out of his interest and control over lands held by him and his wife as tenants by the entirety, but from the reasoning in all our decisions on the subject, this question would seem to be involved in no serious doubt as to its proper solution. His liability would still be personal regardless of its source. Lands held by husband and wife as tenants by the entirety are not subject to levy under execution on a judgment rendered against either the husband or the wife alone, nor can the interest of either be thus sold, because the right of survivorship is merely an incident of the estate, and does not constitute a remainder, either vested or contingent, but in this jurisdiction a judgment rendered against the husband and wife jointly, upon a joint obligation, may be satisfied out of an estate in lands held by them as tenants by the entirety. *Martin v. Lewis,* 187 N. C., 473; 30 C. J., 573.

This tenancy by the entirety is *sui generis,* and arises from the singularity of relationship between husband and wife. In order to comprehend its peculiar properties and incidents, the one fact which must be constantly borne in mind is that the estate may be taken and held only by husband and wife in their capacity as such, and not otherwise, though it is not necessary that they be so described. 13 R. C. L., 1108. As between them, there is but one owner, and that is neither the one nor the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole, and every part and parcel thereof. *Ketchum v. Walsworth,* 5 Wis., p. 102. It may be taken under execution against one of the parties only when the legal personage of "husband and wife" has been reduced to an individuality identical with the natural person of the survivor. *Stuckey v. Keefe,* 26 Pa., p. 399.

For the benefit of the investigator, the following supplementary observations on estates held by husband and wife as tenants by the entirety may be added to those heretofore made in the case of *Davis v. Bass, ante,* 200:

1. Where husband and wife contract jointly for a building to be built, rebuilt, repaired or improved, upon lands held by them as tenants by the entirety, said building and lands may be subjected to the pay-

ment of all debts contracted for work done on the same, or materials furnished. C. S., 2433. But the law would seem to be otherwise where the contract is made by the husband alone or by the wife alone. *Finch v. Cecil,* 170 N. C., 72.

2. Where several judgments are taken against a husband or a wife individually, and at different times, no present lien attaches to property held by the entirety, but upon the death of either, the survivor acquires the entire legal title to such property, and the liens of the several judgments held against the survivor, if still active and unsatisfied, would then attach to said property, *eo instante* and at the very moment when the title vests in the judgment debtor in his or her individual right; hence, the previously taken judgments would all stand upon the same footing, and the proceeds of a sale thereunder would be distributed pro rata without reference to the priority of said judgments or to the time of their docketing. *Moore v. Jordan,* 117 N. C., 86; 42 L. R. A., 209, and note. In other words, the acquisition by the judgment debtor of the title to such property by right of survivorship would place the estate upon the same footing with relation to said judgments as after-acquired property. And the rule in this jurisdiction with respect to the priority of judgment liens against after-acquired property is that such judgment liens attach equally without reference to the date of their rendition or docketing. C. S., 614 and 654. This rule is based upon the theory that the liens attach the instant there is a title capable of being encumbered, but they do not for this reason relate back to the time of the original judgment. 23 Cyc., 1381.

3. No homestead may be claimed in lands held by the entirety as against a judgment rendered on a joint obligation given for the purchase of said property. *Smith v. High,* 85 N. C., 93. "No property shall be exempt from sale for taxes or for payment of obligations contracted for the purchase of said premises." Const., Art. X, sec. 2. But the law may be otherwise where the joint obligation is not for the purchase price of the land. See *dictum* in *Martin v. Lewis,* 187 N. C., p. 476. The "laborer's lien" for labor performed and the "mechanic's lien" for work done on the premises under a joint contract, have a constitutional priority over the homestead exemption (*Broyhill v. Gaither,* 119 N. C., 443), but not so in case of a lien for materials furnished, which is only statutory. *Cumming v. Bloodworth,* 87 N. C., 83. The homestead exemption should not be confused with the wife's interest in the husband's "home site" (chapter 123, Public Laws 1919) when sought to be conveyed without her signature, which is also statutory. C. S., 4103; *Bank v. Sumner, post,* 687.

From the facts and agreement appearing of record, the judgment entered in the Superior Court must be upheld.

Affirmed.

SOUTHERN STATE BANK v. C. F. SUMNER AND WIFE, MINNIE SUMNER.

(Filed 3 December, 1924.)

Husband and Wife—Dower—"Home Site"—Statutes — Injunction—Appeal and Error—Prejudice.

Under the facts of this appeal it appears that a mortgage given by the husband was insufficient to pass the interest of the wife in his lands for insufficiency of her probate, and that the court below, upon her motion in the present case, dissolved a temporary order as to her inchoate right of dower, but continued it with respect to her husband's "home site," C. S., 4103, which had previously been included in another action to which she was not a party in the dower allotted to her mother-in-law. There was no evidence as to when her husband had acquired the title to the land, or when he married the appellant. *Held*, the appellant had no just ground to complain of the action of the court below, and the consideration of C. S., 4103 is not involved on the appeal.

APPEAL by defendant, Minnie Sumner, from *Finley, J.*, at Chambers, 17 June, 1924, from HENDERSON.

Motion in this cause to enjoin execution of judgment in a special proceeding for partition in which the movant was not, and is not, a party.

From a judgment, dissolving the temporary restraining order issued in the cause, except as to the "home site" of defendant's husband, now in the possession of Mrs. L. A. Sumner as her dower, the defendant appeals.

T. J. Rickman and Shipman & Justice for plaintiff.
D. L. English and O. K. Bennett for defendants.

STACY, J. This appeal presents a novel question on a singular state of facts.

The present suit was instituted by the plaintiff in 1921, under C. S., 1743, to quiet its title to 7/8 undivided interest in certain lands and to remove the defendants' claims as clouds therefrom. Plaintiff acquired its interest in the lands by purchase at a foreclosure sale under a deed of trust executed by C. F. Sumner and wife, Minnie Sumner, but which was held to be invalid as to Minnie Sumner because her acknowledgment and privy examination were not taken as required by law, and the case was accordingly remanded for a new trial. 187 N. C., 762.

While this cause was pending, the plaintiff instituted a special proceeding before the clerk of the Superior Court for Henderson County to have the lands divided, but in which Minnie Sumner was not, and is not, a party. In the proceeding for partition, Mrs. L. A. Sumner,

mother-in-law of Minnie Sumner, was allotted her dower and Bettie Leverette her 1/8 interest in the lands. The home place was included in Mrs. L. A. Sumner's dower. This was affirmed on appeal. *Bank v. Leverette et al.*, 187 N. C., 743.

Minnie Sumner, thereupon, files a motion in this cause, to which she is a party, to enjoin the plaintiff from executing its writ of possession in the case of *Bank v. Leverette, supra,* to which she is not a party, until her inchoate right of dower can be ascertained and determined and her husband's "home site" set off and possession awarded to her under C. S., 4103. A temporary restraining order was granted, but dissolved upon the hearing so far as appellant's inchoate right of dower is concerned, and continued with respect to her husband's "home site" which was adjudged to be in the lands previously allotted to Mrs. L. A. Sumner as her dower. From this order, Minnie Sumner alone appeals.

The appellant has no just cause for complaint; she has received all, if not more, than she is entitled to on her motion.

There is no finding on the record as to when C. F. Sumner acquired title to the lands in question, nor when he was married. It is contended by the appellee that both events took place prior to the enactment of ch. 123, Public Laws, 1919, now C. S., 4103. Hence, plaintiff takes the position that the act has no application to the present case, citing by analogy, decisions holding that where a husband married and acquired lands prior to the dower act of 1867, such lands were not subject to dower, though sold by the husband without his wife's concurrence, after his marriage and after the passage of said act. *Jenkins v. Jenkins,* 82 N. C., 208. See, also, *Gladney v. Sydnor,* 172 Mo., 318, 60 L. R. A., 880.

The facts of the present record do not call for an interpretation of C. S., 4103, which is not altogether free from difficulty, and we refrain from a discussion of it. Its meaning is by no means clear. The value of the "home site" is not fixed by the statute. It is not certain as to whether it is intended to be in addition to, or included within, the homestead right. Nothing is said as to whether it is superior to the right of heirs or the claims of creditors. It has been suggested that the statute may apply, and probably was intended to apply, only as against those claiming under a deed from the husband without his wife's proper joinder. We leave its interpretation for future consideration.

The appellant has no valid cause to complain at the judgment entered below.

Affirmed.

JOHN E. MANGUM v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 December, 1924.)

1. Carriers — Railroads — Federal Statutes and Decisions—Negligence—Employer and Employee—Trials.

The Federal statutes and decisions control in an action brought in the State court to recover damages for a personal injury alleged to have been negligently caused to a railroad employee while engaged in interstate commerce, in the course of his duties to the defendant railroad company, his employer therein.

2. Statutes—Carriers—Railroads—Commerce—Employer and Employee—Federal Employers' Liability Act—Federal Boiler Inspection Act—Interstate Commerce Commission

Where a violation of the duty imposed by the Federal Employers' Liability Act and the Boiler Inspection Act and the rules of the Interstate Commerce Commission in relation thereto causes a personal injury to an employee engaged in the course of his employment by a railroad company in interstate commerce, it is unnecessary for the plaintiff to plead or prove the provisions of these acts and rules in his action in the State courts to recover damages for the injury, etc., for the courts will take judicial notice thereof.

3. Same—Negligence—Evidence.

The Federal Employers' Liability and Boiler Inspection acts and the rules of the Interstate Commerce Commission in pursuance thereof require, among other things, that the locomotives be equipped with a proper *pilot, or cow-catcher:* and where a locomotive was not so equipped, but with a rotten pilot, came into collision with an automobile at a crossing, and the evidence in plaintiff's action to recover damages tends to show that by reason of the defect the automobile went under the locomotive, and caused a derailment, proximately producing the injury complained of to a fireman thereon while engaged in interstate duties, the failure of defendant to comply with the requirements of the Federal law is in itself evidence of actionable negligence, for which a recovery may be had.

4. Same—Collisions—Witnesses—Experts' Opinion—Questions for Jury.

In an action to recover damages for a personal injury under the Federal Employers' Liability Act and the Boiler Inspection Act, and the rules of the Interstate Commerce Commission in pursuance thereof, expert opinion evidence in proper instances is competent to show that a rotten pilot to the locomotive in a collision with an automobile would result in the automobile's breaking through to beneath the locomotive, resulting in a derailment, when relevant to the inquiry, in an action by an employee on the locomotive of a railroad company engaged in interstate commerce, who was injured in the derailment, and an exception by the carrier, under the facts of this case, that it invaded the province of the jury upon the issue of negligence was *held* untenable.

5. Same—Proximate Cause.

Where a railroad locomotive was derailed in a collision with an automobile at a public crossing, and there is evidence of negligence on the

carrier's part in proximately causing an injury to its employee, in his action for damages the mere fact that the driver of the automobile may have likewise been negligent does not bar the plaintiff's right to recover in his action against his employer, alone, under the principle that another negligent act may concur in proximately causing an injury, without excluding liability of the defendant, when its negligent act was one of the proximate causes of the injury in suit, and the doctrine of intervening negligence is inapplicable.

6. Same—Measure of Damages.

In an action to recover damages for a personal injury to an employee of defendant railroad company under the provisions of the Federal Employers' Liability and Boiler Inspection acts, the measure of damages are those caused by the negligence of the defendant for physical suffering and the plaintiff's pecuniary loss by reason of permanent disability, when permanently disabled, present, and prospective, upon evidence in the case, reduced to the present worth of such aggregate sum as the jury may find the plaintiff to have been endamaged under the proper rule of expectancy of life, and the evidence as to plaintiff's earning capacity, etc.

7. Instructions—Appeal and Error.

The charge of the court when as a whole it correctly lays down to the jury upon the evidence in the case the correct rule for the admeasurement of damages will not be held for reversible error when in its disconnected part, taken disjointedly, error may be found; and where the charge thus construed is correct, reversible error will not be held because of faulty illustrations given upon correct principles.

APPEAL by defendant from *Grady, J.*, and a jury, at March Term, 1924, of WAKE.

Action brought by plaintiff against defendant under the Federal Employers' Liability Act to recover damages for personal injuries received on 13 December, 1921, at Red Springs, N. C. The plaintiff was a locomotive engineer, but was performing service of fireman at the time, on defendant's train which collided with a Chevrolet automobile at a public crossing. The engine and train were derailed, the driver of the automobile, one Gilchrist, was killed, the automobile demolished, and the plaintiff employee, at his post of duty, on the engine of defendant, permanently and seriously injured. The main allegations of negligence was that the defendant's pilot, or what is commonly known as the "cow-catcher," was old, worn, defective, insecure, an insufficient pilot and equipment, and an old, worn defective, and insecure tender. The train was running at an unlawful speed. The engineer was not keeping a proper lookout or giving any warning to people driving along the public highway, when approaching the crossing, to avoid collision.

The complaint further alleges: "That, as a direct and proximate result of the defendant's said negligent, careless and wrongful conduct, the defendant's said locomotive engine violently collided with said auto-

mobile at said public crossing, completely demolishing said automobile and the pilot of said locomotive engine and the tender attached thereto; said locomotive engine, tender, and several cars in said train were derailed, and the plaintiff was caught between the demolished tender and the cab of said locomotive engine, and his left leg was horribly lacerated, mangled and injured; he was suspended by the flesh of his leg for a long space of time before being removed from said wreck; he was badly bruised and injured all over his body; he was forced to undergo a number of surgical operations," etc.

Plaintiff testified, in part: "I, as fireman, had nothing to do with the inspection of the engine. The pilot, or cow-catcher, was provided to the engine to remove obstructions from the track. This drawing correctly illustrates the position of the pilot that was on the locomotive engine. That is the shape pilot that it was; that is a correct diagram of it. The location of the pilot is at the end here. There was not anything else provided on this engine for the removal of obstructions. Upon removal of the pilot, the front of the engine is left open; the front of the engine is left entirely open. There would have been about three feet of space left there in front of the engine after the removal of the pilot, and as wide as the front, the width of the track. The standard width of the track is 4 feet 8½ inches. It would leave an opening there of 4 feet 8½ inches by 3 feet. There would not be anything left there to prevent the wheels coming in contact with any obstruction on the track. On this morning of 13 December, 1921, we were going in Red Springs, as usual, and hit some object. We went in on the same day as usual, and we generally went in on time. I did not notice about the speed then. Yes, it was running 45 or 50 miles per hour. There were yard-limit boards in Red Springs at that time, 200 yards south of the crossing. You get to the yard-limit board before you get to the crossing. This collision occurred within the yard limits of Red Springs—it indicates the railroad yard, where the switch engine or other trains can use the main line without protection. They generally slowed down before getting to that crossing, because it is in the city limits. . . . The first thing that I noticed was Mr. Rutledge applying the emergency brakes. With respect to the time he struck the automobile, it all happened about the same time, and it was very quick. I observed, when the engine struck the automobile, that it mounted, and the train was derailed on the crossing. It mounted it when it struck; whatever it struck, it run over the top of it."

Evidence was introduced by plaintiff to sustain his allegations. They were denied by defendant, and evidence introduced to contradict plaintiff's allegations.

The issues submitted to the jury, and their answers thereto, are as follows:

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

2. If so, what damage is plaintiff entitled to recover of the defendant? Answer: Disability, $15,000; mental and physical suffering, $7,500—$22,500.

Judgment was rendered on the verdict, to which defendant excepted, and appealed to the Supreme Court. There are thirty exceptions and assignments of error. The material ones we will consider in the opinion, without doing so *seriatim*.

Douglass & Douglass and R. N. Simms for plaintiff.
Thomas W. Davis and Murray Allen for defendant.

CLARKSON, J. This action was brought under the Federal Employers' Liability Act (35 U. S. Stat. at L., p. 65, ch. 149) and the Federal Boiler Inspection Act (36 U. S. Stat. at L., p. 913, ch. 103), and the amendments thereto. The defendant was engaged and the plaintiff was employed in interstate commerce.

The material parts of the two statutes, and the amendments thereto, and rules promulgated and applicable to this case, are as follows, to wit, (Italics ours, as set forth in act and rules):

EMPLOYERS' LIABILITY ACT.

"SECTION 1. That every common carrier by railroad, while engaging in commerce between any of the several States, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce (in case of death of such employee, etc.), . . . for such injury or death resulting in *whole* or in *part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defects or insufficiency due to its negligence in its cars, . . . appliances, . . . or other equipment.

"SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such

common carrier of any statute enacted for the safety of employees *contributed* to the injury or death of such employee.

"SEC. 4. That in any action brought against any common carrier under or by virtue of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

BOILER INSPECTION ACT.

"SEC. 2. That from and after the first day of July, 1911, it shall be unlawful for any common carrier, its officers or agents, subject to this act, to use any locomotive engine propelled by steam power in moving interstate or foreign traffic *unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb,* and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided."

The above section was amended on 4 March, 1915, U. S., Statutes at L., p. 1192, ch. 169:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section two of the act entitled 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe, suitable boilers and appurtenances thereto,' approved February seventeenth, nineteen hundred and eleven, shall apply to *and include the entire locomotive and tender and all parts and appurtenances thereof.*"

"SEC. 3. That nothing in this act shall be held to alter, amend, change, repeal or modify any other Act of Congress than the said act of February seventeenth, nineteen hundred and eleven, to which reference is herein specifically made, *or any order of the Interstate Commerce Commission promulgated* under the Safety Appliance Act of March second, eighteen hundred and ninety-three, and supplemental acts."

Rule No. 141 (a), promulgated by the Interstate Commerce Commission, and which was in full force and effect 13 December, 1921, the date of the injury, provides: *"Pilots shall be securely attached, properly braced, and maintained in a safe and suitable condition for service."*

Rule No. 152 (a), promulgated by the Interstate Commerce Commission, which was in full force and effect, provides: *"Tender frames shall be maintained in a safe and suitable condition for service."*

Other rules of the Interstate Commerce Commission make the railroad responsible for the design, construction and maintenance of *locomotives and tenders, and all parts thereof,* under its control.

It is not necessary for the plaintiff to plead or prove the aforementioned statutes as the Court will take judicial notice thereof.

In 25 Ruling Case Law, sec. 209, it is stated: "Judicial notice will be taken of public acts of Congress, not only by the courts of the United States, but by the courts of the several states and territories. Federal statutes need not be pleaded in the state courts. In construing a Federal statute, a state court is bound by the construction placed on it by the Federal courts." *Seaboard Air Line Railway Co. v. Duval,* 225 U. S., p. 477.

Exceptions and assignments of error were made to the following questions asked plaintiff and answers thereto:

"Q. Have you an opinion, satisfactory to yourself, based upon your knowledge and experience as a locomotive engineer as to whether a locomotive engine of that type, and operated at the speed at which that was operated, would mount an obstruction if the pilot was in good condition? Answer: 'Yes.'

"Q. What is it? Answer: 'If the pilot had been in good condition I do not believe that it would.'

"Q. Mr. Mangum, do you know the effect a defective condition of the pilot would have upon a locomotive engine in case of a collision with a Chevrolet automobile on the track? Answer: 'Yes.'

"Q. What effect, if any, would decayed ribs of pilot of engine No. 63 have upon the engine in case of collision with a Chevrolet on the track? Answer: 'The pilot would be demolished and would allow the automobile to go under the engine and cause a derailment.'

"Q. Would the effect be the same with all automobiles? Answer: 'Yes.'"

It was contended by the defendant that the court below in the answers to the foregoing questions permitted the witness to express an opinion upon the very matter to be passed upon by the jury. It was in evidence that the wood on the pilot to the engine had been permitted to become decayed and rotten.

It was in evidence that the plaintiff was an expert, skilled and experienced locomotive engineer and his answers to the questions propounded to him were based upon his knowledge and experience as a locomotive engineer. He was thoroughly familiar with the engine, its speed, the weight of the train, the track and roadbed, and he was fully

qualified to express an expert opinion as to whether such locomotive, equipped with a proper pilot, would, in case of collision, mount an obstruction. The plaintiff's testimony in this regard was but "expert testimony on the facts," based upon his knowledge and experience with such conditions and instrumentalities. We think the evidence was admissible. *Shaw v. Handle Co., ante,* p. 232 and cases cited.

"For the plaintiff to recover under the Federal Employers' Liability Act it is not sufficient that he prove negligence and injury under conditions within the terms of the act. To create a jury issue, the plaintiff must introduce proof tending to show that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation must depend largely upon the circumstances of each case. . . . An injury which is the natural and probable result of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever of the injury. The natural consequence of an act is the consequence which ordinarily follows it, the result which may reasonably be anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is not to follow it." Roberts on Federal Liability of Carriers, Vol. 1, sec. 548, pp. 942, 944.

In Wood on Railroads, Vol. 2, p. 1438, the matter is well stated: "But a wrongdoer is responsible for all consequences that ensue in the ordinary and natural course of events, although those events are brought about by the intervening agency of others, provided the intervening agency was set in motion by the primary wrongdoer, *or the acts causing the damage were the necessary or legal and natural consequences of the original wrongful act.*" (Italics ours.)

The defendant contends that regardless of the condition of the pilot, the real cause of the accident was the negligent conduct of the driver of the automobile in going on the track in front of an approaching train, that the entire evidence in the case establishes as a matter of law that the plaintiff's injuries resulted from the intervening negligent act of an independent third party, for which the defendant is not liable, and defendant's motion for nonsuit should be allowed. We cannot so hold. To sustain its position, the case of *Harton v. Telephone Co.,* 146 N. C., p. 429, is cited.

That case, in general, decides, when it was shown by the evidence that the defendant's telephone pole had fallen upon a public road, and that intelligent third persons, not agents of the defendant and acting without its knowledge, or its knowledge of the conditions, replaced the pole in

the hole in such manner as to make it insecure and unsafe for travelers along the road, and that the plaintiff's intestate, free from negligence, was injured about half an hour thereafter by the falling of the pole, the question of the defendant's negligence, if any, was eliminated by the intervening act of third persons, constituting the proximate cause; and it was error in the court below to refuse to instruct the jury that, if they found the evidence to be true, the plaintiff could not recover.

The facts in that case are not analogous to the one at bar. It was the *duty* of the defendant to equip its engine with a pilot (commonly known as a cow-catcher) which "*shall be securely attached, properly braced and maintained in a safe and suitable condition for service.*" The purpose of the pilot was to remove obstructions from the track—to clear the way—and so constructed as to throw the object struck off of the track. In the instant case it was shown that the pilot was old, worn, rotten and defective, and instead of throwing the automobile from the track, on account of the defective condition of the pilot, when the engine struck the automobile, it mounted it and the train was derailed at the crossing, and plaintiff injured.

The plaintiff's evidence showed that the pilot to the engine was defective and rotten and the frame of the tender was defective. When the pilot, or cow-catcher, struck the automobile it mounted the automobile and the train was derailed and plaintiff injured. The speed of the train and the defective condition of the tender, the trailing cars of the train were hurled against the tender breaking it loose from its bed and pinning plaintiff in between the top part of the tender and the rear end of the engine.

The decisions of this State, and the United States which are applicable here, under the facts and circumstances of this case, do not, we think, bear out defendant's contentions.

In *White v. Realty Co.*, 182 N. C., p. 537, this Court said: "There may be two or more proximate causes of an injury; and where this condition exists, and the party injured is free from fault, those responsible for the causes must answer in damages, each being liable for the whole damage instead of permitting the negligence of the one to exonerate the others. This would be so though the negligence of all concurred and contributed to the injury, because with us, there is no contribution among joint tort feasors. *Wood v. Public Service Corp.*, 174 N. C., 697." *Hinnant v. Power Co.*, 187 N. C., 295.

The court below instructed the jury, in part, as follows: "As to the first issue, the plaintiff asks you to answer it 'Yes.' The defendant asks you to answer it 'No.' Before you can answer it in the affirmative the plaintiff must offer evidence, which from the greater weight, satisfies you that the defendant has been guilty of some breach of duty which it

owed to the plaintiff, that is to say, that it has been guilty of negligence, and that such negligence was the proximate cause of the plaintiff's injury, under the instructions that I have already given you, and that I will now give you upon this particular point. You may understand, gentlemen, that there may be more than one proximate cause of an injury. By proximate cause is meant that which in natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and, without which, the injury would not have occurred. It is the cause which directly produces the result, and, without which, the injury complained of would not have occurred. To show that other causes occurred in producing or contributing to the injury complained of is no defense to an action for negligence. So that, where there are two or more efficient proximate causes, all contributing to an injury, if the defendant's negligence produces one of such causes, it would be liable. To state the rule differently: there may be two or more proximate causes of any injury, and where this condition arises, and the injured party is free from fault, those responsible for the causes must answer in damages, each being liable for the whole damage, instead of allowing the negligence of one to exonerate the others. This would be true, although the negligence of all concurred and contributed to the injury, because under the laws of this State, there is no such thing as contribution among those jointly liable for an actionable wrong. Therefore, gentlemen, it being admitted that the driver of the automobile was negligent, and that such negligence on his part was one of the proximate causes of the plaintiff's injuries, it remains for you to inquire and ascertain from this evidence whether or not the defendant was negligent, and, if so, was such negligence the proximate or one of the proximate causes of such injury, for if the plaintiff's injury was due in whole or in part to any act of negligence on the part of the defendant, that is to say, that such negligence was one of the proximate causes thereof, then he would be entitled to recover, and it would be your duty to answer the first issue 'Yes.' Now, gentlemen, you will remember that the burden is upon the plaintiff as to both issues; and before you can answer either in his favor, he must satisfy you by the greater weight of the evidence, first that the defendant has been negligent in one of the ways alleged in the complaint, and that such act or acts of negligence was the proximate or contributing cause of his injuries, and if you do so find, it will be your duty to answer the first issue 'Yes.' "

Several exceptions and assignments of error were duly made to the foregoing charge. We cannot sustain them. We think the charge proper under the facts and circumstances of this case.

"Liability is shown under the Federal act when the plaintiff proves that the injury or death was due either 'in whole or in part' to negligence

of the defendant. This phrase is an adoption of the common-law doctrine of concurrent causes. Although causes for which the carrier is not liable contributes directly to produce the injury, yet if a cause of which the carrier is liable, that is, a negligent act of any other employee or a defect or insufficiency due to negligence in equipment or works, contributes also as a cause, without which the injury would not have occurred, the carrier is still liable. The quoted phrase means nothing more or less than that the negligent act must be the proximate cause under the Federal (act) of the injury and, in cases of doubt, to ascertain when a negligent act is the proximate cause under the Federal law, decisions of courts passing upon such questions under the common law, are applicable." Roberts on Federal Liabilities of Carriers, vol. 1, sec. 538, p. 945.

Mr. Chief Justice White, in *Grand Trunk Ry. Co. v. Lindsay,* 233 U. S., p. 47, affirms what was said by the Court in 201 Fed. Rep., p. 844: "If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

In *Texas & Pacific Ry. v. Rigsby,* 241 U. S., p. 43, the defendant in error Rigsby, an employee a switchman, was injured on account of defect in one of the hand-holders or grab-irons that formed the rungs of the ladder when descending from the car. *Mr. Justice Pitney,* said: "The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition. *St. Louis & Iron Mountain Ry. v. Taylor,* 210 U. S., 281, 294, 295; *Chicago B. & Q. Ry. v. United States,* 220 U. S., 559, 575; *Delk v. St. Louis & San Francisco R. R.,* 220 U. S., 580, 586." *Great Northern R. R. v. Donaldson,* 246 U. S., 121; *San Antonio & A. P. R. R. Co. v. Wagner,* 241 U. S., 476; *Minneapolis & St. Louis R. R. Co. v. Gotschall,* 244 U. S., p. 66.

Mr. Justice Pitney, in *Spokane & I. E. R. R. Co. v. Campbell,* 241 U. S., 509, said: "Upon the whole case, we have no difficulty in sustaining his right of action under the Employers' Liability Act. That act (sec. 1, 35 Stat., 65) imposes a liability for injury to an employee 'resulting in whole or in part from the negligence of any of the officers, agents,

or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, . . . or other equipment.' As was held in *San Antonio & Arkansas Pass Ry. v. Wagner,* decided 5 June, 1916, *ante,* p. 476, a violation of the Safety Appliance Act is 'negligence' within the meaning of the Liability Act. And by the proviso to section 3 of the latter act, no employee injured or killed shall be held to have been guilty of contributory negligence in any case where a violation of the Safety Appliance Act 'contributed to the injury or death of such employee.' It is too plain for argument that under the legislation the violation of the Safety Appliance Act need not be the sole efficient cause, in order that an action may lie."

The case of *Davis v. Kennedy,* decided 17 November, 1924, by the Supreme Court of the U. S., *Mr. Justice Holmes,* delivering the opinion of the Court, is in no way applicable to the facts here. In that case there was a collision, the sole cause was the conduct of the engineer. The Court says: "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more. *Frese v. Chicago, Burlington & Quincy R. R. Co.,* 263 U. S., 1, 3."

The court below withdrew the speed of the train and lookout from the jury's consideration and limited the issue of negligence to defective pilot and tender.

In *Michigan Central R. R. Co. v. Vreeland,* 227 U. S., p. 65, *Mr. Justice Lurton,* construing the Federal Act, said: "It plainly declares the liability of the carrier to its injured servant. If he survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering and diminished earning power." *Chesapeake, etc., R. R. v. Carnahan,* 241 U. S., p. 241, 36 S. Ct., 594; Richey on Federal Employers' Liability (2 ed.) sec. 178, 179, p. 364, 365.

The measure of damages, under the Federal Employers' Liability Act, for wrongful injury must be settled according to the principles of law as administered in the Federal Courts. In the present case, without any exception, the issues as to damages were made dividable—first, as to the amount recoverable for "disability" and, second, for "mental and physical suffering." This Court has substantially followed the Supreme Court of the United States in regard to damages of this nature, and in the case of *Ledford v. Lumber Co.,* 183 N. C., p. 616, it is said: "In cases like the one at bar, if the plaintiff be entitled to recover at all, he is entitled to recover as damages one compensation—in a lump sum—for all

injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction (if he be entitled to recover at all) for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury. And it is for the jury to say, under all the circumstances, what is a fair and reasonable sum which the defendant should pay the plaintiff, by way of compensation, for the injury he has sustained. The age and occupation of the injured party, the nature and extent of his business, the value of his services, the amount he was earning from his business, or realizing from fixed wages, at the time of the injury, or whether he was employed at a fixed salary, or as a professional man, are matters properly to be considered. *Rushing v. R. R.*, 149 N. C., 158. 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 award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present and prospective. *Penny v. R. R.*, 161 N. C., 528; *Fry v. R. R.*, 159 N. C., 362."

The court below fully set forth the contentions of the parties. Near the conclusion of the statement of the plaintiff's contentions, the court stated: "He (plaintiff) is asking you to find that his (plaintiff's) injuries are not only serious and permanent, but that he is now suffering a total disability, and he is asking you to award to him a lump sum of money that will be equivalent to the present value of his diminished earning capacity; and in addition thereto such amount as you may find would be due him for his mental and physical suffering." After proceeding, with much fairness to defendant, to review at length the defendant's contentions concerning the elements and manner of ascertaining the damages, the court below said: "Now, gentlemen of the jury, having given you some of the contentions of the parties as I understand them, I will proceed to lay down for your guidance certain rules to be followed by you in estimating the plaintiff's damages in this case. If the plaintiff is entitled to recover at all, he is entitled to recover the reasonable present value of his diminished earning capacity in the future, and his loss of time in the past; and where future payments of money, such as wages for labor, are to be anticipated by the jury, and capitalized into a verdict, the plaintiff is only entitled to the present value thereof. In other words, the damages to be awarded to the plaintiff, if at all, because of his diminished earning capacity, would be a sum of money equal to the present worth of such dimunition, and not the aggregate amount of such earnings during his expectancy

of life. Your answer to this last issue will embrace two figures, first, the present worth of his diminished earning capacity, and in addition thereto, a reasonable compensation for his physical and mental suffering." The court, we think, laid down the correct rule then gave illustrations which perhaps may be objectionable to which defendant excepted and made assignments of error. In the illustrations the court below said: "I have used the above figures merely for the purpose of illustration and not for the purpose of influencing you in arriving at any definite sum." The defendant did not ask any specific instruction as to the measure of damages.

Taking the charge as a whole, we cannot hold it prejudicial or reversible. In *Cobia v. R. R., ante,* p. 492, it is *held:* "It is now settled law that the charge of the court must be considered and examined by us, not disconnectedly, but as a whole, or at least the whole of what was said regarding any special phase of the case or the law. The losing party will not be permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with other portions, they are readily explained and the charge in its entirety appears to be correct. Each portion of the charge must be considered with reference to what precedes and follows it. In other words, it must be taken in its setting. The charge must be viewed contextually and not disjointedly. Any other rule would be unjust, both to the trial judge and to the parties. *Exum v. Lynch, ante,* 392."

The record shows that the plaintiff had been for years a faithful employee of defendant company. He was at his post of duty on the engine when seriously and permanently injured and admittedly free from blame. The pilot, or cow-catcher, to the engine that was placed to remove obstructions and keep the track clear by throwing obstructions off, was rotten and defective and caused the engine to mount the automobile when it ran in front of the engine and derailed the train and injured the plaintiff. The tender to the engine was defective and he was caught between it and the engine.

These facts were established in the court below by competent evidence. The court gave fairly and fully the contentions of the defendant. The jury under proper instructions from the court have rendered their verdict in favor of plaintiff. We have read the record and briefs carefully, examined all the exceptions and assignments of error, and can find no reversible or prejudicial error.

No error.

IN RE LAST WILL AND TESTAMENT OF JENNY WESTFELDT, DECEASED.

(Filed 10 December, 1924.)

1. Appeal and Error—Briefs—Objections and Exceptions.

To be considered on appeal under the rule of court, exceptions of appellant appearing of record must be mentioned and discussed in his brief.

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

Where the charge of the judge to the jury does not appear of record, the presumption is that the instructions given were correctly given upon competent evidence introduced upon the trial.

3. Wills—Caveat—Evidence—Nonsuit—Actions—Parties.

Proceedings to caveat a will are *in rem* involving the rights of the beneficiaries as named in the will, and those of the opposing heirs at law or next of kin depending upon the answer to the issues of *devisavit vel non*, and there being no parties, strictly speaking, upon whom a judgment as of nonsuit may be taken, the issue should be tried in the due course and practice of the court, and a motion as of nonsuit should be denied.

4. Judgments—Evidence—Motions to Set Aside—Discretion of Court—Wills—Caveat.

A motion to set aside a verdict as being against the weight of the evidence, and the consequent granting of a new trial upon the issue of *devisavit vel non*, is within the sound discretion of the trial judge.

5. Wills—Evidence—Holograph Wills.

Evidence that a paper-writing purporting to be the last will and testament of the deceased, wholly written and signed by her, was found among her valuable papers after her death, in a desk where she kept her business papers, and those she desired to keep for their sentimental value to herself, and transferred after her death to her trunk where they were found, *is held* sufficient, under the circumstances of this case to sustain the verdict of the jury and deny the caveator's motion as of nonsuit.

6. Same—Mental Capacity—Statutes.

There being evidence upon the trial of the issue of *devisavit vel non* that the deceased had sufficient mental capacity to execute the paper-writings being propounded as her will, that she was aware of the nature, extent and value of the property, and those whom she wished to have it, etc., the issue was properly submitted to the jury. C. S., 4144.

7. Wills—Holograph Wills—Witnesses—Beneficiaries—Void Legacies—Statutes.

One who is a beneficiary under a holograph will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. C. S., 1792, 1793. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witnesses thereto. C. S., 4138.

8. Wills—Interpretation—Several Writings—Repugnancy—Implied Revocation.

Where there are several papers purporting to be a valid holograph will, reconcilable in their terms, the fact that none of them were dated or the time of their execution offered in evidence is not material, and the principle that a later will inconsistent with a former one repeals the latter to the extent of the repugnancy, has no application.

APPEAL by caveator from *Finley, J.*, and a jury, May-June Term, 1924, of HENDERSON.

On 22 July, 1922, Jenny Fleetwood Westfeldt had probated in Henderson County certain paper-writings as the last will and testament of the late Jenny Westfeldt. On 3 October, 1923, caveat was filed thereto; and at the May-June Term, 1924, of the Superior Court of said county, the issue of *devisavit vel non* was tried.

Jenny Fleetwood Westfeldt, the propounder, alleges that certain paper-writings propounded by her were the last will and testament of the said Jenny Westfeldt, deceased, and the caveator alleged that such paper-writings were not the last will and testament of the said decedent.

The said paper-writings are as follows:

PROPOUNDER'S EXHIBIT 1.

"If anything happens to me take care of Lulie and Jenny and let my portion of the Rugby Grange property go to them equal parts for each and if there be anything to build them a home with do so—I want to help Alice to get a home too.

(Signed) JENNY WESTFELDT.
RUGBY GRANGE.

"December 22d, 1914."

PROPOUNDER'S EXHIBIT 2.

"May 22; 15 and September 30, 1915.
"Frankfort, Ky.

"I leave to Lulie Westfeldt, daughter of Patrick Westfeldt, the half of my property and to Jenny Fleetwood Westfeldt the other half—to revert to Lulie Westfeldt in case of Jenny Westfeldt's decease, and should Lulie Westfeldt die without heirs the property to go to Overton Westfeldt Price's children—I leave to Christine Price $1,000, Christine Reynolds $1,000 and to Deaver Lance $300 and to my servants Josephine Clayton, Ella Prince $100 each, to Gertrude and Josephine Pinner $50 each.

"To C. R. Westfeldt whatever he may care for from the Grange, books, furniture, pictures, etc., to M. C. W. Price what she would care

for from the Grange. The silver to be divided between Jenny F. W.—Janey Westfeldt. I want all the heirs to have something of mother's from the Grange. The silver cream pitcher is Christine Reynolds' the water kettle is Lulie's, the tea pot is Ethel Jane's—the china is also to be Lulie's and Jenny's, Barbara's, Dorothy's and Janey's.

"(Signed) JENNY WESTFELDT."

"Mother's and (fathers)? picture is for Kitty Monroe and the Madonna is for Martha—the English Park is Jenny's and the big painting in the hall is to go to the Del Gardo. The books are for Bo first, Wallace, G. R. Jr., and Jenny. The piano is Sissy's and her crayon and the children's are Alice's—the furniture to be divided.

"(Signed) JENNY WESTFELDT."

"I am thinking of them all—Louise and Mary and Llew included and leave Dot and Sister there Dear Jenny F. carry out my wishes."

PROPOUNDER'S EXHIBIT 3.

"January 25th.

"I want $3,000 paid to Christine Reynolds and $3,000 to my sister Christine W. Price and if Hunt's gold mine is a success and takes good care of Jenny F. Westfeldt the rest of my property I leave to Lulie Westfeldt. If the gold mine proves not a success I leave my property as I wrote before. "(Signed) JENNY WESTFELDT."

The beneficiaries under the paper-writings propounded as the will of Jenny Westfeldt and her heirs at law and next of kin were all notified and citation issued in accordance with law. Guardians *ad litem* were duly appointed for all the infants.

The following issues were submitted to the jury:

"Is the paper-writing propounded by Jenny Fleetwood Westfeldt, and consisting of three separate sheets marked (Propounder's Exhibits 1, 2 and 3) and every part thereof, the last will and testament of Jenny Westfeldt, deceased? Answer: 'Yes.'"

The court below rendered judgment that the said paper-writing and every part thereof, as above set forth and offered for probate by propounder, as the last will and testament of Jenny Westfeldt, deceased, is the last will and testament of Jenny Westfeldt, deceased.

The caveator, Gustaf R. Westfeldt, made exceptions and assignments of error set forth in the record, and appealed to the Supreme Court.

Jones, Williams and Jones, Eubank & Whitmire, and Haywood Parker for propounder, appellee.

Albert L. Cox for caveator, appellant.

CLARKSON, J. The caveator, in his brief, says: "The trial judge erred in refusing the motion of the caveator, made at the close of the propounder's evidence and all of the evidence, to dismiss the action and proceedings and for judgment as of nonsuit against the propounder, and to this error of the judge this argument will be principally directed. The trial judge likewise erred in overruling motion of caveator to set aside the verdict, which error will be included in this argument."

"Exceptions in the record not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." Rules of Practice in the Supreme Court, 185 N. C., p. 798—part of rule.

The caveator introduced no evidence. The record fails to show that he prayed any special instructions. The charge of the court below is not in the record.

In *Indemnity Co. v. Tanning Co.*, 187 N. C., p. 196, it was said: "The presumption of law from the record is that the court below charged the law correctly bearing on the evidence as testified to by the witness at the trial."

So, the only thing for us to consider, on all the evidence of the propounder, is—should the proceeding be dismissed or judgment as of nonsuit rendered against the propounder and the verdict and judgment be set aside?

The propounder contends that, on the record, no judgment of nonsuit could have been properly entered or the case dismissed, that the proceeding is *in rem*.

In *Collins v. Collins*, 125 N. C., p. 104, *Faircloth, C. J.*, said: "This is a proceeding *in rem* and the statute confers jurisdiction on the clerk of the court. There are no parties, strictly speaking, certainly none who can withdraw or take a nonsuit, and thus put the matter where it was at the start, as in actions between individuals. A nonsuit in the latter case affects no one but the litigants; in the former, creditors, legatees and distributees are interested and they are stayed until the question of testacy or intestacy is determined. The court having *jurisdiction*, public policy and our statutes require that this preliminary question should be determined as soon as practicable, and require the court to do it, regardless of objecting persons. *Hutson v. Sawyer*, 104 N. C., 1." *In re Hinton's Will*, 180 N. C., p. 214.

The question of setting aside the verdict and granting a new trial is a matter within the sound discretion of the court below. 15 Enc. Digest of N. C. Rep., p. 112, and cases cited.

The contention of propounder is sustained by authorities in this jurisdiction, but we will consider the evidence in the record in the light most

favorable to caveator. On the whole record, should the verdict and judgment be disturbed—as contended by caveator? We think not.

The testimony of Jenny Fleetwood Westfeldt, the propounder, and other witnesses, to establish the validity of the paper-writings as the will of Jenny Westfeldt, is undisputed. Dr. H. M. Fletcher, a physician, testified: "I was born and reared in Fletcher and knew the late Miss Jenny Westfeldt all my life. I knew her very well as a neighbor and friend and knew her after I began practicing medicine as being her physician for a time. In my opinion, in 1914 and 1915, and up to and including the time that I last saw her, on 24 December, 1919, she had mind and intelligence sufficient to enable her to have a reasonable judgment of the kind and value of the property she proposed to will and to whom she was willing to will it. I would say that she had a strong mind and strong will. I was not related to her by blood or marriage."

The paper-writings found were not witnessed, but propounded as a holograph will. C. S., 4144, sec. 2, is as follows:

"In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of the witnesses, or some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping.

More than three witnesses—the jury found credible—testified that the paper-writings (propounder's Exhibits 1, 2 and 3) were in the handwriting of Jenny Westfeldt. They were familiar with her handwriting and had often seen her write. One witness, Jenny Fleetwood Westfeldt, under the paper-writings was a legatee and devisee. Her evidence was competent.

"At common law one who had a direct legal interest in the event of the suit was thereby disqualified as a witness on the side of his interest, but the Revisal, secs. 1628, 1629 (C. S., 1792, 1793), removes such disqualification, and now no person offered as a witness shall be excluded by reason of his interest in the event of the action. By Revisal, sec. 3120 (C. S., 4138), devisees and legatees may be attesting witnesses to wills, but their devisees and legatees, and any devises and legacies left to their husbands and wives or to any one claiming under such devisees or legatees, are void. But the section only applies to *attesting* witnesses, and devisees and legatees may be witnesses to prove holograph wills without losing their devises and legacies." Lockhart's Handbook on Evidence, sec. 39, *McEwan v. Brown,* 176 N. C., p. 252.

There was no evidence that these paper-writings were "lodged in the hands of some person for safe-keeping," so the question involved here is—were these paper-writings "found among the *valuable papers and effects* of the decedent."

Jenny Westfeldt was the owner of "Rugby Grange," a home in Henderson County, where she died on 8 June, 1921, at the age of 76 years. Ella Prince (colored) for about 25 years was employed as her maid. She testified that Jenny Westfeldt kept her valuable papers in a desk drawer in her bedroom. She had a waste basket that was beside her desk that she put old papers and letters and things in she did not want and had them thrown away. She remained a few days after the death of Jenny Westfeldt, her employer. She testified, in part: "Miss Jenny Fleetwood Westfeldt gave me instructions about packing Miss Westfeldt's property.

"A. I first taken all papers, books and letters from Miss Jenny Westfeldt's drawer and put them in the tray of the trunk, and then I got all her wearing clothes and packed what I could in the trunk and the other parts of her clothes I put somewhere else.

"Q. Did you or did you not remove all the contents of the desk? Answer: 'Yes, I removed all.'

"Q. Where did you put all the things that you took out of Miss Jenny Westfeldt's desk? Answer: 'Into Miss Jenny Westfeldt's trunk.'

"Q. Where did you put the papers from Miss Westfeldt's desk? Answer: 'Into Miss Westfeldt's trunk.'

"Q. Where was the trunk? Answer: 'In the upstairs hall.'

"Q. Did you know who had the key to the trunk? Answer: 'I gave it to Miss Jenny Fleetwood Westfeldt.'

"Q. Did you lock the trunk before you gave it to her? Answer: 'Yes.'

"Q. When you took Miss Westfeldt's things out of the desk, where did you put this book? Answer: 'I put it in the trunk.' "

When she put the papers in the trunk, she testified, there was a little bundle of papers in the trunk, one package of papers tied up with a string, and some clothing.

Jenny Fleetwood Westfeldt testified, in part: "I found those papers, introduced as propounder's Exhibits 1, 2 and 3, among my aunt's valuable papers in her trunk with which she had traveled about three weeks before she died, and in which all papers from her desk had been put. The papers were put from her desk into the trunk by her maid, Ella Prince. I gave Ella Prince directions about them. My aunt, Jenny Westfeldt, kept her valuable papers in her desk in her bed room at Rugby Grange. The desk was a flat-top desk with five drawers, two on each side and one in the middle. She kept in this desk her canceled

checks and receipted bills and business letters and statements of account from Westfeldt Brothers of New Orleans. . . . Lulie Westfeldt, my cousin, and Thomas Dugan Westfeldt and I went through her trunk to divide my aunt's wearing apparel. . . . After we got through dividing the things, I said, 'Let's wait, that we could look at those papers some other time. We could do that at any time, and we will put all of those papers back in the trunk'; and my cousin, Tom Westfeldt, said, 'Oh! no, it won't take long, let's do it now.' And we sat down around the trunk and went through the papers and were discarding papers and tearing papers up that were not any longer valuable, and my cousin Lulie found one of these papers, and I think Tom Westfeldt found the other two. I don't think I found any. I refer to 'propounder's Exhibits 1, 2 and 3.' That same night I found statements of account of Westfeldt Brothers and canceled checks. We found statements of account between my aunt and Westfeldt Brothers in my aunt's trunk at the same time we found the Exhibits 1, 2 and 3. . . . Yes, five bank stub books came from my aunt's trunk, likewise a contract for a telephone, likewise an account of Westfeldt Brothers and I think a farm account, and likewise a statement to the stockholders from the Trust Company of Norfolk, Va., dated 1 July, 1919, and likewise a box of paid checks. There also came from the trunk at this time a paper signed by the president of the Trust Company in Norfolk, dated 21 July, 1920."

Valuable papers and effects mean more than papers that have a pecuniary or money value. Papers that have a sentimental and personal value are sometimes more precious and valuable to men and women than stocks and bonds. Sometimes these letters and mementoes of the past are most tenderly kept, frequently in trunks, according to the particular person's condition, business and habits of preserving papers. In the trunk was found the diary of Jenny Westfeldt's mother from the year 1863, and a package labeled "My precious treasures." Lulie Westfeldt testified, in part: "Tom Westfeldt sat down on the floor and started untying the parcels. The papers were in packages tied up with elastics, and Jenny Fleetwood Westfeldt and I sat down and did the same thing, untied packages or papers and examined them and those packages or papers contained personal letters, receipts, canceled checks, business letters, and there was a diary. One of the packages was labeled in my aunt's handwriting. . . .

"Q. What was the label on the package? Answer: 'My precious treasures.' "

Among these papers in the trunk were found the paper-writings Exhibits 1, 2 and 3.

"Valuable papers consist of such as are regarded by a decedent as worthy of preservation, and therefore in his estimation, of some value; depending much upon the condition and business and habits of the decedent in respect to keeping his valuable papers." *Winstead v. Bowman,* 68 N. C., 170.

"What is meant by *valuable* papers? No better definition perhaps, can be given, than that they consist of such as are regarded by the testator as worthy of preservation, and, therefore, in his estimation, of some value. It is not confined to deeds for land or slaves, obligations for money, or certificates of stock. Any others which are kept and considered worthy of being taken care of by the particular person, must be regarded as embraced in that description. This requirement is only intended as an indication on the part of the writer, that it is his intention to preserve and perpetuate the paper in question as a disposition of his property; that he regards *it* as valuable." *Marr v. Marr,* 39 Tenn., 306.

The charge of the court not appearing in the record, it is to be presumed that the court below charged the law in accordance with the evidence. Under the evidence, the jury were warranted in finding that at the death of Jenny Westfeldt the paper-writings were among her valuable papers and effects in her desk, and after her death put in her trunk by her maid, Ella Prince. If paper-writings, Exhibits 1, 2 and 3, were not in the desk and put in the trunk, under the evidence, the jury were warranted in finding that the paper-writings found in her trunk were found among other valuable papers and effects of deceased.

Ashe, J., in *Brown v. Eaton,* 91 N. C., p. 30, said: "Where a person has two or more depositories of his valuable papers and effects, the *finding* in either will suffice. It is not necessary it should be found in that which contains the most valuable papers and effects. *Winstead v. Bowman,* 68 N. C., 170." *Hill v. Bell,* 61 N. C., p. 122; *Hughes v. Smith,* 64 N. C., 493; *Cornelius v. Brawley,* 109 N. C., 542; *In re Sheppard's Will,* 128 N. C., 54; *Harper v. Harper,* 148 N. C., 453.

It is contended by caveator that Jenny Westfeldt did not have "*animus testandi.*" This contention might well be resolved against the caveator, on the face of the paper-writings, but if not, the presumption by the record is that this aspect was submitted to the jury.

In the case of *In re Harrison,* 183 N. C., 459, *Stacy, J.,* says: "The *animus testandi* of Mrs. Harrison being doubtful, or, at least, ambiguous, as appears from the face of the instrument, we think his Honor was justified in submitting the question to the jury for determination. 'It is essential that it should appear from the character of the instrument and the circumstances under which it was made that the testator

intended it should operate as his will, or as a codicil to it.' *In re Bennett,* 180 N. C., 5." *In re Southerland, ante,* 325.

It was contended by caveator that the three paper-writings were not in harmony so that they may be upheld as one will—uncertain as to date, inconsistent and mutually destructive of each other, nothing on the face of the papers to prove which is the latest expression of the intent of the deceased. That they were "found in separate packages. There were more than a dozen packages in the tray of the trunk, consisting of old letters, canceled checks, etc., and among such papers was one referred to by Lulie Westfeldt as the fourth paper and which read as follows: 'Take care of Lulie, comfort Lulie if anything happens to me '17'; while on the other side was written four names: 'Pink, Jenny, George, Alice.' The paper was in an envelope."

A fresh will, with no clause expressly revoking the old will, may impliedly revoke it by dispositions so inconsistent with those in the old will that they could not have been intended to stand together.

The general principle is that "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together: for though it be a maxim, as Swinburne says above, that 'no man can die with two testaments,' yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper, whether in form a will or a codicil, be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent." Williams on Executors (Vol. 1) 7 Amer. Ed., p. 212.

"If, from the absence of date and of every other kind of evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are necessarily held to be void, and the heir as to the realty, and the next of kin as to the personalty, are let in; but this unsatisfactory expedient is never resorted to until all attempts to educe from the several papers a scheme of disposition consistent with both, have been tried in vain. And even where the times of the actual execution of the respective papers are known, so that if they are inconsistent, there can be no difficulty in determining which is to be preferred, the courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper; supposing, of course, that such latter paper contains no express clause of revocation, or other clear indication of a contrary intention." Jarman on Wills (Vol. 1) 6 Ed., p. 172. *Hyatt v. Hyatt,* 187 N. C., p. 113.

We said in *Kidder v. Bailey*, 187 N. C., p. 508: "Where the language is clear as to the intent of the testator and there is no latent ambiguity, there can be no extrinsic proof. In *McDaniel v. King*, 90 N. C., 602, *Merrimon, C. J.*, said: 'If a will is sufficiently distinct and plain in its meaning as to enable the court to say that a particular person is to take, and that a particular thing passes, that is sufficient, and it must be construed upon its face without resorting to extraneous methods of explanation to give it point. Any other rule would place it practically within the power of interested persons to *make* a testator's will, so as to meet the convenience and wishes of those who might claim to take under it.' *Williams v. Bailey*, 178 N. C., 632."

We cannot agree with the contentions of caveator. We think the paper-writings on the face (except one word we do not think material) are not inconsistent and mutually destructive of each other. All the papers can be reconciled and harmonized, showing a clear intent of testatrix. The setting surrounding the testatrix when the paper-writings were signed, the home conditions and family relationship, when shown, as was proper and done on the trial below, makes it clear as to the disposition of the property—the persons taking and the things taken. The exact dates are immaterial from the facts here. The paper-writing 4th is no will, but a loving request to care for one whom, the record shows, had lost her mother a few days after her birth and had been from her infancy a tender care of the testatrix. She was lame from early childhood. On account of this sorrow and affliction, no doubt, the heart of the old aunt who took a mother's place, went out especially to Lulie Westfeldt, as shown in this request and the special provision made for her in the paper-writings in controversy.

From a critical examination of the entire record, we can find,

No error.

MAX PLOTKIN v. THE MERCHANTS BANK & TRUST COMPANY ET AL.

(Filed 10 December, 1924.)

Parties—Equity—Statutes—Actions—Cloud on Title—Mortgages—Deeds and Conveyances—Warranty.

Where the owner of lands in possession thereof or entitled thereto brings his action claiming as such owner to remove as a cloud upon his title the lien of one claiming under his mortgage, and *pendente lite* has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest, C. S., 446, without claim of the right to the possession, under the provisions of the statute of 1893, C. S., 1743; and where issue has been joined, he may, if successful, recover his costs.

PLOTKIN *v.* BANK.

APPEAL by defendant from *Bryson, J.*, at May Term, 1924, of FORSYTH.

On 30 June, 1920, S. E. Case and wife, and E. S. Porter and wife, for a valuable consideration, by deed, with usual covenants and warranties, conveyed a lot of land in the city of Winston-Salem, N. C., to plaintiff; on the same day, the same grantors conveyed the same lot of land, by deed of trust, to J. E. Alexander, trustee, to secure the payment of $5,250 to the defendant; the deed to plaintiff was duly registered on 13 July, 1920, and the deed of trust was duly registered on 10 August, 1920.

On 16 May, 1921, plaintiff commenced this action, alleging that the deed of trust was a cloud upon his title to the said lot of land, and that by virtue of the same defendant claimed an interest or estate in the said lot of land adverse to him; defendant, in its answer, admitted the execution and registration of the deed and of the deed of trust, as alleged, but as a defense to plaintiff's cause of action, as set out in the complaint, alleged that at the time of the conveyance of the land to him, plaintiff had full knowledge of the execution of the deed of trust by their common grantors, and agreed to assume the payment of the indebtedness secured therein; defendant further alleged that by virtue of the said deed of trust, it owned an interest or estate in the land superior to the interest or estate of plaintiff. Plaintiff, in his reply, denied that he had assumed the payment of the indebtedness secured in the deed of trust or that he knew of the execution of the same.

The action came on for trial at May Term, 1924, of the Superior Court of Forsyth County. Upon his cross-examination by defendant, plaintiff testified that on 8 June, 1923, he had conveyed the lot of land to O. F. Brown and J. C. Gatewood, by deed, with full covenants and warranties. This deed was duly registered on 9 June, 1923. At close of plaintiff's evidence, defendant moved for judgment dismissing the action or for nonsuit. This motion was denied, and defendant excepted.

No evidence was offered by defendant. The court instructed the jury that if they believed the evidence, they should answer the issues as contended by plaintiff. Defendant excepted to this instruction. The jury answered the issues submitted as follows:

"1. Did plaintiff assume the payment of the deed of trust executed to the Merchants Bank & Trust Company? Answer: 'No.'

"2. Did plaintiff purchase the property for a valuable consideration and without notice of any incumbrance? Answer: 'Yes.'

"3. Did the deed of trust executed by S. E. Case and E. S. Porter *et al.* to the Merchants Bank & Trust Company for $5,250 constitute a cloud upon the title of the plaintiff? Answer: 'Yes.'"

Upon the verdict, it was adjudged and decreed that the lot conveyed to plaintiff by Case and Porter is "free and clear from the effect of the said deed of trust, that the same is no lien upon the said property, and that the cloud upon the title of the plaintiff, so far as the same affects the title of the plaintiff is declared to be removed and of no effect." It was further adjudged that plaintiff recover of the defendant the costs of the action to be taxed by the clerk of the court. Defendant excepted to this judgment.

Holton & Holton for plaintiff.
J. E. Alexander and L. M. Butler for defendant.

CONNOR, J. Defendant's assignments of error are based upon its contention that plaintiff, having conveyed the lot of land *pendente lite*, at the date of the trial, had no title to or estate in the same; that he had no interest therein to which defendant's claim under the deed of trust was adverse; and that therefore plaintiff could no longer maintain or prosecute an action to have the deed of trust declared a cloud upon his title or to have defendant's claim to the land decreed to be adverse to him. Each of defendant's exceptions is founded upon the proposition involved in this contention.

Plaintiff contends that at the commencement of the action he was seized in fee and in possession of the land; that defendant's claim thereto was adverse to him and a cloud upon his title; and that notwithstanding his conveyance of the land *pendente lite*, it was within the discretion of the court to permit him to continue the prosecution of the action in his own name or to cause his grantee to be substituted as plaintiff in his stead.

Plaintiff further contends that although he had conveyed the land and no longer had any estate therein or title thereto, he had at the date of the trial by reason of the warranty in his deed to the grantee, such an interest in the title to the land as that he could maintain an action under C. S., 1743 to have the validity of the claim of the defendant under the deed of trust determined.

This action did not abate upon the conveyance by plaintiff of the land owned by him at the date of its commencement. The cause of action survived. It was within the discretion of the court to determine whether the action should be continued in the name of the plaintiff or whether his grantee should be substituted as plaintiff; C. S., 461. This is the law unless the plaintiff no longer was a real party in interest as provided in C. S., 446.

Plaintiff having warranted the title to the land conveyed by him against the claims of all persons whomsoever, had an interest in the

action which was originally instituted and finally prosecuted to determine whether or not defendant's claim to the land, asserted in its answer, was valid. The possession of the land is not involved in this action. Its subject-matter is the title and in this plaintiff had an interest, not only at the commencement of the action, but also at its trial. Defendant relies upon *Burnett v. Lyman,* 141 N. C., 500, to sustain his contention that the action could not be prosecuted by the plaintiff after his conveyance of the land. The plaintiff in that action sought to recover of defendant the possession of the land and at the trial upon its appearing that plaintiff had, *pendente lite,* conveyed the land and was no longer entitled to possession of the same, this Court held that it was error to disallow defendant's motion for nonsuit. *Clark, C. J.,* quotes with approval the language of *Burwell, J.,* in *Arrington v. Arrington,* 114 N. C., 120, as follows: "In an action to recover land the rule is that the plaintiff must have the right to the possession not only at the institution of the suit, but at the time of the trial also."

In that action plaintiff was asking judgment that he was the owner and entitled to the possession of the land. Having conveyed the same after the commencement of the action and prior to the trial, he was no longer the owner or entitled to possession and therefore was not the real party in interest. He, therefore, could not maintain an action to have himself adjudged the owner and entitled to the possession of the land. In this action plaintiff seeks no affirmative relief. He is not demanding possession of the land nor are his rights put in issue. He demands judgment that the defendant has no right, title or interest in the land adverse or superior to him. The subject-matter of the action is the title to the land and in this, plaintiff had an interest both at the commencement and at the trial of the action; at the commencement of the action because he was seized in fee and in possession of the same, claiming an unencumbered title thereto; at the trial because he had warranted the title to his grantee and was liable on his warranty for a defect in the title. He was a real party in interest and as such, could continue to prosecute the action in his own name as plaintiff, the purpose of the action being to determine the validity of defendant's claim to an interest or estate in the land.

Defenses both to the jurisdiction of the court and to the merits of plaintiff's cause of action which would have been available to defendant if this had been a suit in equity to remove cloud upon title, are no longer applicable. This is an action authorized by a statute enacted by the General Assembly at its session in 1893, which with amendments, appears as section 1743 of the Consolidated Statutes of North Carolina. This section as applicable to the instant case is as follows: "An action

may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim. If the defendant in such action disclaim in his answer any interest or estate in the property or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs." This Court has said in *Campbell v. Cronly*, 150 N. C., 459: "It is well settled that prior to the statute of 1893, the jurisdiction of courts of equity to entertain bills to remove cloud from title or to quiet title was restricted within well defined limits. The Legislature in the session of 1893 enacted a statute for the purpose of enlarging the power of the courts to entertain suits to quiet titles where the conditions were such that a possessory action could not be brought."

In *Rumbo v. Mfg. Co.*, 129 N. C., 10, *Clark, C. J.*, says: "It was because the General Assembly thought the equitable doctrines (as laid down in *Busbee v. Macy*, 85 N. C., 329, and *Busbee v. Lewis, ibid.*, 332, and like cases) inconvenient or unjust that the act of 1893 was passed."

Walker, J., in *Christian v. Hilliard*, 167 N. C., 4, speaking of this statute, says: "The beneficial purpose of this statute is to free the land of the cloud resting upon it and make its title clear and indisputable so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion."

The contention that a plaintiff in an action brought under this statute must allege and prove that at the commencement of the action and at its trial he had an estate in or title to the land, cannot be sustained. It is only required by the statute that he have such an interest in the land as that the claim of the defendant is adverse to him. The language of the statute is broad and liberal, showing the purpose of the General Assembly to permit any person to bring an action against another who claims an interest or estate in real property adverse to him. The defendant is fully protected by the provision in the statute that if he disclaim in his answer any interest or estate in the property or if he suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. If the defendant claims no interest or estate in real property as alleged by the plaintiff, or if he does claim such interest and his claim is well founded, no costs can be adjudged against him.

In this action the defendant filed an answer asserting an estate or interest in the land adverse to the plaintiff. Upon the trial plaintiff offered evidence amply sufficient to establish the truth of his allegations. The defendant at no time renounced or disclaimed an interest or estate in the land. The claim of defendant was adverse to plaintiff, who was, therefore, entitled to the benefits of C. S., 1743, a highly remedial

statute; *Satterwhite v. Gallagher,* 173 N. C., 525; *Nobles v. Nobles,* 177 N. C., 243; *Clemmons v. Jackson,* 183 N. C., 382.

There was no error in refusing defendant's motion to dismiss the action or to nonsuit the plaintiff, or in giving the instructions to the jury as set out in the case on appeal.

No error.

J. MARVIN HUNT v. N. L. EURE ET AL.

(Filed 10 December, 1924.)

1. Bills and Notes—Negotiable Instruments—Statutes.

In order to come within the intent and meaning of our negotiable instrument law, a note, must be payable to the order of a specified person or to bearer. C. S., 2982.

2. Statutes—Interpretation—Intent.

The preliminary and vital object to be obtained in the interpretation of the language of a statute is the intention of the Legislature, with further consideration of the existing law, the evils intended to be avoided, and the remedy to be applied.

3. Same—Bills and Notes—Negotiable Instruments—Nonnegotiable Instruments—Value—Evidence—Prima Facie Case—Burden of Proof.

The principle that when a note sued on reciting a valuable consideration, has been shown to have been executed and delivered, makes a prima facie case in plaintiff's favor that he has paid value (C. S., 3004), requiring the defendant to disprove it by the preponderance of the evidence, applies only to negotiable instruments under the provisions of our statutes, and not to those which are nonnegotiable: and an instruction that places this burden on the defendant in the latter instance, is reversible error.

APPEAL by defendants from *Bryson, J.,* at August Term, 1924, of GUILFORD.

Plaintiff brought suit on the following note:

"$2,000. GREENSBORO, N. C., 20 July, 1920.

"Sixty days from date we and each of us jointly and severally promise to pay to J. Marvin Hunt the full sum of two thousand dollars, for value received of him, with interest thereon at the rate of six per cent per annum, payable at maturity and thereafter semiannually until paid.

"N. L. EURE,
JOHN J. SHERRIN,
J. H. WHEELER."

The defendants Eure and Wheeler filed an answer admitting the execution of the note and defending on the ground that it was an accommodation paper. The following instructions were given the jury:

1. Upon the proof of the execution of the note by defendants, the placing of it in evidence, showing of demand for payment, and that it has not been paid in whole or in part, the plaintiff makes out a prima facie case in his favor and shifts the burden of the proof, not the burden of the issue, for it remains with the plaintiff at all times, but shifts the burden of the proof to the defendants. Sometimes, gentlemen, question arises as to what is meant by the words prima facie. Prima facie means simply this: that which suffices for the proof of a particular fact until contradicted or overcome by evidence. To the end that there may be no question in your minds as to the rule of law stated to you, I again instruct you that the burden of this issue is upon the plaintiff to satisfy you by the greater weight of the testimony, the preponderance of the testimony of his right to recover as against the defendants or either of them, and again, at the peril of repetition, to the end that you may be thoroughly enlightened and advised, I repeat what I have just stated to you in the following language:

2. Upon proof of the execution of the note by the defendants, the placing of it in evidence, the showing of demand for payment, and that it has not been paid in whole or in part, the plaintiff makes out a prima facie case in his favor and shifts from his shoulders to those of the defendants, not the burden of the issue, but the burden of the proof.

3. If the plaintiff thus makes out a prima facie case and the burden of proof shifts to the defendants, then the defendants in order to defeat such a recovery must show by the greater weight of the testimony that the note was signed without valuable consideration, was given as an accommodation to the plaintiff, and if such facts are shown by the greater weight of the testimony the plaintiff would not be entitled to a recovery.

The issue—"Are the defendants or either of them indebted to the plaintiff and if so in what amount?"—was answered in favor of the plaintiff. Judgment. Appeal by defendants.

Wilson & Frazier and King, Sapp & King for plaintiff.
Bynum, Hobgood & Alderman for defendants.

ADAMS, J. In *Campbell v. McCormac,* 90 N. C., 491, it is said: "At the common law, promissory notes were not negotiable, but were made so by the statute of 3 and 4 Anne, ch. 9, which was reënacted in this State by the act of 1762, and that act was amended by the act of 1786, which

declared them to be negotiable, whether expressed to be payable to order or for value received. Rev. Stat., ch. 13, secs. 1, 2; Rev. Code, ch. 13, sec. 1; The Code, sec. 41. All such notes thus made negotiable import prima facie that they are founded upon a valuable consideration; and while such consideration is essential to their support, yet it is not necessary, in an action upon them for the plaintiff to aver and prove such consideration; yet when evidence has been introduced by the defendant to rebut the presumption which they raise, the burden is thrown upon the plaintiff to satisfy the jury by a preponderance of evidence that there was a consideration."

This case was decided in 1884; but the negotiable instruments law, ratified 8 March, 1899, made material changes in the law as theretofore declared in reference to bills and notes. Code, ch. 6; C. S., ch. 58. It is now provided that in negotiable paper the absence or failure of consideration is a matter of defense as against any person not a holder in due course and that partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise. C. S., 3008. In *Piner v. Brittain,* 165 N. C., 401, this statute was construed as imposing on the defendant the burden of showing by the greater weight of the evidence that the contract was not supported by a valuable consideration and as modifying in this respect the rule previously obtaining as expressed in *Campbell v. McCormac, supra.*

But this statute applies only to negotiable instruments. Under the existing law an instrument to be negotiable must conform to several requirements, one of which is that it must be payable to the order of a specified person, or to the bearer. C. S., 2982. Tested by this requirement the note under consideration is not negotiable; it is not payable to the bearer or to the order of the payee. *Johnson v. Lassiter,* 155 N. C., 47; *Newland v. Moore,* 173 N. C., 728. For the same reason the note sued on in *Jones v. Winstead,* 186 N. C., 536, was not negotiable; but the questions there presented for decision were treated by the parties as if the note were negotiable, the issues being whether the intestate executed the note for value and, if so, whether he had sufficient mental capacity to make the contract. There was no exception to the instruction relating to the burden of proof on the first issue and the rule pertinent to such cases was not discussed.

As the note sued on in the case before us is not negotiable we must determine whether the rule laid down in *Piner v. Brittain, supra,* applies to a nonnegotiable instrument, and if it does not whether there is error in the instruction to which the defendants except.

In the interpretation of statutes the primary object is to give effect to the intent of the lawmaker. Such intent, it has been said, is the

vital part, the essence of the law. The intention of the Legislature in enacting a law is the law itself, and it must be determined upon a consideration of the language used, the existing law, the evils intended to be avoided, and the remedy to be applied. Lewis' Sutherland on Stat. Con. (2 ed.) sec. 363 *et seq.; S. v. Johnson,* 170 N. C., 685; *Alexander v. Johnston,* 171 N. C., 468.

We have considered the questions just referred to in the light of this principle and since section 3008 of the Consolidated Statutes relates only to negotiable instruments, we apprehend that *Piner's case* is not decisive of the exceptions, and that the instruction complained of must be examined under the law applicable to instruments that are not negotiable. This is so because the law merchant prevails unless modified by statute, as for instance by the negotiable instruments law.

Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration (C. S., 3004), but the authorities are in conflict as to whether a nonnegotiable bill or note which does not recite "value received" is deemed prima facie to have been given for a consideration. Norton on Bills and Notes, 102, sec. 39; 4 A. & E. Ency. Law, 2 Ed., 187; 8 C. J., 993, sec. 1297 *et seq.* This Court, however, has held that as to an unnegotiable instrument a consideration is not presumed and must be both averred and proved. *Stronach v. Bledsoe,* 85 N. C., 473, 476; *Carrington v. Allen,* 87 N. C., 354. In such case the burden of proving a consideration is upon the plaintiff. If the note, though unnegotiable as in the present case, recites value, the plaintiff makes out a prima facie case by showing the execution and delivery of the note. If the defendant then offers evidence tending to establish a failure of consideration, the burden remains with the plaintiff to satisfy the jury by the preponderance of all the evidence that the contract is supported by a valuable consideration. The defendant when sued on a nonnegotiable paper is not required under our decisions to rebut the prima facie proof of value by the greater weight of the evidence. *White v. Hines,* 182 N. C., 275.

The principle is practically the same as that applied to negotiable instruments in *Campbell v. McCormac, supra,* before the negotiable instruments law went into effect. Whether the provisions of sec. 3008 of the Consolidated Statutes should be extended to nonnegotiable bills and notes so as to make the rule uniform is a matter which is addressed to the exercise of the legislative discretion.

In *Stronach v. Bledsoe, supra,* and *Carrington v. Allen, supra,* the burden of proof was borne by the respective defendants because in one case the defense was a counterclaim and in the other money alleged to have been won in breach of the statute avoiding gaming and betting

contracts. Code sec. 2841; C. S., 2142; Norton on Bills and Notes, 379, sec. 115. The principle applies also in cases in which payment is relied on as a defense. *Banking Co. v. Walker,* 121 N. C., 115.

His Honor imposed upon the defendant the burden which by virtue of the statute applies only to negotiable instruments and for this reason the defendants are entitled to a

New trial.

STATE v. ALEX RODMAN.

(Filed 10 December, 1924.)

1. Courts—Discretion of Court—Abuse of Discretion—Homicide—Trials—Appeal and Error.

The mere fact that the prisoner, indicted for a capital felony, was forced into the trial at a term being held at the time the offense was alleged to have been committed, does not of itself show, on appeal, that he has thereby been injured by an abuse of the discretion of the trial judge vested in him by law; nor will a new trial be granted on the ground that he had been unable to consult attorneys assigned to him, or prepare his defense, or to ascertain the truth of evidence he had recently discovered, when the circumstances of the case tend to disprove these objections, and when moving for a continuance to a subsequent term, he was vague and indefinite in these respects.

2. Homicides—Evidence—Declarations.

Upon the trial for a homicide, evidence of the declarations of the prisoner tending to incriminate him, made separately to several officers of the law entirely voluntary, and not induced by representations of hope or fear, is competent and admissible.

3. Same—Murder—Manslaughter—Instructions.

Upon a trial for a homicide evidence tending alone to show that the prisoner suddenly killed an officer of the law to escape arrest, with a pistol with which he had previously provided himself while engaged in violation of the prohibition law, and who was temporarily alone with and guarding the prisoner at the time, is, under the circumstances of this case, *held* sufficient for an instruction to convict the prisoner of murder either in the first or second degree, or acquit him; and an exception that the court should have further charged upon the offense of manslaughter, is untenable.

APPEAL by defendant from *Stack, J.,* at February Term, 1924, of MECKLENBURG.

Indictment for murder. Verdict, guilty of murder in the first degree. From judgment upon the verdict as required by law, defendant appealed. Exceptions and assignments of error appear in the opinion below.

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

J. L. Delaney and Frank B. Helms for defendant.

CONNOR, J. Defendant's first exception is to the refusal of the court to grant his motion for a continuance of the trial. Conceding that this motion was addressed to the discretion of the court, defendant contends that the refusal to grant the motion was a gross abuse of the discretion vested in the court and was therefore error reviewable upon appeal to this Court.

The facts pertinent to the consideration of this exception are as follows: The homicide occurred on Saturday night, 16 February, 1924, in Sharon Township, Mecklenburg County. Defendant was arrested, charged with murder, on Saturday night, 23 February, 1924, and was in custody continuously from the date of his arrest to the date of the trial, 29 February, 1924; during this time he was confined in jails in counties adjoining Mecklenburg; the indictment was returned by the grand jury of Mecklenburg County on 26 February, 1924; defendant was immediately arraigned upon said indictment, and, being without counsel, the court assigned two members of the bar, residents of Mecklenburg County, as his counsel; upon the arraignment, defendant plead not guilty; the case was called for trial on 29 February, 1924, when defendant moved for a continuance. The grounds upon which defendant urged the continuance were: First, that he had been unable to consult with his counsel assigned by the court on 26 February, 1924; second, that he had not had sufficient time between his arrest and the date of the trial to prepare his defense; third, that he desired opportunity to ascertain whether certain evidence recently discovered was true.

The evidence for the State tended to show that at the time of the homicide no one was with or near deceased except the man who shot him; that deceased, an officer, had in his custody a man who had been arrested upon a charge of violating the prohibition laws of the State; that the officer and the man under arrest were strangers to each other; that the homicide occurred during the night-time, some 40 or 50 yards from the home of Sam Cunningham. The State contended that the defendant is the man who was in the custody of the officer immediately before he was shot and killed, and that the defendant fired the pistol which inflicted the fatal wound.

No evidence was offered to the court upon the hearing of this motion that defendant desired the attendance of any witness or witnesses upon whose testimony he relied to support his defense. Defendant did not indicate to the court the character or nature of his defense, in order that the court might determine whether or not he had had sufficient time to

prepare for his trial or whether or not he had in fact consulted with his counsel and advised them of the defense which he desired to make. Defendant offered no evidence from which the court could determine whether or not the evidence which he desired to investigate in order to determine its truth, was material to the defense which the defendant proposed to offer at the trial.

There was no abuse of the discretion vested in the court in refusing the motion for continuance. The first exception is not well taken and this assignment of error is not sustained.

As said by the late *Chief Justice Clark,* in *S. v. Sultan,* 142 N. C., 569, "There is no rule of law or practice that when a bill of indictment is found at one term the trial cannot be had until the next. Whether the case should be tried at that term, which is often done and in many cases required by the public interest and the orderly and economical administration of justice, or whether the case shall go over to the next term, depends upon the nature of the case, of the charge and the evidence, the facility of procuring witnesses and the legal preparation necessary." While the trial of this action involved the gravest consequences to the defendant—his life or death being at issue—the facts in controversy were few and simple and the principles of law applicable elementary and well settled. The circumstances surrounding the homicide were such that the attendance of a large number of witnesses could not be necessary or helpful to defendant. There is nothing in this record to indicate that the defendant was prejudiced by the refusal of the motion to continue the trial to a subsequent term.

The State offered as evidence the testimony of Howard Wilson, a rural policeman of Mecklenburg County. He testified that on the night of 16 February, 1924, accompanied by other officers, in consequence of information received by him, he went to the home of Sam Cunningham in Sharon Township, Mecklenburg County; that the officers found there a large number of persons, 75 or 100, dancing, playing cards and drinking; that he first saw defendant in the house and a few minutes thereafter saw him again, in the field adjoining the house, 40 or 50 yards away; that upon discovering that defendant had a bottle of whiskey upon his person he turned his flashlight upon him and arrested him. John Fesperman, one of the officers present, came to him and he placed the defendant in Fesperman's custody; that he told the defendant that Fesperman, whose badge was pinned on the outside of his coat, was an officer. Witness then left Fesperman and the defendant standing in the field and went in the direction of Sam Cunningham's house. On the way witness arrested a boy who was drunk. When within about 15 yards of the house witness looked back and saw Fesperman and defendant standing where he had left them. He could hear them talking but their

voices were so low that he did not understand what they were saying. Just as he got into the house with the boy whom he had arrested, he heard a pistol shot. He called to Fesperman and receiving no response, ran at once to where he had left him with defendant. As he approached this place he heard some one running through the field and when he arrived there found Fesperman lying upon the ground, on his face, dead, with a bullet wound in his left temple. Fesperman's skull was fractured and his head was blue on the left side. The bullet went in at an angle. There were powder burns on his face all around where the bullet entered into his head. Fesperman's pistol and scabbard were on his right side under his coat. Defendant was not there. Not a minute had elapsed between the time witness heard the pistol fire and the time he got to Fesperman. When witness arrested defendant he turned his flashlight upon him and searched him for weapons. He found no weapon on his person. Witness testified: "I am just as certain as I am that I am here, that defendant is the man I arrested and turned over to John Fesperman. I know, because he has the same lips, the same face—the same looking negro. I am just as certain he is the same man as I can be."

W. B. Orr, chief of police of the city of Charlotte, testified that he arrested the defendant on Saturday night, 23 February, 1924; that on the same night at the city hall, defendant made a statement to him. Defendant objected in apt time to the testimony of this witness as to any statement made to him by defendant, on the ground that same was not voluntary. Objection overruled and defendant excepted.

M. R. Alexander, sheriff of Iredell County, testified that after his arrest, defendant was put in his custody and taken by him to the jail in Iredell County; that while in said jail, defendant made a statement to him. Defendant objected in apt time to the testimony of this witness as to any statement made to him by the defendants on the ground that same was not voluntary. Objection overruled and defendant excepted.

Clifford Fowler, sheriff of Union County, testified that after his arrest and while awaiting trial, defendant was a prisoner in the jail of Union County. That while there defendant made a statement to him. Defendant objected in apt time to the testimony of this witness as to any statement made to him by the defendant on the ground that same was not voluntary. Objection overruled and defendant excepted.

Each of the witnesses whose testimony, as to statements made to him by the defendant, was admitted by the court testified that he made no threats and offered no inducements to defendant to make a statement and that the statement made to the witness by defendant was voluntary on his part. There is no evidence that any threat was made or inducement offered to defendant to make any of the statements offered by the

State as confessions of the defendant. The court found that each statement was voluntary and therefore competent as evidence on the part of the State and against the defendant. The fact that defendant was under arrest and in custody at the time he is alleged to have made the statements to these witnesses, does not render them incompetent as evidence.

This Court has held consistently and uniformly that statements made by defendant, although in custody or in jail, are competent if made voluntarily and without any inducement of hope or fear. In *S. v. Christy,* 170 N. C., 772, *Clark, C. J.,* says: "It is also well settled that whether a statement is voluntary is a preliminary question of fact and that the finding of the judge cannot be reviewed if there is any evidence to sustain it; *S. v. Page,* 127 N. C., 512. A confession is deemed to be voluntary unless the party against whom it is offered shows facts to the contrary; *S. v. Sanders,* 84 N. C., 728." There was no evidence that either of the statements made by defendant, testified to by witnesses for the State, was involuntary or induced by hope or fear. The exceptions of the defendant are not sustained.

The statements made by the defendant at different times and in different places to the several witnesses offered by the State are substantially the same. The defendant said that after Officer Wilson left him in the field some distance from Cunningham's house, in the custody of Fesperman, he shot Fesperman who was holding him. Defendant had his pistol stuck down in his pants and pulled it out; as he did so Fesperman grabbed him and after striking him several times on the head, he shot him. Fesperman crumpled and fell to the ground and defendant ran across the field, later going to the home of his uncle, Guy Hope. Defendant further stated that he was at Sam Cunningham's house on that night and when he discovered that the officers were in the house, he went out and hid his pistol under the steps. He later got his pistol and was out in the field when Officer Wilson arrested him. After Wilson left him in the custody of Officer Fesperman he decided to get away from him and that was his reason for shooting the officer.

There was evidence also that after defendant made his statement to Chief of Police Orr, he was taken to the home of his uncle, Guy Hope. Hope was asked by one of the officers to produce defendant's pistol. He hesitated and thereupon defendant told his uncle to give the pistol to the officer, for he had already confessed all about it. Thereupon Guy Hope, in the presence of defendant, stated that on the night of 16 February, 1924, defendant came to his home and told him that he had killed a police officer.

In the charge to the jury the court instructed them as follows: "Hence, gentlemen of the jury, if the State has satisfied you beyond

a reasonable doubt that Alex Rodman killed John Fesperman with a pistol or other deadly weapon, but has failed to satisfy you that he did so with premeditation and deliberation as I have heretofore defined these terms, then your verdict would be guilty of murder in the second degree and if the State has failed to satisfy you fully that Alex Rodman fired the fatal shot which resulted in the death of John Fesperman, then it would be your duty to render a verdict of not guilty. The court instructs you that there is no evidence of the crime of manslaughter in this case—so your verdict will be one of three, guilty of murder in the first degree, guilty of murder in the second degree, or not guilty."

To this instruction defendant excepted. Defendant contends that there was evidence from which the jury could have found facts in support of a verdict of guilty of manslaughter. We have examined all of the evidence set out in the case on appeal and are unable to discover any evidence to sustain this exception. It is true that there is some evidence that one of the officers slapped the defendant while he was in the house of Sam Cunningham. There is no evidence as to which of the officers did this nor is there any evidence of any conduct on the part of Fesperman while defendant was in his custody, or before, which mitigated or tended to mitigate the act of defendant in shooting Fesperman with a pistol.

The charge of the court in this case was unusually clear, full and accurate, showing on the part of his Honor a keen appreciation of the responsibility resting upon him as the presiding judge at this trial. None of the exceptions can be sustained. The defendant has had a fair and impartial trial. The verdict of the jury is amply sustained by the evidence and is fully supported by the law applicable to the facts which the evidence tends to establish. The judgment must be affirmed. There is

No error.

CALDWELL POWER COMPANY v. CHARLES RUSSELL ET AL.

(Filed 10 December, 1924.)

Condemnation—Measure of Damages—Electricity—Transmission Lines—Instructions—Appeal and Error—Harmless Error.

While the compensation for permanent damages to the owner for his lands, taken in condemnation for a designated location by an electrical power company for a single line of poles or towers thereon for the stringing of its wires, carrying its transmission current, is the fair market value of lands so taken, diminished by such restricted use, etc., a different rule may prevail, as in case of railroads, where a strip one hundred feet wide has been condemned across the owner's lands, that the power com-

pany may use in part or *in toto*, as it may deem necessary, wherein the rule applies in the admeasurement of such damages that a recovery may be had for the impaired value of the lands, including the market value actually covered by the right of way, with damages to the remainder of the tract or portion of the land if any used by the owner as one tract, deducting from the estimate pecuniary benefits or advantages which are special or peculiar to the tract, not common to the owners of other lands in the locality; and under the circumstances of this case an instruction that charged both of these principles was not held for reversible error, to the prejudice of the power company.

PROCEEDINGS to condemn land, giving plaintiff a right of way for its power lines over lands of defendant.

The proceedings were instituted before the clerk, on 16 June, 1922, commissioners appointed, land and route designated, and damages assessed, and judgment for amount, in September, 1922, by the clerk. Defendants, having duly excepted, appealed to Superior Court of CALDWELL, where same was heard on an issue as to amount of damages, at May Term, 1924, before *Long, J.*, and a jury. The jury awarded damages to the amount of $150.00. Judgment for same, and plaintiff, having duly excepted, appealed to this Court, assigning errors in the charge on the issue as to damages.

Squires & Whisnant for plaintiff.
Lawrence Wakefield and E. B. Cline for defendants.

HOKE, C. J. There is no exception made in the record as to plaintiff's right to condemn the land for the purposes indicated, nor as to the regularity of the proceedings looking to that result, nor to the condemnation itself, the single question being as to the amount allowed defendants, and the rule given by which the same has been estimated.

On that issue the court charged the jury, in part, as follows: "The measure of permanent damages against this defendant for appropriating a right of way over plaintiff's lands for the construction of an electrical overhead system is the difference between the fair market value of the land before the right of way was taken and its impaired value, directly, materially and proximately resulting to plaintiff's land by the placing of the power line across the premises in the manner and to the extent and in respect to the uses for which the easement was acquired."

The court, among others, further instructed the jury as follows: "As I may be able to do so, I will try and give you the rule for the measure of damages in a case of this kind. One of these rules I find to have been made by *Judge Hoke*, in *R. R. v. Armfield*, 167 N. C., p. 464 *et seq.*, which is as follows: In awarding compensation to the owner of land for an easement acquired, recovery may be had for the impaired

value, including as a rule the market value of the land actually covered by the right of way, with damages to the remainder of the tract or a portion of the land, if any, used by the owner as one tract, deducting from the estimate the pecuniary benefits or advantages, if any, which are special or peculiar to the tract in question, but not the benefits or advantages, if any, which are shared by the owner in common with other owners in the same vicinity. That is one rule with regard to the estimate of damages which the court allows you to consider in connection with your estimate."

And defendant excepts, contending that this second instruction contains an erroneous modification of the first.

The first instruction above noted is in accord with that prescribed for assessment of damages in condemnation of a power line, laid down by the same learned judge in *Lambeth v. Power Co.*, and approved by this Court on appeal, decision reported in 152 N. C., p. 371, and is a fair and correct rule where the condemnation is of a single line with designated poles and towers. The second is the rule ordinarily applicable to assessment of damages in condemnation of a railroad right of way. Owing to the fact that in such a condemnation so large a part of the right of way is actually occupied permanently for railroad uses, and all of it liable to be taken at any time without further compensation, the Court has considered it a just rule to allow as part of the assessment the value of the land covered by the right of way, a rule that might in ordinary instances amount to prejudicial error in awarding damages for a single power line, properly defined and restricted. The Court is of opinion, however, that the modification should not be held for reversible error in the present case, owing to the very broad privileges sought in the present proceedings, which are set forth in the petition as follows:

"The description of the easement, or right of way, over the lands of defendants, necessary to be condemned is as follows: A strip of land not exceeding 100 feet in width, being 50 feet on either side of the center of petitioner's pole line through defendant's premises as surveyed and staked by C. C. Babb, civil engineer, being a line running south 27 degrees 10 minutes east 680 feet from a stake at the boundary line between defendants and C. J. Annas to the boundary line between defendants and A. P. Annas, such strip of land to be used for the purpose of constructing an electric power transmission line to be erected on steel poles and towers, together with the right to plant poles, erect towers, make repairs of and on its poles, towers and transmission lines from time to time, preserve its poles, towers, works and other property, and, also, to use said strip of land for such other purposes as may not be inconsistent with law and as may be necessary for the

enjoyment and maintenance of its rights and property and to enable it to faithfully discharge its public duty."

This Court has held in *Power Co. v. Wissler,* 160 N. C., pp. 269, 274, that the extent of an easement of this character is left very largely to the discretion of the Public Service Corporation, with the limitation that there be no fraud or manifest abuse of same. And, as stated, the right here having been sought and acquired, giving the privilege of appropriating the entire right of way, and permitting an interpretation authorizing as many lines as the company sees proper to construct, fully justifies the modification of the general rule stated by his Honor that the jury in the instant case could, if it saw proper, allow for the value of the land covered by the right of way.

In *Power Co. v. Wissler, supra,* speaking to the principle that the extent of the easement sought is left so largely to the discretion of the applicant, the Court said: "The extended discretion accorded to public service corporations by this interpretation of the statute does not, in our opinion, afford just ground for apprehension that the rights obtainable will be greatly abused, for it must be remembered, as suggested in some of the cases, that the ordinary uses of that portion of the right of way not actually required for the needs of the company remain with the owner, and the amount of compensation to be made, dependent as it is largely on the width of the right of way and the extent of the easement, will act in wholesome restraint of any disposition to seek more than is actually required. A contrary position, too, would be to seriously embarrass, and at times threaten, the success of enterprises giving promise of great benefit to the communities affected."

There is no reversible error presented in the record, and the judgment below is therefore affirmed.

No error.

LILLIE WILLIAMS v. ARTHUR WILLIAMS, ADMINISTRATOR OF J. A. WILLIAMS, JR.

(Filed 10 December, 1924.)

1. Courts—Jurisdiction—Constitutional Law—Statutes.

The General Assembly has constitutional authority to distribute among the other courts prescribed in the Constitution, that portion of judicial power and jurisdiction which does not pertain to the Supreme Court. Const., Art. IV, sec. 12.

2. Same—Justices of the Peace—Superior Courts.

By C. S., 1436, exclusive original jurisdiction is conferred on courts of a justice of the peace in actions *ex contractu* where the amount demanded does not exceed the sum of two hundred dollars, and in the

Superior Court where the demand exceeds that sum, the jurisdiction of the latter court depending upon whether from the pleadings it may be seen that it was made in good faith, and whether the allegations of the complaint sufficiently allege a good cause of action to sustain the jurisdiction sought.

3. Same—Pleadings—Good Faith.

Where it appears from the complaint in an action brought in the Superior Court that a good cause of action is alleged in the amount cognizable only in the court of the justice of the peace, and recovery cannot be had for the difference in amount necessary to sustain the jurisdiction of the Superior Court, a demurrer should be sustained.

4. Courts—Jurisdiction—Justices of the Peace—Superior Courts—Torts.

In this case, *held*, the damages plaintiff alleged to have sustained by her having voluntarily undertaken to take care of deceased during his last illness with a contagious or infectious disease, by causing her, under the advice of his attending physician, to destroy the clothes that were on the bed he had occupied, etc., was not in the nature of a tort that would confer jurisdiction in the amount claimed, upon the Superior Court.

APPEAL by defendant from *Bryson, J.*, at May Term, 1924, of ALLEGHANY.

The plaintiff alleges that the defendant is the administrator of J. A. Williams, Jr., deceased; that the intestate at the request of his sister Bessie Williams, who was ill with influenza in the plaintiff's home, went there to wait upon his sister, and two days after his arrival contracted the disease himself, and died on 25 December, 1922, from the combined effects of influenza and tuberculosis; that a few days later the physician who had attended the deceased advised and directed the plaintiff to burn all the bed clothing that had been used by the deceased during his sickness, the value of which was $92.50; that the deceased was indebted to the plaintiff in the sum of $12.00 as the balance due for a horse and in the sum of $36 for board; that the house in which the intestate died has become infected with tubercular germs and is now unfit for habitation; that she has not occupied it since 5 January, 1923; that prior to the time the deceased was taken sick the house was worth $2,500, and that the plaintiff has been damaged in this amount; and that she has demanded payment of $2,650.50, etc.

The defendant demurred on two grounds: (1) The allegations with respect to the destruction of the bed clothing and the damage to the dwelling do not constitute a cause of action; (2) the other items are within the jurisdiction of a justice of the peace and not within that of the Superior Court.

Floyd Crouse and T. C. Bowie for plaintiff.
Doughton & Higgins for defendant.

ADAMS, J. The General Assembly is authorized to distribute among the other courts prescribed in the Constitution that portion of the judicial power and jurisdiction which does not pertain to the Supreme Court. Const., Art. IV, sec. 12. Under this provision the Superior Court is given original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court. C. S., 1436. Justices of the peace have jurisdiction of civil actions founded on contract wherein the sum demanded does not exceed two hundred dollars and wherein the title to real estate is not in controversy. Const., Art. IV, sec. 27.

If the action be *ex contractu* and the sum demanded does not exceed two hundred dollars a justice of the peace has jurisdiction, and the question of jurisdiction is determined by the sum which is demanded in good faith. When the complaint shows that the sum actually in dispute is less than two hundred dollars a mere demand for more than this sum will not confer jurisdiction upon the Superior Court. *Froelich v. Express Co.*, 67 N. C., 1; *Moore v. Nowell*, 94 N. C., 266; *Brantley v. Finch*, 97 N. C., 92; *Bowers v. R. R.*, 107 N. C., 721; *Knight v. Taylor*, 131 N. C., 84; *Teal v. Templeton*, 149 N. C., 32; *Petree v. Savage*, 171 N. C., 437; *Brown v. Taylor*, 174 N. C., 423; *Shoe Store Co. v. Wiseman, ibid.*, 716.

The exercise of good faith as a factor in determining jurisdiction of necessity implies the existence and the statement of a legal or equitable cause of action. Where there is no cause of action there cannot be an exercise of good faith for jurisdictional purposes. The word jurisdiction as applied to courts imports a legal controversy; the power to hear, determine, and pronounce judgment on the issues before the court; or to inquire into the facts, to apply the law, and to render judgment. Demanding recovery of a jurisdictional sum upon allegations which are not sufficient to constitute a cause of action cannot in itself confer jurisdiction to proceed to judgment. In such case there would be no legal cause to be adjudicated and jurisdiction can be acquired only when the law confers the power to pronounce judgment. *Wiseman v. Witherow*, 90 N. C., 140; *Martin v. Goode*, 111 N. C., 288; *Wooten v. Drug Co.*, 169 N. C., 64; 15 C. J., 723 *et seq.*

The defendant admits that the complaint states a cause of action for the board and lodging of the intestate and for the amount alleged to be due for the horse; but he contends that the remaining allegations are not sufficient to warrant a recovery, and he presents this question for decision.

In their brief the plaintiff's counsel say that her cause of action rests, not in contract, but in tort; that the intestate should have foreseen that by attending upon his sister he "would contract influenza and die

therefrom"; and that the defendant is liable for the natural consequences of the intestate's act in impairing the value of the plaintiff's property.

There is no allegation that the deceased was a trespasser upon the plaintiff's premises, or that he failed, neglected or refused to exercise due care for the preservation of his health, or that by reason of any negligent act of omission or commission he damaged or endangered the plaintiff's property, real or personal. Indeed, it is not alleged that the deceased was in the advanced stages of tuberculosis or that he knew, and that the plaintiff did not know that he had the disease at all. In what respect he was negligent we are unable to perceive from a perusal of the complaint. The law does not make any man an insurer of his acts; he is liable only for injury arising from a failure to exercise the care that characterizes the conduct of a prudent man. *Supervisor v. Jennings,* 181 N. C., 293; *Moore v. Iron Works,* 183 N. C., 438; *Gaither v. Clement, ibid.,* 450.

It should be noted that the bed clothing was burnt by the plaintiff upon the advice of the attending physician and not by the direction of the board of health under the exercise of the police power.

Construing the complaint most favorably for the plaintiff we are of opinion that it states a cause of action only as to the items relating to the intestate's board and the trade of the horse, and that these items are within the jurisdiction of a justice of the peace.

Under these circumstances the demurrer should have been sustained.

Reversed.

MAUDE SAMS AND R. SAMS v. COCHRAN & ROSS COMPANY.

(Filed 19 December, 1924.)

1. Courts—Discretion—Pleadings—Amendments.

The judge of the Superior Court may, as a matter of his sound discretion, allow amendments to the pleadings before or after verdict, to make them conform to the evidence adduced upon the trial, when the foundation of the cause of action is not thereby changed.

2. Contracts—Insurer—Bailment—Damages.

Where a packing and storage company enters into a contract to pack and deliver to the railroad company plaintiff's household goods for shipment, and for its own convenience in packing the same removes them to its own warehouse with an agreement to become "responsible" for the goods until delivered to the carrier, and the goods are destroyed by fire while in the warehouse of the storage company, and in its possession, the storage company is, as an insurer, answerable in damages

for the loss by the terms of the special contract irrespective of the question of negligence, and the principles of law relating to the liability of bailment, etc., have no application.

3. Judgments—Issues—Verdict.

In this case *held*, an answer to the issue raised by the pleadings upon the evidence under proper instructions, making the defendant liable under a special contract as insurer, was not inconsistent with the verdict in defendant's favor upon the issue as to the defendant's negligence as warehouseman or bailee, and defendant's exception that a judgment could not be rendered thereon is untenable.

4. Contracts—Insurer—Insurance — Policies—Evidence—Trials—Appeal and Error.

Where under a special contract the defendants are held liable as insurers for the loss of plaintiff's goods while in their possession in their warehouse, the admission of evidence that the goods were perhaps covered by a policy of fire insurance at the time is not reversible error to the defendant's prejudice.

APPEAL by defendant from *Stack, J.*, and a jury, at March Term, 1924, of MECKLENBURG.

The defendant conducts a transfer and storage business in Charlotte, and packs and prepares for shipment household goods and other property. In April, 1923, the plaintiffs were about to move their residence from Charlotte, and engaged the defendant to crate and prepare for shipment their household goods, and while the goods were being held in defendant's warehouse for the purpose of being prepared for shipment the warehouse was burned and the goods destroyed. There is no dispute that defendant had the goods from 5 April to 7 April, when they were burned, about midnight.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Did the defendant agree to remove the plaintiffs' household goods to its warehouse in Charlotte, N. C., and to crate and deliver same to the Southern Railway Company for shipment to Augusta, Ga., not later than Thursday, 5 April, 1923, as alleged in the complaint? Answer: 'No.'

"2. If so, did defendant crate said household goods and have them ready for delivery to said railway company on said date? Answer: '.....'

"3. Did the defendant agree with the plaintiffs to be responsible for the safety of the said household goods if the plaintiffs would permit the defendant to remove the said goods to its warehouse, there to be crated for shipment to Augusta, Ga., as alleged in the complaint? Answer: 'Yes.'

"4. Were the said household goods of the plaintiffs destroyed by fire by reason of the negligence of the defendant in not crating and delivering same to the Southern Railway Company for shipment to Augusta, Ga., as alleged in the complaint? Answer: 'Yes.'

"5. What amount, if any, are the plaintiffs entitled to recover as damages from the defendant? Answer: '$1,500.00.'"

There was a judgment on the verdict. Defendant excepted, assigned numerous errors, and appealed to the Supreme Court. We will only consider the material ones.

J. D. McCall, G. T. Carswell, and F. B. McCall for plaintiffs.
D. B. Smith and W. S. O'B. Robinson for defendant.

CLARKSON, J. The interesting and learned discussion of bailment and warehouseman, in the briefs of the defendant, we will not consider, as we do not think it necessary for the determination of this case.

Under our liberal practice, the court below, in its sound discretion, in furtherance of justice, can amend the pleading, before and after judgment, to conform to the facts proved, keeping in mind always that an amendment cannot change substantially the nature of the action or defense without consent. Our system is broadening and expanding more and more, with the view at all times that a trial should be had on the merits and to prevent injustice.

The plaintiffs, in their replication, treated as an amendment to the original complaint, and allowed by the court below, allege:

That a representative of defendant company, at the request of Mrs. Sams, the plaintiff, came to see her for the purpose of having the defendant company crate and deliver their household goods to the Southern Railway Company for shipment to Augusta, Ga.; that the plaintiff requested the defendant to crate said household goods in their home, No. 312 N. Brevard Street; that the defendant thereupon "requested the plaintiffs to permit him, for his convenience, to transfer said goods to his warehouse, preparatory to crating and delivering it to the railroad company for shipment, and at the same time telling the plaintiffs that he would be responsible for the said goods if allowed to remove same to his warehouse; that upon this special agreement the plaintiffs permitted and allowed said goods to be removed by the defendant to his warehouse"; that the defendant accordingly did remove the goods, on Tuesday, 3 April, with the understanding and agreement that the same were to be delivered the following Thursday, the 5th, to the Southern Railroad Company; that the defendant, on the following Thursday, negligently and carelessly failed to crate and deliver the goods to the Southern Railroad Company, as it had contracted to do; "that the said

goods were permitted and allowed to remain uncrated in the defendant's warehouse until Saturday night, 7 April, when the same were destroyed by fire, about midnight of the same day."

It is contended by the defendant that "The verdict is contradictory, and, when construed with reference to the pleadings, the evidence and the charge, is not legally sufficient to support the judgment." We cannot so hold, on the record.

The principle laid down in *Ginsberg v. Leach,* 111 N. C., p. 15, is as follows: "The Supreme Court will not consider exceptions arising upon the trial of other issues, when one issue, decisive of the appellant's right to recover, has been found against him by the jury." *Hamilton v. Lumber Co.,* 160 N. C., 52; *Beck v. Wilkins-Ricks Co.,* 186 N. C., p. 215.

The third issue submitted was, "Did the defendant agree with the plaintiffs to be responsible for the safety of the said household goods if the plaintiffs would permit the defendant to remove the said goods to its warehouse, there to be crated for shipment to Augusta, Ga., as alleged in the complaint?"

After this issue was found against the defendant, it cannot now be heard to complain if a reasonable interpretation of the pleadings, evidence, and charge of the court will support the judgment rendered on the findings of the jury on this issue, and there is no error shown affecting this issue. From the answer, "No," by the jury to the first issue, from the evidence, they were not satisfied that the goods were to be shipped "not later than Thursday." On the other hand, they found in response to the third issue, "Yes"; that in accordance with the allegations of the complaint that defendant had violated its special contract; that plaintiff, for defendant's convenience, agreed to allow defendant to crate the goods in its warehouse; that defendant *"would be responsible for the said goods if allowed to remove same to his warehouse; that upon this special agreement the plaintiff permitted and allowed said goods to be removed by the defendant to his warehouse."*

The issue under this allegation of the complaint, "Did the defendant agree with the plaintiff to *be responsible for the safety of the said household goods?"* etc., was answered "Yes." The answers to the issues are not inconsistent or in conflict.

From a careful review of the evidence and the charge of the court below, the jury were warranted in answering this issue as they did. On this aspect of the case we can find no error in the charge of the court, or any error in the exceptions taken and assignments of error.

Issues are sufficient when they submit to the jury proper inquiries as to all the material, essential or determinative facts about which there is a dispute or controversy. *Mann v. Archbell,* 186 N. C., p. 74; *Potato Co. v. Jeanette,* 174 N. C., 240; *Power Co. v. Power Co.,* 171 N. C., 258.

The serious question arises on the record: Was the allegation in the complaint, and the submission of the third issue and the answer, "Yes," a sufficient special contract to make the defendant responsible as an insurer and not a bailee or warehouseman? We think, under the facts and circumstances of this case, the special contract made defendant an insurer.

The case of *Robertson v. Lumber Co.*, 165 N. C., p. 4, was written by *Brown, J.* In that case the contract was that the lumber company had decided to take the boat "and would pay every two weeks, and would keep her in good repair and return her in good condition." Although in that case negligence was found under an issue submitted, the Court said: "But, under the contract as testified to by Hopkins, it is only necessary to prove a breach of the contract, viz., that the boat was not kept in good repair nor returned in good condition, and there is abundant evidence of that."

The defendant relies upon *Sawyer v. Wilkinson*, 166 N. C., p. 497, written by the same learned judge. *Clark, C. J.*, in *Clark v. Whitehurst*, 171 N. C., p. 3, says, in regard to the *Sawyer case, supra:* "Where a mule was hired to the defendant, to be returned in good condition, and the mule was burned to death when a fire destroyed the defendant's stables, without any negligence on his part, in that case it was held that the bailee, being in lawful possession of the mule, was responsible only for ordinary care in its preservation and protection, and was not responsible for its destruction and consequent failure to return it, in the absence of any negligence on his part. Though this decision is in accordance with the weight of authority, there are many cases which hold that even where the party holds under a contract of bailment, if there is a special contract to return the horse in good condition, and the horse dies in the bailee's possession, though without fault on his part, he is liable for its value as insurer. *Grady v. Schweinler*, 16 N. D., 452; 125 Am. St., 676; 15 Anno. Cases, 161, and cases there cited."

In *Cooke v. Veneer Co.*, 169 N. C., p. 494, *Brown, J.*, said: "The parties may, however, substitute a special contract for this contract implied by law. In such cases the express agreement determines the rights and liabilities arising from the bailment. The bailee may be relieved of all liability, or he may become an insurer. A bailee may thus become liable, irrespective of negligence or fraud, for a breach of the bailment contract. Hale on Bailments, 28, and cases cited in notes; *Grady v. Schweinler*, 15 A. & E. Anno., 161."

The *Cooke case, supra,* further says: "It is stated in the record that the 'defendant agreed to redeliver the barge in as good condition as when received, ordinary wear and tear excepted.' Under such contract,

the defendant is liable for the return of the barge in as good condition as when received, unless prevented by the 'act of God or the king's enemy,' and is liable for the stipulated rent until returned." And says: "This case differs from *Sawyer v. Wilkinson, supra,* very materially. In that case the mule died without any fault or negligence upon the part of the bailee, and the animal could not be returned. *Actus Dei nemini facit injuriam.*"

The real basis of distinction between the liability of a bailee and one acting under a special contract is that the duties of a bailee are fixed by law and do not extend to losses occasioned by an act of God or circumstances beyond his control, while one acting under a special contract is liable according to the terms of his agreement. *Gardner v. Quakenbush, ante,* 180.

The principle applicable is laid down in *Steele v. Buck,* 61 Ill., 343; 14 Am. Rep., 62: "The general doctrine is, as laid down in *Paradine v. Jaine,* Aleyn, 27, cited in 3 Bos. & Pul., 420: 'Where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his own contract.' And, as said by *Mr. Justice Chambre,* in the latter case: 'If a party enter into an absolute contract, without any qualifications or exceptions, and received from the party, with whom he contracts, the consideration for such engagement, he must abide by the contract, and either do the act or pay damages, his liability arising from his own direct and positive undertaking.' To the same effect are the following cases: *Bacon et al. v. Cobb et al.,* 45 Ill., 47; *Mill Dam Foundry v. Hovey,* 21 Pick., 441; *Demott v. Jones,* 2 Wall., 1; *School Trustees v. Bennett,* 3 Dutch., 518; *Bullock v. Dommitt,* 6 Term, 650; *Brennock v. Pritchard, id.,* 750." *Sun Printing & Pub. Assn. v. Moore,* 183 U. S., p. 642.

The fact that the plaintiff stated that the furniture was insured, we do not think, if error, prejudicial. Mrs. Sams stated that she did not know in what company she had insurance, and did not know of her own knowledge whether it was canceled or not. She did state that she did not want the furniture taken from the house, as it would cancel the insurance. The facts are not many. Mrs. Sams' husband was in Augusta, Ga., and she was arranging to go there. The defendant is engaged in the transfer and storage business, and plaintiff sent for an agent of defendant to have her furniture crated and shipped. She wanted it crated at her house, but defendant wanted to take it to its place of business. He said it would be more convenient, and he said he would be responsible for it. She said she did not want it moved, as it would cancel the insurance. The defendant insisted on its going, she said. After he said he would be responsible for it, she let him take it.

The furniture, by defendant's testimony, was taken to the storage house on 5 April, Thursday, and burned Saturday, the 7th. Plaintiff said she called him every day to see if it was gone, as she was going to leave Sunday and wanted it to go before she left.

Black's Law Dictionary (2d Ed., p. 1029) defines "responsible": "To say that a person is 'responsible' means that he is able to pay a sum for which he is or may become liable, or to discharge an obligation which he may be under. *Farley v. Day,* 26 N. H., 531; *People v. Kent,* 160 Ill., 655; 43 N. E., 760; *Com. v. Mitchell,* 82 Pa., 349."

"Strictly speaking, the word 'responsible' means liable, answerable, rather than able to discharge an obligation; but the word is used in the latter sense in Rev. St., ch. 183, sec. 17, requiring a writ to be endorsed by a responsible person. *Farley v. Day,* 26 N. H. (6 Fost.), 527, 531." "One's 'responsibility' is his liability, obligation, or bounden duty. *Crockett v. Village of Barre,* 29 Atl., 147; 66 Vt., 269 (citing Soule, Syn. 1880), p. 337." 7 Words and Phrases, p. 6179.

From the issue the jury found that the defendant did "agree with the plaintiff to be responsible for the safety of the said household goods," etc.

The defendant, as found by the jury, took them under a special contract, and must abide its agreement. Defendant denied the contract, but this was a question of fact, and the jury found it had made it.

It is a hardship on defendant, the fire was a misfortune, but it agreed to become responsible, and we cannot, under the law and findings of the jury, relieve it of the responsibility it undertook. We have examined the entire record, exceptions and assignments of error, and able briefs, but can find no reversible or prejudicial error.

No error.

CITY OF GREENSBORO v. JOHN W. SIMPSON, R. G. VAUGHAN AND R. R. KING, TRUSTEES OF THE FIRST PRESBYTERIAN CHURCH OF GREENSBORO, NORTH CAROLINA.

(Filed 19 December, 1924.)

Schools—Deeds and Conveyances—Statutes—Constitutional Law.

Where a deed to lands to a city for school purposes, conveying a fee-simple title thereto for such purposes, has been executed and delivered, and thereafter statutes have been enacted making certain provisions whereby the original owners and their heirs may acquire the lands in the event of the cessation of such use, and the lands have been held for such use for a long term of years, and then sold under authorization of a statute, reserving the proceeds of the sale for the use of the public school funds of the city: *Held,* the statute so specially passed was constitutional and valid, and a deed to the purchaser in accordance therewith passed an absolute fee-simple title.

GREENSBORO *v.* SIMPSON.

APPEAL by defendants from *Bryson, J.*, at October Term, 1924, of GUILFORD.

Facts: On 2 September, 1924, the plaintiff, the city of Greensboro, contracted in writing to sell and convey to the defendants certain lands, known as Lindsay Street Graded School property, adjoining the First Presbyterian Church of Greensboro, at the price of $71,500.00. Plaintiff, thereafter, in accordance with the contract, tendered a fee-simple warranty deed, sufficient in form in all respects, and demanded payment of purchase price.

Defendants declined to pay the purchase price upon being advised that the plaintiff, the city of Greensboro, derived its title by virtue of a deed from Jed. H. Lindsay, dated 19 October, 1854, and that at the time this conveyance was made, there was a clause in the public-school law of North Carolina which read as follows: "*And provided further,* that if after the purchase or condemnation of land for school purposes, the school committee sees fit to remove the school, then the original owner of the land, or his vendee, shall have the right to take the land at the original price, with the privilege to the committee of removing the building or other improvements." Whereupon, plaintiff then instituted this action.

The deed from Jed. H. Lindsay to the school committee, of which the city of Greensboro is the successor in an ordinary fee-simple warranty deed, with full covenants of warranty and seizin, and makes no reference whatsoever to the said act, and plaintiff and the school boards, to whose rights it succeeds, have been in continuous possession of said property since 1854.

The said Jed. H. Lindsay made no attempt during his lifetime to either sell, convey, grant or devise any interest or right whatsoever in said property. He died during the year 1881, leaving a number of children, who have since died, leaving children now surviving, being grandchildren.

In 1872 (chapter 90, section 21) the General Assembly of North Carolina reënacted this section of the school law, and amended the same by inserting after the words "original owner," the words "his heirs or assigns," making the section then read:

"The school committee may receive any gift, grant, donation or devise made for the use of any school or schools within their jurisdiction, and in their corporate capacity they shall be and are hereby entrusted with the care and custody of all schoolhouses, schoolhouse sites, grounds, books, apparatus, or other public-school property belonging to their respective jurisdiction, with full power to control the same as they may deem best for the interest of the public schools and the cause of education. When, in the opinion of the committee, any schoolhouse, school-

house sites, or other public-school property has become unnecessary for public-school purposes, they shall return the land to the original owner, his heirs or assigns, if he or they so desire, on the payment of first cost, and remove or sell the building, after advertisement for twenty days at three public places in the townships. The deed for the property thus sold shall be executed by the chairman and clerk of the committee, and proceeds of the sale shall be paid to the township treasurer for the school expenses in the township."

By the Public Laws of 1881 (chapter 200) this section was entirely repealed, and it was provided that whenever a schoolhouse site has become unnecessary for school purposes the school committee might sell the same at public auction, after advertisement, etc., and the proceeds turned over to the board of education for school purposes.

The Public Laws of 1883 (chapter 121, section 19) amended the Laws of 1881 (chapter 200, section 54) by providing that the committee should first offer the site and improvements to the original grantor, donor, or his heirs, at a price fixed by the committee, and in the event of the disagreement as to the price the same should be determined by arbitration, as therein provided for. Therefore, the section (2582) of The Code of 1883 brings forward the section as thus amended.

The Public Laws of North Carolina, 1901 (chapter 4, section 30) repeals the above section as amended, and in lieu thereof provides that whenever any schoolhouse site has become unnecessary for public purposes the school authorities may sell the same at public auction, after advertisement of twenty days at three public places in the county, or at private sale. This is brought forward as section 4130, volume 2, Revisal 1908 (Pell's).

The General Assembly of North Carolina has reënacted this section as thus amended from time to time, and it now appears as section 5416, subsection 3, of the Consolidated Statutes of North Carolina, and the law now seems to be as set out in said section, which reads as follows: "When, in the opinion of the board, any schoolhouse, site, or other public-school property has become unnecessary for public purposes, it may sell the same at public auction, after advertisement of twenty days at three public places in the county, or at private sale."

The General Assembly of North Carolina (Extra Session 1924) passed an act to vest the title to the Lindsay Street Graded School property of the city of Greensboro, and make provision for the sale of same, and by this act assumed to vest title in the city of Greensboro as the owner in fee, to authorize the sale of the same to the trustees of the First Presbyterian Church, and provide for the execution of the deed for said property and the disposition of the proceeds of the said sale.

The defendants declined to pay the purchase price, for the reason that they were advised that the plaintiff could not convey such an estate as it had agreed; that its estate was a qualified one, and subject to be defeated upon certain conditions, by reason of the law in force at the date of the making of the deed under which the plaintiff claimed the first-described lot, and subsequent legislation. This action was then instituted for the recovery of the contract price and is in effect a suit for specific performance.

When the attorneys in the case were here, the following was filed by the plaintiff, appellee, with the consent of the defendants, appellants:

"The attention of the court is called to the fact that the old acts of the General Assembly were not available to the attorneys in this case until their arrival here, where, upon examination of them, it appears that the clause in the school law, to wit, 'If . . . the school committee see fit to remove the school, then the original owner of the land or his vendee shall have the right to take the land at the original price,' . . . was not passed until six months after the deed of Jed. H. Lindsay to said school board had been made.

"The school laws, as passed or amended at the Session of 1840, page 14; 1842, pages 64 and 90; 1844, page 49; 1846, page 238; 1850-51, page 76; 1852, page 66, did not contain the clause in question.

"The first time the power to condemn land for school purposes was conferred on the school committee was in 1852 (page 66), and this does not contain any right to repurchase nor any reference to the clause in question.

"The clause in question first appears in the Acts of 1854-55, page 58, and is carried forward in the Revised Code of North Carolina (1854), which was adopted at that session. The school law containing the clause in question was adopted 10 February, 1855, and under the law (Revised Code of North Carolina, page 619, also page 311) took effect thirty days after the rise of the session.

"The deed was made 19 October, 1854. The law was not passed until 10 February, 1855, and took effect about April, 1855—probably six months after the deed was made.

"The General Assembly met at that time on the third Monday in November, bienially. (Revised Statutes, 1837, ch. 52.) Revised Code of North Carolina, 1854, page 309, sec. 25.

"The clause in question does not appear in Revised Statutes, 1837, and a careful examination of all laws from that time up to 1854 fails to disclose any such clause until the Acts of 1854-55, page 58, when the clause is enacted in a restatement and consolidation of the school law, which is brought forward in the Revised Code of 1854, adopted 1855.

"Therefore, it would appear that the deed was made before the clause in question was enacted into law."

B. L. Fentress and A. Wayland Cooke for plaintiff.
O. L. Sapp and R. R. King for defendants.

CLARKSON, J. On 19 October, 1854, Jed. H. Lindsay, of Guilford County, N. C., made a deed for the land in controversy, for the consideration, expressed in the deed, of $37.50, to James Sloan, Andrew Weatherby, and Jed. H. Lindsay, school committee for Common School District No. 38 of Guilford County "and their successors in office." The deed was duly acknowledged and recorded in Book 36, p. 197, register of deeds office for Guilford County.

The land in controversy has been used, up to the present time, for school purposes, and was used in connection with the graded-school system of the city of Greensboro. The land in controversy and another piece the defendants have agreed to purchase from plaintiff for $71,500. The contract entered into between the parties—the city of Greensboro, the plaintiff, and the defendants, trustees of the First Presbyterian Church of Greensboro, N. C.—provides that defendants will pay for the land "if and when the party of the first part can and shall convey a good and indefeasible estate to said lands in fee, free and clear of all encumbrances, and with the usual covenants of warranty, seizin, etc., to the parties of the second part and their successors in office for said church."

The General Assembly of North Carolina (Extra Session), by act ratified 19 August, 1924, entitled "An act to fix the title to certain school property in the city of Greensboro and make provision for the sale of the same." This act made provision for the sale of the lot in controversy and another lot to defendants, and by this act assumed to vest the title in the city of Greensboro as owner in fee to the lot in controversy. The act says, "which property has been held and used for more than fifty years by the city of Greensboro and the Greensboro School District for school purposes," . . . "is declared to be now vested in the city of Greensboro, and shall, from and after the ratification of this act, be vested in and held by the 'city of Greensboro,' as defined in chapter 37 of the Private Laws of North Carolina, Session 1923, as owner thereof in fee."

Section 21 of the act of 1923, *supra,* is as follows: "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,' and, as such, shall have exclusive control of the public free schools in said district. The conduct of said schools shall be vested

in a board of seven (7) members, to be elected by the council, as herein provided for, and said board collectively shall be known and designated as the 'Board of Education of Greensboro.' The members of said board, in order to be eligible to office, shall be residents of said city, and shall be persons of good moral character."

Sections 2, 3, and 4 of chapter 49, Private Laws, Extra Session 1924, are as follows:

"SEC. 2. That the said city of Greensboro is hereby authorized and empowered, through its mayor and city council, to sell privately and convey in fee, for the sum of $71,500, to the trustees of the First Presbyterian Church, and their successors, for the use and benefit of the said church, its successor or successors and assigns," the land in controversy (describing it by metes and bounds, and the other lot in the beforementioned contract, describing it by metes and bounds).

"SEC. 3. That any deed to be executed by the city of Greensboro under the provisions of this act shall be sufficient to convey said property in fee if the same shall be signed in the corporate name of said city by its mayor, attested by the city clerk, and sealed with the corporate seal of the city.

"SEC. 4. That the said sum of $71,500 to be paid to the city of Greensboro for said land shall be placed by the city treasurer to the credit of the school fund of the Greensboro School District, and shall be used for such public purpose or purposes as the board of education of Greensboro may determine."

We think the Legislature had the power to pass the act of August, 1924, vesting the title to the land in controversy in the city of Greensboro, and giving it the right, power and authority to sell the land to defendants, its successor or successors or assigns. The money obtained by the sale is to be placed to the credit of the school fund of Greensboro School District and be used for such public purpose or purposes as the board of education may determine.

The land was sold originally for school purposes; it had been used for fifty years for school purposes. The fund arising from the sale is to be turned over to the proper authorities and used for public purposes, as the board of education of Greensboro may determine, presumably for school purposes. *Blue v. Wilmington,* 186 N. C., 321; *Harris v. Durham,* 185 N. C., 572; *Torrence v. Charlotte,* 163 N. C., 562; *Venable v. School Comrs.,* 149 N. C., 120.

From the amended brief filed in this case, and an examination of the statutes, we find that when the original deed was made by Jed. H. Lindsay and others to the school board and their successors in office, there was no statute in this State that could in any way affect the plain terms of the deed to the land in controversy. The judgment of the court

below, we think, is in all respects in accordance with law, and that upon execution and delivery by plaintiff to the defendants of a fee-simple warranty deed to said lands, defendants will be seized of a good, sure and indefeasible title in fee simple to said lands.

It is a matter of public interest to note that on the argument of this case it was stated that on the land in controversy was established one of the first graded schools in the State.

The judgment of the court below is

Affirmed.

LANK R. BECK v. THOMASVILLE CHAIR COMPANY.

(Filed 19 December, 1924.)

1. Evidence—Nonsuit—Employer and Employee—Master and Servant—Fellow-Servant—Safe Place to Work.

Evidence that the plaintiff in an action to recover damages for a personal injury, was required to adjust, in his line of duty, belts on overhead pulleys by using stepladders in the narrow, etc., aisle in the defendant's manufacturing plant, where trucks loaded with material were constantly passing, and the floor was uneven so that ladders could not be securely placed, and that the injury occurred near the place where the defendant's superintendent was standing, occasioned by a fellow servant of the plaintiff pushing forward a truck out of the way of the one he was using, which ran down an inclined place of the floor, striking the ladder on which the plaintiff was at work, causing the injury, is sufficient for the determination of the jury upon the question of whether the proximate cause of the consequent injury was the negligent failure of defendant to furnish the plaintiff a safe place to work.

2. Same—Concurring Negligence—Proximate Cause—Nonsuit.

Where the failure of defendant employer to furnish the plaintiff, its employee, a safe place to work, concurs with the negligence of a fellow servant in proximately causing the injury in suit, the defendant is liable in damages for the consequent injury, and his motion as of nonsuit upon the evidence, C. S., 567, is properly denied.

3. Appeal and Error—Objections and Exceptions.

Exceptions on appeal that do not relate to the controversy between the parties and are to matters entirely collateral to the issues will not be sustained on appeal.

4. Courts—Discretion—Verdict Rendered Out of Term—Consent—Appeal and Error.

Where the parties to the action have consented that the judge adjourn the term of the court *sine die*, and that the clerk take the verdict of the jury in his absence, and after the judge had left the district and pending

the jury's investigation a juror expressed a desire for further instructions upon a matter not disclosed, a motion to set aside the verdict on that ground is addressed to the sound discretion of the trial judge, and the exercise of this discretion will not be disturbed on appeal.

APPEAL by defendants from judgment rendered by *Bryson, J.*, at July Term, 1924, of DAVIDSON.

Civil action, to recover damages for personal injuries alleged to have been caused by the negligence of defendants. In accordance with verdict, judgment was rendered for plaintiff. Defendants appealed, assigning as error (1) the refusal of the court to allow defendants' motion for nonsuit at the close of all the evidence; (2) the refusal of the court to give special instructions as requested by defendants; and (3) the refusal of the court to set aside the verdict and grant a new trial because of the absence of the judge during the consideration of the case by the jury and at the time verdict was returned. These assignments are discussed in the opinion.

Leroy B. Wall and Phillips & Bower for plaintiff.
Raper & Raper and Z. I. Walser for defendants.

CONNOR, J. At the close of the evidence offered by plaintiff, defendants moved for judgment as of nonsuit. Motion denied. Defendants excepted. Defendants thereupon offered evidence, and at the close of all the evidence renewed the motion. The motion was denied, and defendants excepted. C. S., 567.

On 20 March, 1923, plaintiff, an employee of defendants, was standing on a ladder in the machine room of defendants' factory, at work. Suddenly the ladder was struck by a truck which had been shoved by a fellow-servant of plaintiff. Plaintiff fell from the ladder to the floor, about seven or eight feet. He was rendered unconscious by the fall, his right arm broken, his face cut and his body bruised. Plaintiff was taken to a hospital, where he received medical attention. His arm is permanently injured.

One of plaintiff's duties as an employee of defendants was to dress the belt used in operating the machinery. In order to perform this duty it was necessary for plaintiff to go upon a ladder, so that he could reach the belt. On the occasion when plaintiff was injured, the belt was slipping and giving trouble. Plaintiff placed the ladder in position, so that he could perform his duty with respect to the belt. The ladder was placed in the aisle, along which employees moved trucks loaded with material for the manufacture of chairs. The floor was uneven and the ladder was standing on two legs, thus being unsteady. The machine

room in which plaintiff was at work was 50 feet wide and 210 feet long. There were many machines and much material on the floor in this room. The aisle, with machines set on either side, extended through the room for 75 feet. Twenty-five or thirty trucks were in use in this aisle when plaintiff went upon the ladder. These trucks were about 2½ feet wide and 3 or 4 feet long, and were moved along the aisle loaded.

While plaintiff was on the ladder, two of his fellow-servants were moving a loaded truck along the aisle toward the ladder. A truck was standing in the aisle, in the way of the truck which they were moving. One of these employees pushed this truck, causing it to roll toward the ladder. The floor was slanting, and the truck gained speed as it neared the ladder. When it struck the ladder, which was unsteady because the floor was not level, plaintiff was thrown down and injured.

At the time plaintiff went upon the ladder the foreman in charge of the machine room and under whose supervision plaintiff was at work, was within twenty feet of plaintiff and saw or could have seen plaintiff standing on the ladder. The machinery was running and the trucks in constant movement up and down the aisle.

There was evidence from which the jury could have found the facts as above stated. Plaintiff contends that upon these facts defendants were negligent in that they failed to furnish him a reasonably safe place in which to work and that this negligence was the proximate cause of his injury. Defendants contend that there was no negligence on their part but that plaintiff's injury was caused solely by the negligence of his fellow-servant in pushing the truck against the ladder. Plaintiff contends that his injury was the result primarily of the condition of the floor and the congestion on and near the aisle, thus making the place at which he was at work unsafe and that defendants are not relieved of liability for the injury caused by this negligence because the act of his fellow-servant concurred in causing him to fall from the ladder.

In *Beck v. Tanning Co.*, 179 N. C., 124, *Walker, J.*, states the law to be as follows: "It is unquestionably the duty of the master to use proper care in providing a reasonably safe place where the servant may do his work and reasonably safe machinery, implements, etc., with which to do the work assigned to him, and this duty is a primary and an absolute one which he cannot delegate to another without at the same time incurring the risk of himself becoming liable for the neglect of his agent, so entrusted with the performance of this duty which belongs to the master, for in such a case the negligence of the agent, or fellow-servant, if he is appointed to act for the master, is the master's neglect also. If the negligence of the master concurs with that of the servant in causing an injury, the master is liable."

In the instant case, the act of the fellow-servant in shoving the truck toward the ladder was wrongful and contributed to plaintiff's injury. The condition of the floor, both with respect to its being uneven and with respect to the congestion of machinery and material in and along the aisle, was properly submitted to the jury as evidence that defendants had failed to use proper care in providing a reasonably safe place in which plaintiff was required to work. Defendants' foreman in charge of the room, standing within 20 feet of the ladder upon which plaintiff was at work, permitted employees to move heavily loaded trucks up and down the narrow aisle in which the ladder was standing. The ladder was unsteady because of the condition of the floor. Clearly upon this evidence there was negligence on the part of the defendants and there was evidence proper to be submitted to the jury as to whether or not defendants' negligence was the proximate cause of his injury or whether or not such negligence concurred with the negligence of a fellow-servant in causing the injury. *Steele v. Grant,* 166 N. C., 635; *Midgett v. Mfg. Co.,* 180 N. C., 24. The motion for nonsuit was properly denied and the first assignment of error cannot be sustained.

In apt time defendants submitted in writing six requests for special instructions. We have examined these requests with care and find no error in the refusal of the court to give them.

We do not deem it necessary to set out these requests. There was no contention by the plaintiff that his injury was caused by the condition of the line shaft or pulley and therefore the first and second requests were properly refused. The third, fourth, fifth and sixth requests were in effect that defendants were not liable for the reason that plaintiff's injury was caused solely by the negligence of a fellow-servant. They are based upon the same propositions as those involved in the motion for nonsuit.

The court concluded the charge to the jury between the hours of four and five o'clock in the afternoon. This was the last case for trial at the July term of the court. There was no other business requiring the further attendance of the presiding judge, whose home was quite a distance from Lexington, the county-seat of Davidson County. After the judge had charged the jury, it was agreed by counsel for plaintiff and defendants that if the jury did not return a verdict before the departure of the train, the judge might leave Lexington on the night train for his home and that all motions, orders and judgments in the action might be made, noted and signed out of term. In accordance with this agreement, the judge left for his home about 7:40 P. M., having first notified the jury that they could return their verdict to the clerk of court. After the judge had left, one of the jurors stated to the officer in charge of the jury, that some of the jurors wanted some

information from the judge. It does not appear what the information desired by the juror was. He was informed that the judge could not be seen. The jury continued their deliberations and thereafter returned the verdict to the clerk in accordance with the agreement. Defendants moved the court to set aside the verdict and to grant a new trial for the reason that the juror was unable to procure the information he desired on account of the absence of the judge. Motion denied and defendant excepted. This motion was addressed to the discretion of the judge, and upon the facts found by him there was no abuse of discretion in the denial of the motion. The judge after his charge to the jury, absented himself from the court with consent of defendants. His charge to the jury was full, accurate and comprehensive. There are no exceptions to this charge by defendants. Defendants do not except to his absence from court nor do they contend that the motion should have been allowed as a matter of law. The assignment of error cannot be sustained. *Cogburn v. Henson,* 179 N. C., 630.

No error.

FEDERAL LAND BANK OF COLUMBIA, CITIZENS BANK OF YANCEY, JOSEPH F. FORD, TRUSTEE, AND C. C. GREENWOOD v. THE ATLAS ASSURANCE COMPANY

AND

FEDERAL LAND BANK OF COLUMBIA, JOE M. BURLISON, AND C. C. GREENWOOD v. GLOBE AND RUTGERS FIRE INSURANCE COMPANY OF THE CITY OF NEW YORK.

(Filed 19 December, 1924.)

1. Insurance—Fire Insurance—Contracts—Policies—Mortgages.

A mortgagee has a direct insurable interest in a policy of fire insurance taken out by the owner, made payable in event of loss to himself and the mortgagee as their respective interests may appear, and the interest of the mortgagee being separate and distinctive, he is not responsible under the provisions of the policy for a subsequent change in ownership or of title made by the owner without his knowledge, and such defense by the insurance company as to the mortgagee's interest is not available to it.

2. Same—Principal and Agent—Ratification.

Where the owner of the premises covered by a policy of fire insurance has therein protected the interest of the mortgagee under the standard form of policy, without the knowledge of the mortgagee, the rights of the mortgagee having been acquired under the policy itself and in accordance with its terms it is not required that he ratify the acts of the owner in order for him to recover upon the policy, his right thereto

existing under the contract made for his benefit, and in accordance with its terms. As to the rights of the original parties to rescind the contract without the consent of the mortgagee, *quere?*

3. Same—Waiver.

Where there is a coinsurance clause in a policy of fire insurance, making the several insurance companies ratably liable in the event of loss by fire, correspondence after the loss has occurred by the attorney of the mortgagee, whose rights are covered by the policy, as to releasing one of the companies from liability, in inadvertence to this feature of ratable liability, is *held* not to be a waiver of the mortgagee's right to recover, under the circumstances of this case.

APPEAL by defendants from *Finley, J.,* at September Term, 1924, of BUNCOMBE.

Civil actions, consolidated and tried upon the following issues:

"1. Did Joe M. Burlison, on or about 23 July, 1919, execute a mortgage to the plaintiff, Federal Land Bank of Columbia, securing the payment of the sum of $4,800 and interest, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant, Globe and Rutgers Fire Insurance Company, issue its policy in the name of Joe M. Burlison and attach thereto a standard mortgage clause in favor of the Federal Land Bank of Columbia, as alleged in the complaint? Answer: 'Yes.'

"3. Did said Joe M. Burlison, on 9 August, 1919, convey the lands described in the complaints to C. C. Greenwood, as alleged in the answers? Answer: 'Yes.'

"4. If so, was the plaintiff, Federal Land Bank of Columbia, without knowledge of such conveyance until after the buildings insured by said policy had been destroyed by fire, as alleged in the complaint? Answer: 'Yes.'

"5. Did said C. C. Greenwood execute a deed of trust to Joseph F. Ford, as trustee, securing the payment of $5,680.20 to Joe M. Burlison, as alleged in the answer? Answer: 'Yes.'

"6. If so, was the plaintiff, Federal Land Bank of Columbia, without knowledge of the execution of said deed of trust until after the buildings insured by said policy had been destroyed by fire, as alleged in the complaint? Answer: 'Yes.'

"7. Did the defendant, Atlas Assurance Company, on 8 December, 1920, issue its policy of insurance in the name of C. C. Greenwood and attach thereto a standard mortgage clause in favor of the Federal Land Bank of Columbia, as alleged in the complaint? Answer: 'Yes.'

"8. If so, was the Federal Land Bank of Columbia without knowledge of the issuance of the policy by said Atlas Assurance Company until

after the buildings so insured had been destroyed by fire, as alleged in the complaints? Answer: 'Yes.'

"9. Did said C. C. Greenwood, in September, 1920, assign and transfer to L. L. Jenkins all of his right, title and interest in and to said lands, as alleged in the answers? Answer: 'Yes.'

"10. If so, was said Federal Land Bank of Columbia without knowledge of such assignment or transfer until after the buildings insured by the defendants had been destroyed by fire, as alleged in the complaints? Answer: 'Yes.'

"11. Were the buildings so insured and mentioned in said policies of insurance issued by defendants wholly destroyed by fire on 10 January, 1921, as alleged in the complaint? Answer: 'Yes.'

"12. What was the actual value of the dwelling-house, described in the policies of the defendants, at the time of its destruction by fire? Answer: '$5,000.'

"13. What was the actual value of the barn, described in the policies of the defendants, at the time of its destruction by fire? Answer: $'1,500.'

"14. What was the actual value of the smokehouse, described in the policy of the defendant, Atlas Assurance Company, at the time of its destruction by fire? Answer: '$200.'

"15. What amount is due the Federal Land Bank of Columbia on the notes of said Joe M. Burlison secured by said mortgage to said Federal Land Bank of Columbia? Answer: '$5,030.27, as of 1 September, 1924.'

(All the above issues by consent.)

"16. What amount, if any, is the Federal Land Bank of Columbia entitled to recover of the defendant, Globe and Rutgers Fire Insurance Company? Answer: '$1,295.30.'

"17. What amount, if any, is the Federal Land Bank of Columbia entitled to recover of the defendant, Atlas Assurance Company? Answer: '$3,734.97.'"

Judgment on the verdict for plaintiff, from which the defendants appeal, assigning errors.

Mark W. Brown for plaintiff.

Merrimon, Adams & Johnston, and Tillett & Guthrie for Atlas Assurance Company.

Bourne, Parker & Jones, and Ferguson & Vinson for Globe and Rutgers Fire Insurance Company.

STACY, J. This is a consolidation of the two cases, *Bank v. Ins. Co.*, 187 N. C., 97, and *Bank v. Assurance Co.*, 187 N. C., 851, which were before us at the Fall Term, 1923, and remanded for trial in accordance

with the opinions announced at that time. The facts, appearing on the present record, as established by the verdict, are slightly different from what they were on the former appeals, though not materially so.

It is the position of the Atlas Assurance Company (hereafter called the Atlas Company) that at the time it issued its policy of insurance to C. C. Greenwood, 8 December, 1920, with a standard mortgage clause attached in favor of the Federal Land Bank of Columbia, mortgagee or trustee, as its interest might appear, the said C. C. Greenwood had assigned and transferred all his right, title and interest in and to the lands in question to L. L. Jenkins, as disclosed by the ninth issue, above set out, and that, for this reason, said policy is void because of the following stipulations incorporated therein:

"This entire policy shall be void unless otherwise provided by agreements in writing added hereto.

"Ownership, etc.—(a) If the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard; or (e) if this policy be assigned before a loss.

"Unless otherwise provided by agreement in writing added thereto, this company shall not be liable for loss or damage occurring.

"Other Insurance.—(a) While the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

"Increase of Hazard.—(b) While the hazard is increased by any means within the control or knowledge of the insured," etc.

There was evidence on the former record—denied, of course, by the defendant, and not appearing on the present record — sufficient, we thought, to permit the inference that the assignment by Greenwood to Jenkins was no more than a pledge for the security of a debt; and that said transaction was known to the agent of the Atlas Company at the time of the issuance of the policy. This, if true, would have amounted to a waiver of the stipulation of "unconditional and sole ownership," under authority of *Ins. Co. v. Lumber Co.*, 186 N. C., 269, and cases there cited. We now have a direct finding that Greenwood was not the absolute owner of the property at the time of the issuance of the policy by the Atlas Company. Does this render the entire policy void, including the standard mortgage clause in favor of the plaintiff bank? This is one of the questions to be decided.

It will be observed that while Greenwood had assigned and transferred his interest in the property to Jenkins, and therefore was not the sole and unconditional owner at the time of the issuance of the policy by the Atlas Company, yet he did have an insurable interest in the property, for the reason that prior to the issuance of said policy Greenwood had executed his notes and given a mortgage on the property for $5,680.20; and a destruction of the buildings by fire would thus have increased his individual liability and caused him to suffer a loss. Any interest is insurable if the peril against which insurance is made would bring upon the insured, by its immediate and direct effect, a pecuniary loss. *Carter v. Humboldt Fire Ins. Co.,* 12 Iowa, 287. "It is well settled that any person has an insurable interest in property by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself." *Harrison v. Fortlage,* 161 U. S., 57; *Batts v. Sullivan,* 182 N. C., 129; 14 R. C. L., 910.

We disposed of this question when the cases were here before, as follows: "With respect to the rights of the mortgagee under the standard mortgage clause, it is the generally accepted position that this clause operates as a separate and distinct insurance of the mortgagee's interest, to the extent, at least, of not being invalidated by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee; and, according to the clear weight of authority, this affords protection against previous acts as well as subsequent acts of the assured," citing a number of authorities.

It would probably be sufficient to say that this has now become the law of the case (*Strunks v. R. R., ante,* 567), and go no further; but, without invoking the principle of "the law of the case," it may be well to observe that such is in accord with the general trend of the decisions on the subject. *Germania Fire Ins. Co. v. Bally,* A. L. R. (Ariz.), 492. In 14 R. C. L., 1038, the following statement is made: "This provision (standard or union mortgage clause) is held by most courts to operate as an independent contract between the insurer and the mortgagee; and while some courts consider that the mortgagee's rights are defeated by a breach of warranty by the mortgagor at the inception of the contract, the weight of authority is to the contrary." And this is supported by a large number of citations.

In *Syndicate Ins. Co. v. Bohn,* 65 Fed., 165, the Circuit Court of Appeals, Eighth Circuit, in holding a policy void as to the mortgagor, or owner, because of misrepresentation in regard to the sole and unconditional ownership of the property, and valid as to the mortgagee, under the standard mortgage clause, speaking through *Judge Sanborn,* said: "Our conclusion is that the effect of the union mortgage clause, when

attached to a policy of insurance running to the mortgagor, is to make a new and separate contract between the mortgagee and the insurance company, and to effect a separate insurance of the interest of the mortgagee, dependent for its validity solely upon the course of action of the insurance company and the mortgagee, and unaffected by any act or neglect of the mortgagor, of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause."

We hold, therefore, in keeping with our own and other decisions, that the breach of representation on the part of Greenwood as to his sole and unconditional ownership of the property, unknown to the Federal Land Bank of Columbia, is not sufficient to defeat the mortgagee's rights under the following pertinent provisions of the standard mortgage clause attached to the policy in suit:

"Loss or damage, if any, under this policy, shall be payable to Federal Land Bank of Columbia, S. C., trustee under first mortgage, and Joseph F. Ford, trustee under second mortgage, mortgagee (or trustee), as interest may appear; and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: *Provided,* that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same: *Provided, also,* that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

"In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise."

The Atlas Company also takes the position that, as the Federal Land Bank of Columbia had no knowledge of the existence of the policy, issued by it, until after the buildings had been destroyed by fire (eighth issue, above), the same may not now, after a loss has occurred, be

accepted and ratified by the said beneficiary under the standard mortgage clause attached thereto. For this position the case of *Nelson v. Ins. Co.,* 120 N. C., 302, is cited as an authority. But we do not think the *Nelson case* is in point, or that the instant case presents a question of ratification. *Starkweather v. Gravely,* 187 N. C., 526. The contract of insurance was procured by C. C. Greenwood, who had an insurable interest in the property at the time, and who had a right to enter into the contract. The policy was issued with a rider, or standard mortgage clause, attached thereto, in which the Federal Land Bank of Columbia, as mortgagee, or trustee, was named as the first beneficiary as its interest might appear. This was a completed contract, entered into by parties *sui juris,* sanctioned by our statute (C. S., 6437), and it was made for the benefit of the plaintiff, trustee under a first mortgage, and for the benefit of Joseph F. Ford, trustee under a second mortgage, as their interests might appear, and lastly for the benefit of the assured. In short, it was a contract of insurance for the benefit of all who were interested in the property. The fact that the policy may be avoided as to Greenwood, the assured, does not necessarily render the contract, made for the benefit of the mortgagees or trustees, unenforceable or void. Such was our holding when the cases were here before. 187 N. C., p. 102. Nor does it require an acceptance on the part of the mortgagees or trustees to complete the contract. It was made by competent parties for their benefit, as their interests might appear, and it was expressly agreed by the Atlas Company that "This insurance, as to the interest of the mortgagee, or trustee, only herein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property."

Numerous decisions have established the principle, in this jurisdiction at least, that ordinarily the beneficiaries of an indemnity contract may maintain an action on said contract, though not named therein, when it appears by express stipulation, or by fair and reasonable intendment, that their rights and interests were in the contemplation of the parties and were being provided for at the time of the making of the contract. *Dixon v. Horne,* 180 N. C., 585; *Supply Co. v. Lumber Co.,* 160 N. C., 428; *R. R. v. Accident Corp.,* 172 N. C., 636; *Withers v. Poe,* 167 N. C., 372; *Voorhees v. Porter,* 134 N. C., 591; *Gastonia v. Engineering Co.,* 131 N. C., 363.

It was held in *Gorrell v. Water Supply Co.,* 124 N. C., p. 333, that "One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach." This has been affirmed in numerous decisions and is the settled law here and elsewhere.

"That a party, for whose benefit a promise is made to another person, may maintain an action upon such promise against the party who has made it, is a proposition too well settled by this Court to require a citation of cases to support it." *Lewis, J.*, in *Dodge's Admr. v. Moss*, 82 Ky., 441.

It may be well to observe that the right of third parties to recover under contracts which contain no independent agreement in favor of the beneficiaries, or in which they are not mentioned, is subject to equities between the original parties. 7 A. & E. Enc., 109. Thus it has been held that where the agreement is void as between the original parties by reason of fraud, or want or failure of consideration, a third party may not maintain an action thereon. 9 Cyc., 386. But this principle has no application to the policies in suit, for here we have independent contracts of insurance for the separate benefit of the mortgagees, or trustees, engrafted upon the main contracts of insurance themselves. True, as said in a number of cases, these separate contracts are to be rendered certain and understood by reference to the provisions of the policies, but they are not for this reason to be invalidated by any act or neglect of the mortgagor, unknown to the mortgagee. *Fire Assn. v. Evansville Brewing Assn.*, 75 So. (Fla.), 196.

Whether the original parties to the contract could have canceled or rescinded the entire policy, including the standard mortgage clause, without the consent of the mortgagee or trustee mentioned therein, we need not now determine. The question is not before us. *Bassett v. Hughes*, 43 Wis., 319; *Gilbert v. Sanderson*, 56 Iowa, 349.

It is further contended by the Atlas Company that the plaintiff has waived any and all rights which it may have had under its policy by virtue of certain correspondence, had between counsel for defendants and counsel for plaintiff, leading up to and including the following letter of 9 September, 1921, written for and on behalf of the plaintiff bank:

"I have your letter of the 7th in this matter. It is not the intention of the bank to ask for or accept more than $1,750 insurance on account of this fire loss. It holds policy No. 206972 of the Globe and Rutgers Company, to which is attached the usual standard mortgage clause. Therefore it looks to this company to pay the amount of insurance covered by its policy. When this is paid, it certainly will not then have any further claim against any other insurance company growing out of this loss. If for any reason which it cannot now imagine the Globe and Rutgers Company escapes liability under its policy, then it will consider the question of whether or not it has additional elsewhere. It is not now considering that question, and does not think it is called

upon as yet to do so. It has a definite and specific contract with the Globe and Rutgers Company, and it expects this company, in good faith, to fulfill its obligation thereunder; if it does so, it will have no further claim against any other insurance company on account of this fire loss.

"With regard to entering the bank's appearance in the suit which you inform it has been brought in the Superior Court of Buncombe County, North Carolina, I beg to say that it is its purpose now to bring its own suit against the Globe and Rutgers Company in North Carolina if this fire loss is not paid reasonably prompt. Whether or not it will enter its appearance in the other suit has not been considered. I will probably enter a formal appearance, so as to protect the bank's interest and rights from any prejudice. As stated, however, it purposes to bring its own suit against the Globe and Rutgers Company if this company does not promptly adjust the fire loss covered by its policy to the extent of $1,750, with interest from the period it has unreasonably delayed settlement."

In *Woodley v. Tel. Co.*, 163 N. C., p. 289, it was said: "In order to a valid waiver, there must be an agreement founded on consideration, or there must be some element of estoppel." There is nothing in the correspondence between the parties in the present case to indicate any agreement on the part of the plaintiff not to claim under the Atlas policy, nor do we perceive any element of estoppel disclosed in the letters set out on the record. It is evident from all the correspondence that the prorating provisions in the standard mortgage clauses attached to the policies in suit were not uppermost in the minds of the correspondents; at least, such is not apparent from any of the letters written by counsel for plaintiff. Suits were instituted on both policies, and it was held by us, when the cases were here before, that the prorating provisions contained in the two mortgage clauses were valid. It is universally held that a waiver is a voluntary relinquishment of some known right. *Growers Exchange v. Bobbitt, ante,* p. 337.

The Globe and Rutgers Fire Insurance Company of New York (hereafter called the Globe Company) not only joins with its codefendant in saying that ratification by the mortgagees or trustees of the Atlas policy was necessary in order to validate the insurance as to them, as their interests might appear, but it also says that when the Federal Land Bank of Columbia did undertake to ratify said policy it thereby forfeited all of its rights under the Globe policy (which is similar in terms to the Atlas policy), because this act on its part was an offense against the stipulation in said policy prohibiting the taking out of additional insurance on the property without written consent of the

Globe Company. The argument of the two defendants, therefore, when reduced to a nut-shell, is this:

Atlas Company: "My policy is void as to Greenwood and not valid as to the mortgagees or trustees, because not ratified by them before the property was destroyed by fire."

Globe Company: "My policy is void as to Burlison and also as to the mortgagee or trustee, because additional insurance has been taken out on said property and ratified by the mortgagee or trustee named in my policy."

To accept these positions would leave the defendants with their premiums and the Federal Land Bank of Columbia, which has done nothing to violate the terms of the contract, with no insurance at all. This would hardly meet the approval of the business public or the market place, and it is thought that it should be rejected in the courtroom. We are of opinion that both positions must be resolved against the defendants and in favor of the validity of the standard mortgage clause attached to each policy, so far as the rights of the plaintiff are concerned. This is all we are required to say on the present appeal. The chief circumstance, no doubt, which has led the parties to opposite conclusions as to their rights, arises out of, and probably is produced by, momentarily losing sight of the defendants' contractual obligations, as set out in the standard mortgage clauses attached to the policies in suit, while thinking of the derelictions of the assured named in each of the policies of insurance. But it must be remembered that the insurance, as to the interest of the mortgagee or trustee, is not to be invalidated by any act or neglect of the mortgagor or owner. The provisions which work a forfeiture as to the interest of the mortgagor or owner are embodied in the policy proper, but they are not included in the standard mortgage clause; and we have held that this clause operates as a separate and distinct contract of insurance of the mortgagee's interest, to the extent at least of not being invalidated by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee. *Bank v. Ins. Co.,* 187 N. C., p. 102.

Appellants take the further position that in no event is the plaintiff entitled to recover more than $1,750, the amount of the first policy; and the Globe Company contends that this sum should be prorated between it and the Atlas Company in proportion to the amount of insurance issued by each company. It follows from what is said above that this position must be resolved against the defendants.

After a very careful and painstaking examination of the record and all the briefs filed in the case, we are unable to discover any prejudicial error which would entitle the defendants, or either of them, to a reversal or a new trial. The verdict and judgment must be upheld.

No error.

SARAH E. CHRISTOPHER ET AL. v. J. E. WILSON.

(Filed 19 December, 1924.)

1. Estates—Contingent Remainders—Wills—Devise.

A devise of an estate to the testator's grandchildren, the children of a named child, "and should either of my aforesaid grandchildren die without bodily heirs or before the age of twenty-one, then its or their interest to revert to the surviving ones or their bodily heirs," but should the aforesaid grandchildren all die without bodily heirs, then the property shall revert equally to the testator's children, etc.: *Held*, the devise is affected with two sets of contingencies, the first affecting the interest of the grandchildren, the first takers, *inter sese*, and the other, the primary estate as between the grandchildren and the testator's children, the word "or," in this respect, being construed as "and."

2. Same.

Held, under the facts of this case, that when the estate is vested under the terms of the devise in the grandchildren, the first takers, *inter sese*, it is subject to the further contingency, the death of all of the grandchildren without bodily heirs, having reached the age of twenty-one.

3. Same—Substitution of Beneficiaries—Deeds and Conveyances.

Where the grandchildren, or the child of such as may be dead, etc., take an estate from the testator upon contingency that the grandchildren die without leaving bodily heirs, etc., with limitation over to the testator's children: *Held*, the children of the testator's grandchildren who may take thereunder acquire the estate, not as heirs of their parents or as a limitation upon the present estate, but by way of substitution directly under the will; and until the death of all of the grandchildren, or at least one of them leaving issue, it cannot be known or ascertained who are the owners under the ultimate devise, and until then an indefeasible fee-simple title of the entire interest cannot be conveyed. *Hobgood v. Hobgood*, 169 N. C., 485, cited and distinguished.

CONTROVERSY without action, submitted and determined before *Shaw, J.*, at October Term, 1924, of MECKLENBURG.

From the case agreed it appears that defendant has contracted to buy from plaintiffs, at a stipulated price, a certain lot in the city of Charlotte, N. C., fully set out and described, on condition that plaintiffs can make a good title.

The facts pertinent to the validity of the title are as follows:

1. That in 1885 Elizabeth M. Huneycutt, of Mecklenburg County, died, owning said lot in fee and making disposition of same by her last will and testament, as follows:

2. "Second. I give and devise to my beloved grandchildren (the children of my deceased daughter, Mary A. C. Rigler), viz., Sarah Elizabeth Rigler, Minnie Louisa Rigler, and Charles Edward Rigler, the house and lot fronting 45 feet on 'C' Street, adjoining the lot of John T.

Schenck and running back to the line of James F. Moody; and should either of my aforesaid grandchildren die without bodily heirs or before the age of twenty-one years, then its or their interest shall revert to the surviving ones or their bodily heirs; but should the aforesaid grandchildren all die without bodily heirs, then this property shall revert and belong equally to my children and their lawful heirs."

3. That the plaintiffs, Minnie Louisa Osborne, Sarah Elizabeth Christopher, and Charles Edward Rigler, are the original devisees named in item 2 of the will of said Elizabeth M. Huneycutt; that all of said plaintiffs are over the age of twenty-one years; that Sarah Elizabeth Christopher is married and has five children, all living; that Minnie Louisa Osborne is married and has two children living; that Charles Edward Rigler is unmarried and without issue.

4. That the said Elizabeth M. Huneycutt left surviving her the following named children, namely: R. F. Huneycutt, A. J. Huneycutt, Susan Garibaldi, Mary Rigler, Sarah Klontz, Margaret Rigler, and Tobithia Oxenham.

5. That Margaret Rigler (widow) and Tobithia Oxenham were the only ultimate devisees living at the time of the execution of the deed hereinafter referred to, all other ultimate devisees having died several years prior to said date; that A. J. Huneycutt is dead, leaving one son, Joseph F. Huneycutt, who was over the age of twenty-one years at the date of the execution of the deed hereinbefore referred to, as his sole heir at law; that R. F. Huneycutt is dead, leaving surviving him seven children, namely, J. E. Huneycutt, Charles F. Huneycutt, Minnie Ray, Hattie P. Huneycutt, Maggie M. Dwyer, Sue F. Brooks, and Claude E. Wiggins, all over the age of twenty-one years, as his sole heirs at law; that Sarah Klontz is dead, leaving surviving her four children, namely, Nellie Klontz Ledford, Ernest Klontz, Lizzie Klontz, and Bryan Klontz, all over the age of twenty-one; that Mary Rigler is dead, leaving surviving her the plaintiffs in this action as her sole heirs at law; that Susan Garibaldi is dead, and left no children or representative of a child or children.

6. That on 1 September, 1923, Margaret Rigler (widow), Tobithia Oxenham (and husband, W. H. Oxenham), Joseph H. Huneycutt (and wife, Loma Huneycutt), Nellie Klontz Ledford (and husband, T. P. Ledford), Lizzie Klontz (single), Ernest Klontz (single), Bryan Klontz (single), J. E. Huneycutt (and wife, Annie V. Huneycutt), Charles F. Huneycutt (and wife, Mollie Huneycutt), Minnie Ray (widow), Hattie P. Huneycutt (single), Maggie M. Dwyer (and husband, John T. Dwyer), Sue F. Brooks (and husband, Edward A. Brooks), and Claude E. Wiggins (and husband, Joe W. Wiggins), being all of the remaining ultimate devisees and the sole heirs at law

of such ones as are deceased, named in item 2 of the will of the said Elizabeth M. Huneycutt, for proper and legal consideration, executed and delivered to the plaintiffs, Sarah E. Christopher, Minnie L. Osborne, and Charles E. Rigler, a certain paper-writing, by the terms of which the said grantors did grant, bargain, sell and convey unto the plaintiffs, their heirs and assigns, all their right, title and interest which they now or may hereafter have in and to the lot of land described in paragraph 1, said deed being recorded in the office of the register of deeds for Mecklenburg County, in Book 526, page 300.

7. That Margaret Rigler, one of the living ultimate devisees, is now sixty years of age, and Tobithia Oxenham, the other living devisee, is fifty-six years of age.

8. That the grantors in the deed referred to in paragraph 7 constitute all of the ultimate devisees and the sole heirs at law of such ones as are deceased, mentioned in item 2 of the will of the said Elizabeth M. Huneycutt, and also the wives and husbands of such ones as are married.

Upon these facts, the court being of opinion that the title offered, being the fee-simple deed of the original devisees under the second item of the will, and as described in fourth statement of facts as agreed, there was judgment for plaintiffs for the purchase price; and defendant, having duly excepted, appealed.

J. L. DeLaney for plaintiffs.
J. Laurence Jones for defendant.

HOKE, C. J. The validity of the title offered depends largely on the correct interpretation of clause 2 of the will of Elizabeth Huneycutt, former owner, in terms as follows:

"I give and devise to my beloved grandchildren (the children of my deceased daughter, Mary A. C. Rigler), viz., Sarah Elizabeth Rigler, Minnie Louisa Rigler, and Charles Edward Rigler, the house and lot fronting 45 feet on 'C' Street, adjoining the lot of John T. Schenck and running back to the line of James F. Moody; and should either of my aforesaid grandchildren die without bodily heirs or before the age of twenty-one years, then its or their interest shall revert to the surviving ones or their bodily heirs; but should the aforesaid grandchildren all die without bodily heirs, then this property shall revert and belong equally to my children and their lawful heirs."

Considering the clause in connection with the pertinent and explanatory facts, it appears that the devise contained therein is subject to two sets of contingencies, the first affecting the estate and interest of the primary takers, the grandchildren therein named *inter sese,* and the other, the primary estate as between these grandchildren and testator's

children, the ultimate takers of the estate on contingency. In regard to the contingencies first specified carrying the estate of either grandchild to the others, if he should die without bodily heirs or before the age of 21 years, it has been held with us, as the general rule, and in cases where the question was fully considered, that the word "or" shall be construed to read "and" and the estate would be relieved of the defeasance on the happening of either contingency. *Pilley v. Sullivan,* 182 N. C., 492; *Williams v. Hicks,* 182 N. C., p. 112; *Bell v. Keesler,* 175 N. C., p. 525; *Ham v. Ham,* 168 N. C., p. 486. This being the approved principle and the facts showing that all of the grandchildren have arrived at the age of 21, the first contingencies, those affecting the estate of the primary takers *inter sese* are thereby removed and the estate vests in these grandchildren and their heirs—but subject to the second contingency, that if all of these grandchildren die without bodily heirs then the property shall revert to the testatrix's children, etc., "and their lawful heirs." Under such interpretation the estate held by the grandchildren, the first takers, constitutes a defeasible fee and under numerous decisions dealing with the question on the happening of the contingency, the death of all them without bodily heirs, the estate would pass to the ultimate takers, not as a limitation of the present estate, but by way of substitution and under which the ultimate takers hold directly from the devisor. And from this it follows, in our opinion, that plaintiffs are not now in a position to make a good title to the property for, on the facts presented, until the death of these first takers, or at least one of them leaving issue, it cannot be known or ascertained who are the owners under the ultimate devise, or whose deed would be sufficient to assure the title. *Hutchinson v. Lucas,* 181 N. C., p. 53; *O'Neal v. Borders,* 170 N. C., p. 483; *Burden v. Lipsitz,* 166 N. C., p. 523; *Sessoms v. Sessoms,* 144 N. C., p. 121, 125; *Whitfield v. Garris,* 134 N. C., p. 24.

The case of *Baugham v. Trust Co.,* 181 N. C., p. 406, is apparently in conflict with this position, but the cases cited in support of that decision are as to estates in remainder, which operate as limitations on the first estate and involving chiefly the question of when the ulterior limitations would vest and do not seem applicable to a devise such as this, where one line or stock of owners is substituted for another, where the claimants, the ultimate takers are not known and cannot be presently ascertained, and when, as a rule, they are required to fill the description at the time their estate vests.

Recognizing that the true construction of the devise would affect the estate of the first takers with a contingency that still prevails, the plaintiffs contend that the title is fully assured by the deeds of the two surviving children of the devisor and the lawful heirs of such as have

died, under the principle approved in the case of *Hobgood v. Hobgood,* 169 N. C., p. 485. In the *Hobgood case* the ultimate takers were four nephews living and designated by name and it was held that they having conveyed all their interest and title to the primary holders of the defeasible fee, such holders were in a position to give a good title, the deed of the ultimate owners being effective to conclude their heirs whoever they might be. And the principle has been affirmed and approved in *Malloy v. Acheson,* 179 N. C., p. 90; *Williams v. Biggs,* 176 N. C., p. 48; *Kornegay v. Miller,* 137 N. C., p. 659, and other cases. But here the ultimate takers are the children and the heirs of such as have died since the death of the devisor, these heirs are not known and cannot be now ascertained for they must fill the description of the devise and show themselves heirs of the children of testatrix at the time the estate would devolve upon them, and this cannot be shown until the termination of the preceding estate.

Speaking to the question in *Hobgood's case, supra,* the Court said: "In *Kornegay's case,* as in this, the ultimate devisees were ascertained and designated by name, and they having the contingent estate, it was held that they could convey it, and their descendants or heirs, having to claim through them, were concluded by the deed of the ancestor. *Kornegay v. Miller, supra; Bodenhamer v. Welsh,* 89 N. C., p. 78. But in *Burden's case* the ultimate takers, designated in the devise as 'the heirs of the devisor,' were not known nor could they be ascertained till the preceding estate had terminated."

True it is stated in the case argued that the two surviving children had made a deed conveying all their interest to the primary takers, the holders of the defeasible fee, but these are only two of the children, the others having died leaving lineal heirs—and these heirs also have made a deed of their interest, but while they are heirs now of the deceased children of the devisor, they may not be such when the preceding estate falls in—and the case, therefore, comes directly within the principle of *Hutchinson v. Lucas, supra; Borden v. Lipsitz, supra,* and that line of decisions and under which plaintiffs are at present prevented from conveying a valid title.

In *Barnitz's Lessee v. Casey,* 11 U. S. (7 Cranch's), pp. 456, 469, *Associate Justice Story* discussing the transmissibility of an executory devise not dissimilar to this and how and when the ultimate takers may be ascertained, said:

"In the next place it will be necessary to consider what is the nature of an executory devise as to its transmissibility to heirs, where the devisee dies before the happening of the contingency.

And it seems very clear that at common law, contingent remainders and executory devises are transmissible to the heirs of the party

to whom they are limited if he chance to die before the contingency happens. Pollexfen 54. 1 Rep., 99. Cas. Tempt. Talb., 117. In such case, however, it does not vest absolutely in the first heir so as upon his death to carry it to his heir at law, who is not heir at law of the first devisee, but it devolves from heir to heir, and vests absolutely in him who only can make himself heir to the first devisee at the time when the contingency happens, and the executory devise falls into possession."

For the reasons stated, we are of opinion that the judgment of the lower court should be reversed and it is so ordered.

Reversed.

STATE AND CITY BANK AND TRUST COMPANY, COEXECUTOR OF THE ESTATE OF WILLIAM M. HABLISTON v. R. A. DOUGHTON, COMMISSIONER OF REVENUE.

(Filed 19 December, 1924.)

Taxation—Inheritance Tax—Statutes—Trusts.

Where the nonresident owner of shares of stock in a North Carolina corporation incorporates them in a trust terminable by him at his own will at any time, and retains the control and enjoyment of the profits thereof with right to vote the same by proxy whenever he may so elect, and dies without revocation thereof, the same is subject to the inheritance or transfer tax provided by chapter 34, Public Laws 1921, under the provisions of a valid statute.

APPEAL by plaintiff from *Horton, J.*, at September Term, 1924, of WAKE.

Civil action to recover the amount of an inheritance tax, or transfer tax, paid by plaintiff, coexecutor of the estate of W. M. Habliston, deceased, and sought to be regained by this suit.

From a judgment denying recovery, the plaintiff appeals.

John H. Boushall for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendant.

STACY, J. The State and City Bank and Trust Company, of Richmond, Va., coexecutor under the will of W. M. Habliston, deceased, brings this suit to recover of the defendant, Commissioner of Revenue of North Carolina, the sum of $2,331.98, being the amount exacted by the defendant and paid by plaintiff, by way of an inheritance tax, or a transfer tax, on 2,937 shares of stock in the Roanoke Rapids Power Company, a corporation chartered under the laws of North Carolina,

with its principal place of business located in this State. The statute under which the tax in question was imposed, ch. 34, Public Laws 1921, provides that an inheritance tax shall be levied and collected upon the succession or devolution of all real and personal property of every kind and description, and "such property or any part thereof or interest therein within this State," which shall pass by will or by operation of law from a testator to his legatees or devisees, or from an intestate to his heirs or distributees, and section 6 of said act, in part, provides as follows: "From and after the passage of this act all real and personal property of whatever kind and nature which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, whether the person or persons dying seized thereof be domiciled within or out of the State (or if the decedent was not a resident of this State at the time of his death, such property or any part thereof within this State), or any interest therein or income therefrom which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, bargainor, donor, or assignor, or intended to take effect in possession or enjoyment after such death, to any person or persons or to bodies corporate or politic, in trust or otherwise, or by reason whereof any person or body corporate or politic shall become beneficially entitled in possession or expectancy to any property or the income thereof, shall be and hereby is made subject to a tax for the benefit of the State, as follows, that is to say; (*Rate and amount of tax not in dispute*):

"The words 'such property or any part thereof or interest therein within this State' shall include in its meaning bonds and shares of stock in any incorporated company incorporated in this State, regardless of whether or not any such incorporated company shall have any or all of its capital stock invested in property outside of this State and doing business outside of this State, and the tax on the transfer of any bonds or shares of stock in any such incorporated company owning property and doing business outside of this State shall be paid before waivers are issued for the transfer of such bonds or shares of stock as hereinabove provided for."

We had occasion to consider the nature and character of a similar tax in the case of *Trust Co. v. Doughton,* 187 N. C., 263. It would only be a work of supererogation to repeat here what has been so recently said there, and we content ourselves by referring to that case for a discussion of the principles involved. It clearly appears, from the language of the statute, that the Legislature intended to levy an inheritance tax, or transfer tax, on the succession or devolution of stock in domestic corporations, whether held by a resident or nonresident at the time of his death. The power of the State to impose

such a tax is not questioned in the present action. The dispute arises over whether the case comes within the purview of the above provisions.

The essential facts upon which the instant case pivots and which were admitted on the hearing, are as follows:

1. W. M. Habliston, a resident of the state of Virginia, died on 9 March, 1922, leaving a last will and testament in which he appointed his wife and the Old Dominion Trust Company coexecutors. The Old Dominion Trust Company merged with another corporation and changed its name to the State and City Bank and Trust Company, which last named corporation is the proper successor to the Old Dominion Trust Company, as coexecutor of said will.

2. On 9 July, 1915, W. M. Habliston executed a trust agreement whereby he assigned, transferred and conveyed to the Union Trust Company of New York, among other securities, 2,937 shares of stock in the Roanoke Rapids Power Company, a North Carolina corporation; and in which said trust agreement W. M. Habliston reserved for himself the power to revoke, alter or otherwise modify or terminate the same at any time at his option.

3. It was further provided in said trust agreement that the trustee should not sell or otherwise dispose of any of the stock in question without the grantor's written consent, and he specifically reserved to himself the right to vote such shares of stock at any and all meetings of the corporation. Section 2 of the original trust agreement is as follows:

"The trustee will, if requested so to do by the grantor, his representatives or assigns, execute all proxies necessary or proper to enable the grantor, his representatives or assigns, to vote in place of the trustee at any meeting of the stockholders of the companies issuing said shares of stock."

In section 3 the grantor promises to indemnify the trustee against all calls, assessments and other demands upon this stock.

4. On 6 February, 1918, W. M. Habliston executed an amendment to the original trust agreement incorporating in said amendment, among others, the following provision: "I also amend said indenture by providing that the trustee shall invest any money in its hand as such trustee in accordance with my written directions."

5. Other amendments were made to said trust agreement under authority reserved in the original deed, but the provisions of these amendments are not presently material. There was no revocation of the trust during the lifetime of the grantor.

6. The record fails to disclose what per cent of the grantor's estate was conveyed by said trust agreement, or in whose name the stock in the Roanoke Rapids Power Company appears on the books of the

corporation, but it is fairly permissible to conclude that the stock stands in the name of the trustee. These matters, however, are not controlling in the view we take of the trust agreement and amendments thereto.

Plaintiff contends that the 2,937 shares of stock in the Roanoke Rapids Power Company constitute no part of the estate of W. M. Habliston, as said stock had been assigned, transferred and conveyed to the Union Trust Company of New York, trustee, in 1915, nearly seven years prior to the grantor's death, and that, therefore, the tax exacted by the defendant is illegal and should be refunded. For this position, plaintiff relies upon the following decisions: *In re Bowers' Estate,* 186 N. Y. Supp., 912; *In re Carnegie's Estate,* 186 N. Y., Supp., 502; *In re Grogan's Estate,* 219 Pac. (Cal.), 87; *In re Miller's Estate,* 140 N. E. (N. Y.), 701; *In re Schmidlapp's Estate,* 140 N. E. (N. Y.), 697; *In re Dolan's Estate,* 124 Atl. (Pa.), 176.

The defendant, on the other hand, takes the position that the right of the beneficiary, under the trust deed, never became absolute until the death of the grantor, because he at no time, prior to his death, parted with his control and use of the property. We think the defendant has correctly interpreted the trust agreement, and that the transfer, in the instant case, comes within the provisions of sec. 6 above set out, subjecting it to a tax for the benefit of the State.

Under the provision that any transfer by deed, grant, sale, or gift, "made in contemplation of the death of the grantor, bargainor, donor, or assignor, or intended to take effect in possession or enjoyment after such death," shall be subject to a tax for the benefit of the State, it is necessary, in order to escape the tax, to show such a conveyance as parts with the possession, title and enjoyment in the grantor's lifetime. *Reish v. Comrs.,* 106 Pa., 521. And when a transfer is made or intended to take effect in possession or enjoyment after death, and the grantor retains a grasp of the entire estate so long as he lives, as is the case here, it cannot be said absolute possession or enjoyment in the beneficiary takes effect prior to death. Under such conditions, the State is entitled to collect a tax on the transfer. Such is the language of the statute.

In the present case, W. M. Habliston reserved such numerous and extensive powers over the properties, transferred by him, as to preclude a permissible or inferential intent on his part that they were to take effect in absolute possession or enjoyment before his death. The authorities cited by appellant are cases where such control had passed from the grantor, reserving only the power of revocation, which was never exercised. "The power of revocation in a deed is equivalent to the power of appointment; neither prevents the passing of title or the complete enjoyment of the thing granted." *In re Dolan's Estate, supra.*

Interpreting a similar conveyance in the case of *In re Bostwick,* 160 N. Y., 489, the New York Court of Appeals, speaking through *Gray, J.,* said:

"The reserved power to revoke would enable him (grantor), of course, to put an end to the trust; but that was not enough to affect the possession of the trustee, or the beneficial enjoyment of the object of the donor's bounty, while the trust was in force, and such a power carried with it no control over the property or its management. . . . Instead of an out and out gift, which would provide for the enjoyment by the beneficiary of the income of the property during her life and for the disposition of the trust fund thereafter, we find powers reserved to alter, or amend, the trust by notice of the trustee; to withdraw, or to exchange, any securities, and to control the acts of the trustee in selling, or disposing of, the securities, or with respect to investments. All these are *indicia,* rather, of an intention on the donor's part to retain a dominion over the properties transferred, and do not consist with an existing purpose to vest the absolute right to present and future enjoyment in the beneficiaries. He retained practical control of the trust property and left the question of its beneficial enjoyment and eventual possession open until his death."

By correct interpretation of the present trust agreement, with its several amendments, we are of opinion that the 2,937 shares of stock in the Roanoke Rapids Power Company should be held liable to a tax for the benefit of the State, under ch. 34, Public Laws, 1921. This accords with the judgment entered below, which will be upheld.

Affirmed.

PAGE TRUST COMPANY v. WACHOVIA BANK & TRUST COMPANY AND MERCHANTS NATIONAL BANK.

(Filed 19 December, 1924.)

1. Banks and Banking — Bills and Notes — Negotiable Instruments — Guarantor of Payment.

Where a bank sends a note of its customer to another bank for discount, in a letter stating that the note was perfectly good, and that it will see that the note is promptly taken care of at maturity, the bank thus discounting the note becomes a guarantor of payment, and has the right to charge the same against the account of the debtor bank when not so paid.

2. Same—Purchaser for Value.

And where the creditor bank has been bought by another and its assets accordingly transferred, such assets pass to the transferee with the note in question as security therefor, and the purchasing bank acquires the right that the selling bank had therein.

3. Same—Debtor and Creditor.

Where a bank is a depositor of another bank and has the latter to discount a note of its customer under its guaranty of payment, upon the nonpayment of the note at maturity the relation of debtor and creditor is established, and the bank discounting the note may charge it to the account of the debtor bank.

4. Same—Notice.

A cashier of a bank has implied authority in the ordinary course of his employment to guarantee the payment, in behalf of the bank, of its customer's note he has had another bank to discount for it; and where the debtor bank has been taken over by another bank, the latter acquires subject to this liability as shown on the books of the selling bank.

APPEAL by plaintiff from *Sinclair, J.*, at May Term, 1924, of RICHMOND.

On 10 March, 1923, the Merchants National Bank at Raleigh, N. C., received, in due course of business, a letter as follows:

THE FIRST NATIONAL BANK
Hamlet, N. C.

10 March, 1923.

MR. T. F. MAGUIRE, Cashier,
Merchants National Bank, Raleigh, N. C.
Dear Sir:

We enclose two short time renewal notes in the sum of $4,500, which we will thank you to place to our credit, less the discount and stamps and advise us. We consider these notes perfectly good, and will see that they are promptly taken care of at maturity.

Yours very truly,
NOAH H. JENRETTE, Cashier.

One of the notes enclosed was for $2,000, and the other for $2,500. The former, having been paid, is not involved in this action. The latter note was dated 3 March, 1923, due 60 days after date, and was payable "to the order of myself, at the First National Bank, Hamlet, N. C." The note was signed "W. H. Sanders" and endorsed "W. H. Sanders" and "Noah H. Jenrette." This note was the personal obligation of W. H. Sanders. He received credit for the proceeds of the note at the First National Bank.

Pursuant to request contained in said letter, the Merchants National Bank, discounted both said notes, crediting the account of the First National Bank at Hamlet, N. C., with the proceeds. A credit memorandum was at once sent to and received by the First National Bank at Hamlet, showing that the notes had been discounted and the proceeds placed to its credit on the books of the Merchants National Bank.

Prior to the date of this letter, there had been many similar transactions between the Merchants National Bank, at Raleigh, and the First National Bank, at Hamlet, extending over three years. The First National Bank carried an account with the Merchants National Bank. Noah H. Jenrette had been cashier, in active charge, of the First National Bank for six or seven years, since its organization. He was also a director. There is no evidence that he had any personal interest in the note, or in its proceeds. He was an endorser for the accommodation of the maker. The president of the bank had not been active in its management. It had been the custom of the First National Bank to send notes, which were not endorsed by it, to the Merchants National Bank, for discount for its account. Notes thus sent were accompanied by letters, containing the words, "We consider these notes perfectly good, and will see that they are promptly taken care of at maturity." The proceeds of notes thus discounted were placed to the credit of the First National Bank and the notes paid at maturity. There had been no direct dealings between the Merchants National Bank and the makers of these notes, relative to renewals or payments.

On 2d or 3d March, 1923, a contract was entered into between the Merchants National Bank and the Wachovia Bank and Trust Company, by which the latter bank took over the assets of the former, and continued its business. The deposit account of the First National Bank at Hamlet was continued with the Wachovia Bank and Trust Company. Shortly before the maturity of the Sanders note for $2,500, the Wachovia Bank and Trust Company sent the note to the First National for collection. In reply, it received letter as follows:

THE FIRST NATIONAL BANK
Hamlet, N. C.

19 May, 1923.

MR. T. F. MAGUIRE, Cashier,
Wachovia Bank and Trust Company, Raleigh, N. C.
Dear Sir:

We return herewith the W. H. Sanders note of $2,500, which was sent us in your collection letter of April 30th. Mr. Sanders states that he is not in a position to pay this note right now and we are not in a position to pay it for him. In the event that this note has been charged to our account, we have to ask that you kindly credit the same back and advise us. We enclose the renewal which you can handle if you wish.

Yours very truly,
NOAH H. JENRETTE, Cashier.

The reply to this letter is as follows:

WACHOVIA BANK AND TRUST COMPANY
Raleigh, N. C.

22 May, 1923.

MR. N. H. JENRETTE, Cashier,
First National Bank, Hamlet, N. C.
Dear Sir:

Your letter of 19 May returning again the W. H. Sanders paper of $2,500, also his note for like amount which matured on 2 May, received.

We are returning herewith the Sanders papers and are making no comments, as we presume you understand clearly that the paper is unacceptable to us in its present shape and therefore we cannot renew. We also return his note of $2,500 which matured on 2 May, and have marked this from our collection records as we find this was charged to your account and represented by our charge of $2,502.90 of 9 May.

With best wishes,

Yours very truly,
T. F. MAGUIRE, Cashier.

There was no further correspondence between the First National Bank and either the Wachovia Bank and Trust Company or the Merchants National Bank with respect to this note. In July, 1923, plaintiff, Page Trust Company, became the owner of the First National Bank of Hamlet, and thereafter made demand upon the Wachovia Bank and Trust Company for the balance due on deposit of First National Bank. The balance due the First National Bank, according to the contention of the Wachovia Bank and Trust Company was paid. The plaintiff, the Page Trust Company, contended that the sum should include the $2,502.90 charged to the account in payment of the Sanders note. Summons was issued in this action on 15 January, 1924.

The issues submitted to the jury were as follows:

1. Was the payment of the W. H. Sanders note of $2,500 guaranteed by the First National Bank of Hamlet?

2. In what amount, if any, are defendants indebted to plaintiff?

The court instructed the jury as follows: "Gentlemen of the jury, if you find the facts to be as testified by all the witnesses in this case and as shown by the record evidence introduced, the court directs you to answer the 1st issue 'Yes' and the 2d issue 'Nothing.' With your permission, I will answer the issues for you." The jury having indicated its assent, the court answered the issues accordingly.

Plaintiff excepted to this instruction and assigns same as error. From the judgment that plaintiff take nothing by the action and that defendants recover their costs, plaintiff appealed.

Bynum & Henry for plaintiff.
J. M. Broughton for Wachovia Bank and Trust Company.
Albert L. Cox for Merchants National Bank.

CONNOR, J. The Sanders note was not paid, at maturity, by the maker or endorsers. The holder of the note, the Wachovia Bank and Trust Company, with which the First National Bank of Hamlet, N. C., had a deposit account, charged the note to the said account on 9 May, 1923. The deposit account was thus reduced by the amount so charged, to wit, $2,502.90. This charge was made upon the contention by the Wachovia Bank and Trust Company that at the time the note was discounted by its assignor, the Merchants National Bank, its prompt payment, at maturity, was guaranteed by the First National Bank, of Hamlet, N. C., at whose request and for whose credit the note was discounted. If the First National Bank of Hamlet, N. C., was liable as guarantor of the note to the Merchants National Bank, the Wachovia Bank and Trust Company, as assignee of the note, had the right to make the charge and to deduct the amount due on the note from the amount on deposit with it to the credit of the First National Bank of Hamlet, N. C. Upon default of the maker or endorser to pay the note promptly at maturity, the guarantor became liable to the holder, and the relation of debtor and creditor was at once established between the guarantor and the holder of the note.

"A bank has the right to apply the debt due by it for deposits to any indebtedness by the depositor, in the same right, to the bank, provided such indebtedness to the bank has matured." *Hodgin v. Bank*, 124 N. C., 540; *Moore v. Trust Co.*, 178 N. C., 118.

The letter dated 10 March, 1923, addressed to the cashier of the Merchants National Bank, at Raleigh, N. C., and signed by the cashier of the First National Bank, of Hamlet, N. C., is sufficient in form, as a guaranty of the prompt payment of the note enclosed with the letter and discounted in accordance with the request contained therein. *Ashford v. Robinson*, 30 N. C., 114; *Birdsall v. Heacock*, 30 Ohio St., 177; 30 Am. Rep., 572.

The guaranty of the payment of the note, at maturity, made to the Merchants National Bank, upon the transfer and assignment of the note to the Wachovia Bank and Trust Company, passed to the transferee or assignee, as security for the note, and therefore the Wachovia Bank and Trust Company had all the rights arising out of said guaranty

that the Merchants National Bank had. 12 R. C. L. 1056 n 15; *Craig v. Parkis,* 40 N. Y., 181; 100 Am. Dec., 469; *Tideoute Savings Bank v. Libbey,* 101 Wis., 193, 70 A. S. R., 907. "A guaranty is assignable with the obligation secured thereby, and goes with the principal obligation. It is enforceable by the same person who can enforce the principal obligation." The First National Bank of Hamlet was a depositor and therefore a creditor of the Wachovia Bank and Trust Company on 9 May, 1923. Was it also a debtor by reason of the guaranty contained in the letter of 10 March, 1923, of the payment of the Sanders note, the maker and endorsers of the said note having failed to pay the same, promptly?

This question must be answered in the affirmative, if the cashier of the First National Bank of Hamlet, N. C., had authority to make the contract of guaranty and bind the bank thereby. The letter was signed by Noah H. Jenrette, as cashier; it contained the request that the note enclosed be discounted and that the proceeds be placed to the credit of the bank; the proceeds were placed to the credit of the bank, and the bank so notified. The transaction was similar to other transactions between the said banks, extending over a period of three years or more. There is no evidence that the cashier had any personal interest in the note or in the proceeds of the note. There is affirmative evidence that the note was the personal obligation of the maker, and that he received credit for the note at the First National Bank of Hamlet, N. C. He was a customer of said bank. The First National Bank of Hamlet, N. C., was the sole beneficiary of the transaction with the Merchants National Bank at Raleigh. It is immaterial, so far as the Merchants National Bank is concerned, whether the Sanders note was the property of the First National Bank or whether it was sold by the bank as an accommodation for its customer.

If the note was first discounted by the First National Bank of Hamlet, N. C., for the maker, and its proceeds placed to his credit, the note thus becoming the property of the bank, the cashier had authority to rediscount the note to the Merchants National Bank at Raleigh, N. C., in the usual course of business, and to guarantee the payment of the note by the bank, upon default in payment, at maturity, by the maker or endorsers.

If the note was sold by the bank, for its customer, to the Merchants National Bank, and thus was never the property of the bank, the proceeds of the sale being placed to the credit of the bank, the cashier had authority to guarantee the payment of the note by the bank, whose officer he was and for whom he was acting, upon default in payment, at maturity, by the maker or endorsers; 3 R. C. L., 453; *Sturges v.*

Bank, 78 Am. Dec., 296; *Hutchins v. Bank,* 128 N. C., 72; *Bank v. Oil Co.,* 157 N. C., 302; *Sherrill v. Trust Co.,* 176 N. C., 591.

There is no evidence that the cashier of the First National Bank was acting in his own interest in this transaction. On the contrary all the evidence shows that it was a bona fide transaction, in the usual course of business, of which the bank, for whom the cashier was acting, was the beneficiary. *Bank v. Grady,* 184 N. C., 158, is not applicable to the facts in this case. The transaction had been closed on 9 May, 1923, and the First National Bank of Hamlet had not controverted the right of the Wachovia Bank and Trust Company as assignee of the Merchants National Bank to charge the Sanders note to its account on said date. The plaintiff herein, did not take over the business of the First National Bank of Hamlet, N. C., until July, 1923. At that time the Sanders note was in possession of the First National Bank of Hamlet, N. C., and the deposit account with the Wachovia Bank and Trust Company did not include the sum of $2,502.90. The Wachovia Bank and Trust Company cannot be held liable to plaintiff because of errors, if any, in the books of the First National Bank of Hamlet, N. C.

Plaintiff's exception to the instruction of his Honor to the jury is not sustained. There is

No error.

HELENE FILLYAW ET ALS. CHILDREN AND HEIRS AT LAW OF HENRIETTA FILLYAW, DECEASED, v. ROBERT VAN LEAR.

(Filed 19 December, 1924.)

Estates—Rule in Shelley's Case—Deeds and Conveyances—Remainders.

An estate granted by deed with habendum to the grantee for "her own use and benefit during her life and after her death to the lawful heirs of her body who may be living at her death, and to the issue of such child or children who may predecease her, to represent his or her ancestor," etc.: *Held,* though the estate is to the first taker for life with limitation over to the lawful heirs of her body, the words then following show the intent of the grantor not to use the words "heirs of the body" as heirs general in the technical sense of the rule in *Shelley's case,* but to designate her children as the particular ones who shall take in remainder, and this rule having no application, the estate first granted is a life estate only.

CIVIL ACTION to remove a cloud from title to a piece of land claimed by plaintiffs, heard before *Grady, J.,* at September Term, 1924, of NEW HANOVER.

Defendant denies making any wrongful claim and asserts that he is the true owner of one undivided third of the property.

By consent the cause is submitted to the court for decision in the following facts as determinative of the question presented:

"1. That on 29 November, 1876, Henry Schulken executed a deed to Matilda E. Van Lear, which was registered in Book NNN, at page 132, on 14 June, 1877, conveying the property and containing the provision hereinafter quoted, to wit:

" 'Beginning at a point in the northern line of Red Cross Street 110 feet eastwardly from the eastern line of Fourth Street; running thence eastwardly along said line of Red Cross Street 55 feet; thence northwardly and parallel with Fourth Street 66 feet; thence westwardly and parallel with Red Cross Street 55 feet; thence southwardly and parallel with Fourth Street 66 feet to the beginning; being a part of Lot 5 in Book 235 of the city of Wilmington, and also being part of a lot conveyed Henry Schulken by C. W. Oldham—Book BV, p. 32.

" 'To have and to hold the same for her own use and behoof during her life and after her death to the lawful heirs of her body who may be living at her death and to the issue of such child or children who may die before the said Matilda, so that the issue of such child or children shall represent his or her ancestor and take such share as such ancestor would have taken if he or she had been living at the time of the death of the said Matilda, and to their heirs and assigns forever.'

"That on 21 February, 1898, Matilda E. Van Lear and her husband, E. Van Lear, conveyed for value to Henrietta Fillyaw, wife of O. M. Fillyaw, the property above described by deed recorded in Book 21, page 48, of the records of New Hanover County, by the usual fee-simple deed, copy of which is hereto attached, and attached to the deed the following memorandum:

" 'We, E. Van Lear and wife, Matilda E., agree and promise that our children, Robert E. Van Lear and Louise Van Lear, who are now minors, shall and will execute deeds of release and quitclaim to Henrietta Fillyaw for the lot of land on Red Cross Street which we have this day conveyed to her, when they and as soon as they attain their majorities respectively.

" 'This 21 February, 1898.

E. VAN LEAR,
MATILDA E. VAN LEAR.'

"2. The last above memorandum is signed in the handwriting of E. Van Lear and Matilda Van Lear, but is not acknowledged or registered as a part of said deed and its competency as evidence and its legal effect is submitted to the court, the defendant contending that it is incompetent and has no effect upon the deed. The said deed last above referred to was made in exchange for another lot of land conveyed by

deed about the same time in fee simple by Henrietta Fillyaw and husband to Matilda E. Van Lear.

"3. That Matilda E. Van Lear and her husband, E. Van Lear, are dead and left surviving them the following children:

(a) Mrs. Lillie Cherry, wife of Geo. W. Cherry.

(b) Robert Van Lear.

(c) Mrs. Louise Lipscomb, wife of W. M. Lipscomb.

That Matilda Van Lear died August ....., 1920.

"4. That on 21 February, 1898, Lillie Cherry and husband, George W. Cherry, executed a deed to Henrietta Fillyaw for their interest in said property; and on the 28 August, 1905, Louise Van Lear, now Louise Lipscombe, executed a deed to Mrs. Henrietta Fillyaw for her interest in said property; and Robert E. Van Lear has not executed a deed for his interest therein, and now claims a one-third undivided interest in said property.

"5. That Henrietta Fillyaw, grantee of Matilda E. Van Lear, and husband, under the deed of the 21 February, 1898, is dead leaving the following children and heirs at law, who are now living:

Helene Fillyaw, Wilmington, N. C.; Bessie Herring, wife of Edward I. Herring, Wilmington, N. C., which said heirs at law claim that Matilda E. Van Lear took, under the deed from Henry Schulken, a fee simple in said property, which fee simple conveyed to their mother, Henrietta Fillyaw, under said deed of date 21 February, 1898, and to them by descent from their said mother, Henrietta Fillyaw, the property therein described."

Upon these facts the court entered judgment, as follows:

"This cause coming on to be heard before Henry A. Grady, judge, at September Term, 1924, New Hanover Superior Court, upon an agreed statement of facts, and having been argued by counsel, the court is of the opinion that under the deed from Henry Schulken to Matilda E. Van Lear, the habendum clause of which is copied in article one of said agreed statement of facts, the said Matilda Van Lear took only a life estate in and to the lands described therein, with remainder to her children or their issue, it is now, upon motion of C. D. Weeks, attorney for the defendant, considered, ordered and adjudged that the plaintiffs, Helene Fillyaw and Bessie Herring, and the defendant, Robert E. Van Lear, are tenants in common and are each entitled to a one-third undivided interest in and to the lands described in said deed, and entitled to partition of the same if they shall be so advised.

"It is further considered and adjudged that the costs of this action be taxed against the plaintiffs and the surety on their prosecution bond."

Plaintiffs excepted and appealed.

Rountree & Carr for plaintiffs.
Weeks & Cox for defendant.

HOKE, C. J. From the facts submitted, it appears that on 29 November, 1876, Henry Schulken, owner of the property in controversy, conveyed same to Matilda E. Van Lear, the pertinent terms of said deed being as follows:

"To have and to hold the same for her own use and behoof during her life, and after her death to the lawful heirs of her body who may be living at her death, and to the issue of such child or children who may die before the said Matilda, so that the issue of such child or children shall represent his or her ancestor and take such share as such ancestor would have taken if he or she had been living at the time of the death of the said Matilda, and to their heirs and assigns forever."

If, as plaintiff contends, this deed conveyed to Matilda Van Lear a fee-simple title under the rule in *Shelley's case,* then, the ancestor of plaintiffs having acquired that title by proper deed, they are now the owners of the property, and defendant is making a wrongful claim.

If, however, as defendant contends, the Schulken deed only conveyed to Matilda Van Lear a life estate, remainder to her children, etc., then Robert Van Lear, a child of Matilda, and who has never parted with his share, on the death of his mother became the owner of one-third undivided interest in the lot, and the judgment of his Honor must be upheld.

The rule in *Shelley's case* is fully recognized in this State, and where the same properly applies it prevails as a rule of property, both in deeds and wills, and regardless of "any particular intent to the contrary otherwise appearing in the instrument." *Hampton v. Griggs,* 184 N. C., p. 13; *Wallace v. Wallace,* 181 N. C., p. 158; *Crisp v. Biggs,* 176 N. C., p. 1; *Robeson v. Moore,* 168 N. C., p. 389.

Speaking to the rule and its application in *Wallace's case, supra,* it was held, among other things:

"Whenever an ancestor, by any gift or conveyance, took an estate of freehold, as an estate for life, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs or to the heirs of his body as a class to take in succession as heirs to him, such words are words of limitation of the estate, and conveys the inheritance, the whole property to the ancestor, and they are not words of purchase.

"In order to an application of the rule in *Shelley's case,* 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."

And in *Hampton v. Griggs, supra,* where the subject was learnedly discussed by *Associate Justice Stacy,* it was further held as follows: "In construing a conveyance, with reference to the application of the rule in *Shelley's case,* the general or paramount intent of the donor or grantor, in the use of the technical words 'heirs' or 'heirs of the body' should be first ascertained by construing the instrument as a whole, and, should his intent, so found, be that these words should be taken with their technical or legal meaning, this meaning will control any particular intent he may have otherwise expressed; but, should they be ascertained to have been used as denoting a particular class of persons to take in remainder, as distinguished from those who would take in indefinite succession under the rules of descent, that meaning will prevail, and the first taker will acquire only an estate for life, and the rule in *Shelley's case* will not apply."

Considering the deed in question here, we are of opinion that, although the property is conveyed to Matilda Van Lear for life, and after her death to the lawful heirs of her body, these words are so qualified by what immediately follows, "who may be living at her death, and to the issue of such child or children who may die before the said Matilda," as to show that the words "lawful heirs" are not intended in their usual sense as general inheritors under our canons of descent, but are used and intended in the sense of children and passing the estate among other to such of her children as should be alive at that time, and who would take under the Schulken deed as purchasers from the original grantor and not as heirs of their mother.

This, to our minds, being the clear meaning and intent of the Schulken conveyance, that instrument passed to Mrs. Van Lear only a life estate, with remainder to her children living at her death, and to the issue of such as may have died, and on her death, defendant, her son, Robert, became the owner of one-third of the property, and he, never having parted with his interest, is asserting a rightful claim, as his Honor ruled.

In addition to the above authorities, the position finds support also in *Blackledge v. Simmons,* 180 N. C., p. 540; *Puckett v. Morgan,* 158 N. C., p. 344; *Smith v. Lumber Co.,* 155 N. C., p. 389; *Smith v. Proctor,* 139 N. C., p. 322; *Rollins v. Keel,* 115 N. C., p. 68; *Whitesides v. Cooper,* 115 N. C., p. 570.

We find no error in the disposition of the case, and the judgment of the Superior Court is

Affirmed.

CITIZENS BANK AND TRUST COMPANY, EXECUTOR OF CHARLES McDONALD, ET AL., v. ROSA LEE McDONALD DUSTOWE, LUCILLE R. McDONALD AND MATTIE NELSON.

(Filed 19 December, 1924.)

1. Wills—Probate—Evidence—Statutes.

The record and probate of a will according to law is conclusive as to its validity, when not vacated on appeal nor declared void by a competent tribunal, and the executor named has duly qualified and is engaged in the performance of his duties as such without any legal objection having been interposed. C. S., 4145, 4161.

2. Same—Parties—Statutes—Agreements—Courts—Jurisdiction.

Persons who are interested neither as heirs at law of the deceased nor as beneficiaries under the writing propounded as the will, are neither necessary nor proper parties to a case agreed to interpret its provisions, nor to set it aside, nor to assert that an order made by the court be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. C. S., 446. It is otherwise as to one who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon.

3. Same—Consent.

Necessary parties to an action concerning the interpretation of a will are barred by their own consent to submit an agreed case, etc., and their acquiescence in a motion made by others, not necessary or proper parties, cannot affect the judgment accordingly rendered by the court.

APPEAL by Robert E. McDonald, Jr., T. Lawrence McDonald, and Martha G. M. Nelson from order signed by *Harding, J.*, at April Term, 1924, of CABARRUS.

The will of Charles McDonald was duly probated and recorded in the office of the clerk of the Superior Court of Cabarrus County. Thereafter, on 22 March, 1923, summons was issued by said clerk, returnable on 21 April, 1923, in a civil action, entitled as above. The executor and all the devisees and legatees, named in said will, appear as parties, plaintiff or defendant, in said summons. The defendants are nonresidents of the State of North Carolina, and summons was served upon each of them by publication. No complaint or other pleading was filed in said action. At the return term, a statement of facts, signed by attorneys of record, and purporting to be agreed upon by all the parties to the action, was presented to the court. The contentions of the respective parties, as to the construction of said will, upon the said facts, were fully argued before the court. The attorneys also filed briefs in support of the said contentions. By consent, judgment was subsequently rendered, after the expiration of the term and out of the judi-

cial district, in which Cabarrus County is included. The judgment was duly filed on 2 June, 1923. No exceptions were noted to said judgment and no appeal was taken therefrom.

On 5 April, 1924, Robert E. McDonald and T. Lawrence McDonald, whose names appear as plaintiffs in said summons, and Mrs. Martha G. M. Nelson, one of the defendants therein, served notice upon the attorneys of record for the other parties to said action that on 28 April, 1924, they would each enter a special appearance and move that the action be dismissed, for the reasons stated in said notice. Pursuant to said notice, special appearances were entered, and said motion was made and heard by his Honor, W. F. Harding, judge presiding. The court found, from the evidence submitted at said hearing: (1) That Robert E. McDonald and T. Lawrence McDonald, whose names appear as plaintiffs in said action, did not authorize any person to make them parties to said action; that they are the sons of Robert McDonald, a deceased brother of Charles McDonald, the testator, and as such are expressly excluded from any interest in the estate of Charles McDonald under the said will; that neither has any interest in the estate of Charles McDonald under the will or as heir at law; (2) that Martha G. M. Nelson is a daughter of John McDonald, a deceased brother of Charles McDonald, the testator; that she is interested in said will by virtue of a legacy to her of $2,000; that she has no other or further interest than as such legatee; that service of summons by publication on her had not been completed at time the statement of agreed facts was filed, and that she did not agree to such statement, nor did she consent that judgment might be signed after the expiration of the term and out of the district; that she is now a party defendant in said action, summons having been duly served on her; (3) that all the devisees and legatees named in said will are duly constituted parties to the action, and that all except Mrs. Martha G. M. Nelson agreed to the statement of facts filed, and consented to the signing of judgment after expiration of term and out of district; that the entire estate, real and personal, of Charles McDonald is devised and bequeathed by his said will to devisees and legatees named therein.

Upon the facts found, it was ordered and adjudged that "this action be and the same is hereby dismissed as to Robert E. McDonald, Jr., and T. Lawrence McDonald," and that "the purported agreed statement of facts, together with the judgment in this action, be and the same is hereby stricken out and vacated as to Mrs. Martha G. M. Nelson, who is designated as Mattie Nelson in the proceeding."

Appellants excepted to said order, and appealed therefrom, assigning as error: (1) That the court overruled their objection to the introduction as evidence, upon the hearing of their motion, of the record in

the action; (2) that the court found that Robert E. McDonald, Jr., and T. Lawrence McDonald had no interest in or to the estate of Charles McDonald; (3) that the court found that all the devisees and legatees under the will of Charles McDonald are parties to the action, and, with the exception of Mrs. Martha G. M. Nelson, agreed to the statement of facts, and consented to the signing of the judgment after the expiration of the term and out of the district; and (4) that the court failed and refused to set aside and vacate the statement of facts agreed and the judgment rendered thereon, and to dismiss the action.

Maness & Sherrin and Frank Armfield for appellants.

Hartsell & Hartsell for C. D. McDonald and Ed. McDonald, appellees.

J. Lee Crowell, Sr., J. Lee Crowell, Jr., and H. S. Williams for appellees.

CONNOR, J. This is a civil action, to have the will of Charles McDonald construed. The validity of the will is not in issue. It has been duly probated and recorded. It has not been vacated on appeal, nor declared void by a competent tribunal. No caveat has been entered to its probate. The executor named therein has duly qualified and is now engaged in the performance of the duties of the office. The record and probate is therefore conclusive as to the validity of the will. C. S., 4145 and 4161.

Appellants, Robert E. McDonald, Jr., and T. Lawrence McDonald, sons of Robert McDonald, a deceased brother of Charles McDonald, and heirs at law of the testator, are expressly excluded from any interest in or to the estate of Charles McDonald by the provisions of the will. The entire estate, real and personal, is devised and bequeathed, and there is no residuary clause in the will. By no possible construction of the will, as same appears in the record, could they have any interest, present or future, vested or contingent, under the will or as heirs at law in or to the estate of Charles McDonald. They, therefore, have no interest in the subject-matter of the action, the construction of the will, in order to determine the rights, interests and estates of the devisees and legatees named therein, with respect to the property devised and bequeathed to them. Appellants have no rights or interests to be protected or to be prejudiced by any order, decree or judgment that may be made or rendered in the action. They are neither necessary nor proper parties to the action. C. S., 446.

In *McKethan v. Ray*, 71 N. C., 165, which was an action to construe a will, this Court reversed the judgment below and remanded the action to the end that the heirs at law and residuary legatees might be made

parties, the reason given being that "in certain aspects of the matter involved in the construction of the will the heirs at law and residuary devisees have an interest and of course would not be concluded by a judgment in this case as now constituted." In no aspect of the matter involved in the instant case have these appellants any interest in this action. They were inadvertently made parties plaintiff, and upon this fact appearing to the court the action was properly dismissed as to them. This, however, was the only relief to which they were entitled. They have no interests which are or can be affected, adversely or otherwise, by the judgment heretofore rendered by Judge Webb in the action, and therefore there was no error in refusing to set aside and vacate said judgment and to dismiss the action. "When there is merely a surplusage of parties, it is not ground for dismissal, as it cannot prejudice the cause of action, and at most the unnecessary party could be dismissed, on his own motion, with his costs." *Ingram v. Corbit,* 177 N. C., 321.

It was proper for the court to admit and consider evidence from which it could be ascertained whether or not appellants had any interests in the subject-matter of the action which were or could be prejudiced by the judgment of Judge Webb. They were asking not only that their names be stricken from the summons as parties to the action, but also that the judgment be set aside and the action dismissed. The insistence of appellants that there was error in admitting the record as evidence upon the hearing of their motion is based upon a misconception of the purpose for which this evidence was offered and considered. The court was not concerned with the merits of the controversy between the real parties in interest, but solely in determining whether or not the judgment affected any rights of plaintiffs, and upon it appearing that the judgment did not affect any such rights the court properly refused to set aside or vacate such judgment and to dismiss the action, except as to them. The parties whose rights are determined by said judgment have neither excepted to nor appealed therefrom. They are content with the judgment.

Appellant, Mrs. Martha G. M. Nelson, has an interest in the subject-matter of the action, and is therefore a proper and necessary party. Summons has been duly served upon her, and she is now a duly constituted defendant. The action, therefore, was not dismissed as to her. She did not agree to the statement of facts presented to the court, nor did she consent to the signing of the judgment after the expiration of the term and out of the district. The judgment and statement of agreed facts were therefore properly set aside and vacated as to her. The judgment has no validity as to her. She may be heard now, before any order, decree or judgment affecting her rights is made or rendered.

She has no interest, however, in said judgment in so far as it affects the rights of other parties to the action. Upon the facts as they now appear, her legacy of $2,000 is not prejudiced by the judgment. It does not appear that she has any rights under the will, or otherwise, in the estate of Charles McDonald, except as to this legacy. She is not concluded, however, by the judgment, and may proceed in the action as she may be advised.

We are not inadvertent to the brief filed herein by attorneys for Ed. McDonald and C. D. McDonald, plaintiffs, in which they say that they do not resist the motion of appellants "to have the entire judgment and agreed statement of facts vacated and set aside." Having agreed to the statement of facts, and having filed no exception to the judgment, they are barred by its terms. They would, doubtless, like to have another day in court, feeling assured that they could fare no worse, and might fare better, upon another hearing. We see nothing in the record to justify this assurance.

The assignments of error are not sustained. There is

No error.

STATE v. J. J. WILSON.

(Filed 19 December, 1924.)

Criminal Law—Mayhem—Malice—Indictment—Less Degree of the Same Crime—Common Law—Statutes.

Construing C. S., 4212 in connection with the history of legislation on the subject, it is *held* that thereunder the loss of an eye is not included in the offense of mayhem, and though the infliction thereof without malice may neither be sustained as provided by C. S., 4211, nor under the common law, requiring that the offense should have been committed with malice, yet upon proper evidence a conviction may be had of an assault with a deadly weapon and an assault with serious damages, as a less degree of the crime charged under the provisions of C. S., 4211.

APPEAL by defendant from *Sinclair, J.*, at June Term, 1924, of DURHAM, upon a verdict for maiming without malice.

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

Brawley & Gantt and J. W. Barbee for defendant.

ADAMS, J. The first count in the indictment charges the defendant with maiming the prosecutor by putting out his eye with malice aforethought, in breach of section 4212 of the Consolidated Statutes, and the second count with maiming the prosecutor without malice in

breach of section 4211. The verdict was, "Guilty of maiming without malice aforethought."

It is evident, then, that the defendant was not convicted of the offense defined in section 4212; but it is contended that the verdict may be sustained under section 4640: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." The specific contention is that the verdict and judgment can be sustained as a conviction for mayhem at common law. It is true the defendant might have been convicted of an assault, or of an attempt to commit a crime, as the statute provides; but it does not necessarily follow that a conviction for the common-law offense can be upheld. The jury found the fact to be that the assault was not made with malice; but malice, according to the authorities, was an essential element in mayhem at common law. In Pleas of the Crown, Vol. 1, 393, *East* says: "A maim at common law is such a bodily hurt as renders a man less able in fighting to defend himself or annoy his adversary; but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem. Upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye, etc., are said to be maims; but the cutting off his ear or nose are not such at common law. But in order to found an indictment or appeal of mayhem the act must be done maliciously; though it matters not how sudden the occasion." After defining mayhem at common law, *Chitty* points out, "To bring any wound within this denomination, it is said it must be done maliciously, although it matters not how sudden the occasion." Criminal Law, Vol. 2, 784. "Mayhem was always an offense at common law. . . . To render the act indictable it must be done maliciously." Archbold's Cr. Pr. and Pld., 1, 6 Ed., Vol. 2 (264). "At common law an indictment for mayhem could be supported only when the act was done with malice." 26 Cyc., 1596. See, also, Hawkins' Pleas of the Crown by Curwood, Vol. 1, ch. 15; Reeves' History of the English Law, Vol. 2, 34; McClain's Cr. Law, Vol. 1, 418, sec. 436 a. The word "malice" or "maliciously," appears in the statutes of 5 Henry IV, ch. 5; 37 Henry VIII, ch. 6; and 22 and 23 Charles II, ch. 1.

The defendant's contention that he cannot be convicted of mayhem upon the second count involves the construction of section 4211. While the nose, the lip and the ear are particularly designated, the word "eye" is omitted from this section. To determine whether it is embraced in the words "any limb or member" we must look into the history of our legislation on the subject.

The statute of 22 and 23 Charles II, *supra,* provided for the punishment of malicious mayhem committeed by lying in wait, etc. It was adopted in North Carolina, 16 October, 1749 (23 State Records, 324), but was superseded by the act of 1754, which provided "That if any person or persons, from and after the ratification of this act, on purpose, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, bite or cut off a nose or lip, bite or cut off or disable any limb or member of any subject of his Majesty in so doing to maim or disfigure in any of the manners before mentioned such his Majesty's subjects," etc.

In 1791, this act was repealed and the following statutes were enacted: 1. "That if any person or persons shall of malice aforethought unlawfully cut out or disable the tongue, or put out an eye of any person with intent to murder, maim or disfigure, the person or persons so offending, their counsellors, abettors and aiders, knowing of any privy to the offense as aforesaid, shall for the first offense," etc. 2. "That if any person or persons shall on purpose unlawfully cut or slit the nose, bite or cut off a nose or lip, bite or cut off an ear, or disable any limb or member of any other person with intent to murder, or to maim or disfigure such person in any such case the person or persons so offending shall be imprisoned," etc. Laws of North Carolina, 1791, 718, ch. 8.

It will be observed that the first of these statutes is now section 4212, *supra,* and that the second is section 4211, *supra.* From the latter, the words "eye" and "tongue" were omitted, and it is evident that the omission was both intentional and significant.

The act of 1754, *supra,* designates the tongue, the eye, the nose, the ear, the lip, and "any limb or member." The words "limb" and "member" were obviously not intended to include the tongue, nose, lip or eye, which were specifically mentioned in the same clause. In section 4211, the words "tongue" and "eye" are omitted and the words "ear," "nose" and "lip" are retained. It seems to be manifest that the Legislature did not intend that the "tongue" or the "eye" should be embraced in the words "any limb or member."

We need not attempt the assignment of a reason for the omission and may adopt the language of *Chief Justice Ruffin:* "I answer as to the difference between the two sections that the Legislature intended it. If they had not, they would have used the same words, denoting the disposition in both." *S. v. Crawford,* 13 N. C., 425.

The motion to dismiss the action as in case of nonsuit was properly denied. There was evidence not only of mayhem, but of an assault with a deadly weapon and an assault with serious damage, as to which section 4640 would apply, and the law applicable to these phases of the testimony also should have been submitted to the jury.

New trial.

STATE v. DAVID ROBINSON.

(Filed 19 December, 1924.)

1. **Criminal Law—Homicide — Indictment — Evidence—Verdict—Appeal and Error.**

Under the provisions of C. S., 4640, when the bill of indictment is sufficient with the supporting evidence upon the trial, the defendant may be convicted of the criminal offense charged or of a lesser degree thereof, he is entitled to a charge from the court on all degrees of the crime thus encompassed by the indictment; and an error in failing to charge upon the lesser degrees of the crime is not cured by a verdict of conviction upon one of a greater degree.

2. **Same—Self-Defense.**

The killing of a human being with a deadly weapon raises the presumption that it was unlawfully done and with malice, casting upon the person charged the burden of showing to the satisfaction of the jury the legal provocation which will eliminate malice, reducing the offense to manslaughter, or which will excuse it altogether on the grounds of self-defense.

3. **Same—Excessive Force.**

In order for an acquittal of a homicide under the plea of self-defense, it must be shown that no more force was used at the time of the killing than was reasonably necessary under the circumstances, and if excessive force or unnecessary violence had then been used, under the circumstances the defendant is guilty of manslaughter, though he may have acted in self-defense at the beginning of the occurrence.

4. **Same—Manslaughter—Questions for Jury—Trials.**

Where there is evidence that the defendant on trial for a homicide shot at the deceased in self-defense, but that he continued to do so unnecessarily, which resulted in the death, and *per contra*, it is for the jury to determine whether he was justified therein under the plea of self-defense; and should they find from the evidence that the killing was done without malice, the offense would not be greater than manslaughter.

APPEAL by defendant, from *Ray, J.*, at July Term, 1924, of HAYWOOD.

Criminal prosecution, tried upon an indictment charging the defendant with murder in the first degree, a capital felony.

Upon the call of the case for trial, the solicitor announced that he would not ask for a verdict of murder in the first degree, but that he would ask for a verdict of murder in the second degree or manslaughter, as the evidence might disclose.

The jury found the defendant guilty of murder in the second degree, and from the judgment pronounced thereon, he appeals.

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

Morgan & Ward and Alley & Alley for defendant.

STACY, J. The defendant, town constable of the village of Hazelwood, in Haywood County, shot and killed Will Fletcher, a colored man employed on a work-train of the Southern Railway Company, while undertaking to arrest the deceased for jumping on and off a moving train in violation of a town ordinance prohibiting such conduct.

It was in evidence that the deceased had habitually violated this ordinance by getting on a passenger train as it would leave the station at Hazelwood, riding some distance and then jumping off near a shanty car in which Fletcher and other employees were housed and which stood on a siding near where they worked.

On Easter Sunday, 1924, the defendant saw the deceased "swinging on the train." He went down to the shanty car, without any warrant for his arrest, and said to Fletcher, "Let's go see the mayor." Fletcher asked: "What for?" Defendant answered: "For catching the train." Fletcher said: "I can't go until the boss man comes back from Asheville." Defendant replied: "You will have to go now." Then Fletcher asked the officer to let him go into the shanty car and get his coat. A few minutes after entering the car, Fletcher came to the door and said: "I can't go now; the boss man ain't here." The defendant replied: "You will go"; and as he started to enter the car, Fletcher fired one time with a revolver, the bullet entering the door-facing just above the officer's head. The defendant shot four times in return, one shot striking Fletcher in the face and proving fatal.

Whether the defendant was justified in undertaking to arrest Fletcher without a warrant should be determined in accordance with the rules laid down in *S. v. Rogers,* 166 N. C., 388, and *S. v. McClure,* 166 N. C., 321. See, also, C. S., 4544 and annotations.

The trial court instructed the jury that there was no evidence of manslaughter in the case, and that they would therefore convict the defendant of murder in the second degree or acquit him, under his plea of self-defense, as they found the facts to be. The jury convicted the defendant of murder in the second degree. We think there was error, to the prejudice of the defendant, in excluding from the jury's consideration the question of manslaughter.

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 the defendant 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 him 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 if the different views, arising on the evidence, had been correctly presented by the trial court. *S. v. Lutterloh, ante,* 412; *S. v. Merrick,* 171 N. C., 788; *S. v. Allen,* 186 N. C., p. 307; *S. v. Williams,* 185 N. C., 685, and cases there cited.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation; while manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. The presence in the one case and the absence in the other of the element of malice is the distinguishing difference between these two grades of an unlawful homicide. *S. v. Benson,* 183 N. C., 795.

Where it is admitted or established by the evidence, as it is here, that the defendant killed the deceased with a deadly weapon, the law raises two presumptions against him: first, that the killing was unlawful; and second, that it was done with malice. This is murder in the second degree. *S. v. Fowler,* 151 N. C., 732. The law then casts upon the defendant the duty of showing, to the satisfaction of the jury (*S. v. Willis,* 63 N. C., 26), the legal provocation which will rob the crime of malice and thus reduce it to manslaughter, or which will excuse it altogether on the grounds of self-defense, or excusable homicide. *S. v. Little,* 178 N. C., 722; *S. v. Worley,* 141 N. C., p. 767. The plea set up by the defendant was that he shot in his own proper self-defense.

One is permitted to kill in self-defense (*S. v. Johnson,* 166 N. C., 392); but, in the exercise of this right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be used, the defendant would be guilty of manslaughter. *S. v. Garrett,* 60 N. C., 148.

There is evidence on the record tending to show that while the defendant may have fired at first in self-defense, yet the jury might have found that he continued to fire unnecessarily. There are circumstances in evidence, surrounding the occurrence and from which it may fairly be inferred that the defendant's repeated firing was unnecessary to his own proper self-defense; but, if done without malice, his offense would not be more than manslaughter. *S. v. Quick,* 150 N. C., p. 824. In *S. v. Cox,* 153 N. C., p. 642, it is said "that in order to make good the plea of self-defense, the force used must be exerted in good faith to prevent the threatened injury, and must not be excessive or disproportionate to the force it is intended to repel, but the question of excessive force was to be determined by the jury." See, also, *S. v. Pollard,* 168 N. C., 116.

For the error, as indicated, there must be a new trial; and it is so ordered.

New trial.

E. A. SHEPHARD AND WIFE v. E. L. HORTON ET AL.

(Filed 19 December, 1924.)

1. Deeds—Rule in Shelley's Case.

The application of the rule in *Shelley's case* will not be made to a deed for lands where there is no limitation in fee or in tail by way of remainder.

2. Same—Interpretation—Intent.

In construing a deed, effect is given to the intent of the grantor as gathered from its language, unless such intention is otherwise controlled by an arbitrary rule of law.

3. Same—Filled-in Forms.

Where a printed form of a deed has been used and the blank spaces filled in by the grantor, any conflict between the written and printed parts will be construed to effectuate the intention expressed by the former; and where the form thus used is for a fee-simple deed, and the written interlineations confine the estate to the lifetime of the grantee, leaving the printed relative parts in blank, the estate granted will be construed as for the life of the first taker, and the rule in *Shelley's case* has no application.

APPEAL by plaintiff from *Webb, J.*, at August Term, 1924, of YANCEY.

On 2 January, 1918, H. E. Horton executed and delivered to Victory Horton (now Victoria Horton Shephard, the *feme* plaintiff) a deed, the material parts of which follow: "This deed..... by Harriett E. Horton..... to Victory Horton, witnesseth: That the said Harriett E. Horton in consideration of one thousand dollars, to her paid by the party of the second part, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents does bargain, sell and convey to the said party of the second part during her natural life and.....heirs and assigns, a certain tract or parcel of land, etc."

"To have and to hold the aforesaid tract or parcel of land during her natural life, with any and all privileges and appurtenances thereto belonging to the said Victory Horton, ... heirs and assigns, to her only use and behoof forever. And the said Harriett E. Horton covenant to and with the said Victoria Horton, heirs and assigns that she is seized of said premises in fee, and has a right to convey the same in fee simple, that the same are free from all encumbrances, and that she will warrant and defend the said title to the same against the claims of all persons whatsoever."

The deed was written on a printed blank form prepared for general use and the words "during her natural life" were written by the draftsman. The blank space in which the word "her, his or their" is usually written before the word "heirs" was not filled.

The trial judge held as a matter of law that the deed conveyed to the *feme* plaintiff only a life estate, and she thereupon took a nonsuit and appealed. The only question is whether there is error in this ruling.

R. W. Wilson for plaintiff.
Watson, Hudgins, Watson & Fouts for defendants.

ADAMS, J. That the estate conveyed by the deed is a fee simple under the rule in *Shelley's case,* as the plaintiff contends, is a proposition which in our opinion cannot be maintained. This is evident from the language of the rule itself: "Where a person takes an estate of freehold, legally or equitably, under a deed or will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of any interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent Com. (215). It is also evident from the decisions. One of the prerequisites to the application of the rule is a limitation in fee or in tail by way of remainder, and such limitation does not appear in the conveyance. *Reid v. Neal,* 182 N. C., 192; *Willis v. Trust Co.,* 183 N. C., 267; *Hampton v. Griggs,* 184 N. C., 13; *Fields v. Rollins,* 186 N. C., 221; *Bank v. Dortch,* 186 N. C., 510; *Walker v. Butner,* 187 N. C., 535.

In the construction of deeds the primary rule is to ascertain the real intention of the parties and then to give it effect, unless such intention is controlled by an arbitrary rule of law, as in *Shelley's case. Bagwell v. Hines,* 187 N. C., 690. This principle is fairly exemplified in *Triplett v. Williams,* 149 N. C., 394. The deed there presented for interpretation contained the words "Unto the grantee and her heirs forever," followed, after the description, by the habendum, "To have and to hold unto the grantee during her lifetime, and at her death to be divided between her children." Taking the whole deed into consideration with a view to effectuating the purpose of the grantors, the Court held that it was their intention to convey to the designated grantee only a life estate with a remainder over to her children. Antiquated technicalities, it was said, should not be permitted to override the intention expressed by the makers of the deed; and if there should be doubt as to their intention the court should adopt such construction as would accord with their presumed meaning. Among the many decisions upholding this principle the following may be cited. *Ipock v. Gaskins,* 161 N. C., 674; *Guilford v. Porter,* 167 N. C., 366; *Gold Mining Co. v. Lumber Co.,* 170 N. C., 273; *Revis v. Murphy,* 172 N. C., 579;

Williams v. Williams, 175 N. C., 160; *Willis v. Trust Co., supra; Berry v. Cedar Works,* 184 N. C., 187; *Seawell v. Hall,* 185 N. C., 80.

Another principle to be considered is this: Ordinarily the written and printed parts of a deed are equally binding; but if they are inconsistent the writing will prevail over the printed form. *Miller v. Mowers,* 81 N. E. (Ill.), 420; *De Paige v. Douglas,* 136 S. W. (Mo.), 345; *In re Brookfield,* 176 N. Y., 138; 18 C. J., 258 (206). The deed construed in the first of these cases contained the words, "Grant, bargain and sell unto the said party of the second part, *her* heirs and assigns, all the following described lands. . .. . *during her natural lifetime,*" followed by the habendum "To have and to hold the said premises . . . . unto the said party of the second part, *her* heirs and assigns, *during her natural lifetime.*" Only the words in italics were written in the deed, the others being a part of the printed form; and it was held that the written words controlled the construction, that the grantee took a life estate, and that it was unnecessary to reform the deed.

The facts in the case before us are almost identical. As to form, the deed was printed in part and written in part, the words "during her natural life" being in writing. On account of the inconsistency between the written and the printed parts the deed is ambiguous, and, as suggested, we must consider the intention. If the printed form had not been used the words "heirs" would evidently have been omitted, and the intention of the parties would, no doubt, have been more clearly expressed.

If the foregoing principles be applied we must conclude that the deed vests in the grantee an estate for life and not in fee.

The judgment is

Affirmed.

MRS. C. R. DUFFER ET AL. v. A. J. BRUNSON.

(Filed 19 December, 1924.)

1. Judgments—Motions to Set Aside—Irregular Judgments—Pleadings.

A judgment by default and inquiry entered in plaintiff's favor for the want of an answer after the return day of the summons, without more, is an irregular judgment, not rendered in the due course and practice of the courts, and the remedy of defendant is by motion to set it aside made in the original action.

2. Same—Meritorious Defense.

The movant, to set aside an irregular judgment, must show he has a meritorious defense as well as that he has acted with reasonable promptness.

3. Same—Orders—Appeal and Error.

The finding by the trial court, on defendant's motion to set aside an irregular judgment, that he had shown a meritorious defense in one involving a question of mixed law and fact, will be overruled on appeal when there is no evidence to support the finding, it being required that the defendant set forth facts showing prima facie a valid defense, to be passed upon by the court.

APPEAL by plaintiffs from *Cranmer, J.*, at March Term, 1924, of CUMBERLAND. Action to recover land and damages.

The summons, issued 21 April, 1923, was returnable 10 May, 1923. It was served on the defendant 27 April, 1923. The complaint was filed 30 May, 1923. The defendant filed no answer and made no motion to dismiss. On 9 July, 1923, on motion of the plaintiffs, the clerk rendered judgment by default and inquiry in which he recited the service of summons, the filing of the complaint and the want of an answer, and adjudged that the plaintiffs are the owners of and entitled to the possession of the land described in the complaint and to the recovery of rents and profits, and in order that a jury might determine the amount of such recovery, the case was transferred to the civil docket.

On 18 December, 1923, the defendant made a motion before the clerk to set aside the judgment. The defendant and his attorney filed affidavits stating that on the return day of the summons they went to the clerk's office to file an answer and found that the complaint had not been filed; that as late as 7 p. m. they could not find any order extending the time for filing the complaint; and that the defendant knew nothing more about the case until 18 December, 1923, when he discovered the judgment while he and his attorney were examining the records in reference to another matter. The plaintiff's counsel filed a counter-affidavit.

The clerk set aside the judgment on the ground that it had been erroneously and irregularly entered and held that it was null and void, and granted the defendant 20 days in which to file an answer.

The plaintiffs then appealed to the Superior Court in term, and the defendant's counsel filed an additional affidavit to the effect that he had investigated the defense and had found the defendant "has a good and sufficient deed covering the lands described in the complaint and has been in possession of said lands under said deed for quite a while and is still in possession." He expressed the opinion that the defense was bona fide and good in law, and that if an answer were filed, it would raise matters that should be submitted to a jury.

The trial judge recited the substance of the affidavits, found as a fact that the clerk had not extended the time for filing the complaint, held that the defendant has a bona fide defense, and affirmed the clerk's judgment. The plaintiffs excepted and appealed.

A. M. Moore for plaintiffs.
Cook & Cook for defendant.

ADAMS, J. Under the amended statutes relating to process and pleadings the complaint should be filed on or before the return day of the summons, but the clerk for good cause may extend the time to a day certain. In the present case, the clerk did not grant an extension of time and the complaint was filed 20 days after the return day. The defendant neither answered nor moved to dismiss; and after the lapse of several weeks the clerk rendered a judgment by default and inquiry. The lower court held that the clerk's judgment was null and void and set aside the judgment.

A void judgment is one that has merely semblance without some essential element or elements, as a want of jurisdiction or a failure to serve process or otherwise to have the party in court. An irregular judgment is one entered contrary to the course and practice of the court; and an erroneous judgment is one rendered contrary to law. A void judgment may be collaterally impeached, but an irregular judgment should be attacked by motion in the cause, and an erroneous judgment should be corrected by appeal or *certiorari*. *Moore v. Packer,* 174 N. C., 665. The clerk's judgment was not void, but irregular; it was entered contrary to the statute and in disregard of the usual practice. Indeed, in his brief the defendant admits the judgment was merely irregular.

But mere irregularity is not sufficient to warrant an order setting aside the judgment. It is essential for the moving party to show not only that he has acted with reasonable promptness, but that he has a meritorious defense against the judgment. As suggested in *Harris v. Bennett,* 160 N. C., 339, 347, "Unless the Court can now see reasonably that defendants had a good defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside?" *Hill v. Hotel Co., ante,* 586; *Gough v. Bell,* 180 N. C., 268; *Rawls v. Henries,* 172 N. C., 216; *Glisson v. Glisson,* 153 N. C., 185.

The defendant has not shown a meritorious defense. His first two affidavits relate only to an inquiry or search in the clerk's office for the plaintiff's complaint. The third, which was offered on the hearing before the judge, was made by the defendant's attorney, who stated that he had investigated the proposed defense and had found that the defendant had a good and sufficient deed for the land in controversy and had been in possession "for quite a while" and was still in possession. The trial judge found that the defense is bona fide, but this is a mixed question of law and fact, and there is no sufficient evidence to support

the finding. "Quite a while" is indefinite. It is not alleged that the defendant's possession is or has been adverse, or that it has covered the statutory period. Nor is the title of the plaintiffs denied. It has been held many times that the defendant must set forth facts showing prima facie a valid defense and that the validity of the defense is for the court and not with the party. *Jeffries v. Aaron*, 120 N. C., 167.

Section 600 of the Consolidated Statutes, relating to mistake, surprise, and excusable neglect, has no application to an irregular judgment. *Becton v. Dunn*, 137 N. C., 559. There is no finding that the defendant's failure to look after his case from May 10th to December 18th was excusable. In fact, the judgment was set aside, not for excusable neglect, but on the ground of irregularity. There was error, for which the judgment is

Reversed.

J. T. DIXON ET AL. v. JOHN R. PENDER AND WIFE, ANNIE PENDER.

(Filed 19 December, 1924.)

Estates—Wills—Descent and Distribution—Statutes—Posthumous Child.

An estate to the wife for life under her husband's will with remainder to the testator's right heirs, vests title in the child alive *in ventre sa mere* at the time of the testator's death, Rules 7 and 12, canons of descent, and upon the subsequent death (intestate) of such child, born alive, the mother inherits the fee from him under Rules 4 and 6; and upon the remarriage of the mother with children resulting therefrom, the children of the second marriage after her death intestate, take the estate as her heirs, and not the collateral relations of the testator. *Semble*, the estate would be cast upon the after-born unprovided-for child, under C. S., 4169, with like result.

CIVIL ACTION tried before *Bond, J.*, at April Term, 1924, of EDGECOMBE.

The action is to recover two tracts of land and the rents and profits thereof, instituted by the collateral relatives of John H. Daniel, Jr., now deceased, claiming same under his last will and testament, and as his descendants and devisees therein designated. Defendants, in possession and asserting ownership, claim the land under said will and as descendants and heirs at law of John W. Daniel, deceased, son and lineal descendant of said John H. Daniel, Jr.

At the close of the testimony and on formal admission in the pleadings and evidence, on motion, there was judgment of nonsuit, and plaintiffs excepted and appealed.

Skinner & Whedbee, Allsbrook & Phillips for plaintiffs.
James Pender and W. O. Howard for defendants.

HOKE, C. J. On the hearing it appeared from formal admissions in the pleadings and evidence that John H. Daniel, Jr., died 16 July, 1864, seized and possessed of the land in controversy and leaving him surviving his widow, Ann, then pregnant about four to five months, and who was afterwards, and in course of gestation, delivered of her first and only child of that marriage, John W. Daniel, now deceased, said child having been born about four months after the death of its father. That said John H. Daniel, Jr., left a last will and testament duly executed and admitted to probate in terms as follows:

"In the name of God, Amen:

"I, John H. Daniel, Jr., of the county of Edgecombe and State of North Carolina, being of sound mind and memory, do make, publish and declare the following as my last will and testament, viz.:

"After the payment of my debts and funeral expenses, I lend the balance of my estate of every description to my beloved wife, Ann Daniel, during her natural life, and at her death I give, devise, and bequeath the same to such persons as would be entitled to it under the laws of this State were I to die without a will and unmarried.

"I hereby nominate and appoint my said wife executrix of this my last will and testament.

"In testimony whereof, I have hereunto set my hand and seal, this 18 March, 1862. J. H. DANIEL. (Seal)"

"That after the death of the said John H. Daniel, Jr., his widow, Annie Purvis Daniel, went into the possession of the two tracts of land which are described in allegations 1 and 3 of this complaint under and by virtue of the last will and testament of the said John H. Daniel, Jr., which is set out in allegation six of this complaint, and remained in possession thereof, through herself and her assigns, until her death, which occurred on 9 September, 1922."

That after the death of her former husband, John H. Daniel, Jr., his widow, Annie, intermarried with R. C. Brown, and had several children born of the marriage, and defendants, since the death of Annie Brown, their mother, are and have been in possession of the property under decrees of court and deeds by virtue of which they now have and hold all the right, title and interest of the children of the second marriage.

That John W. Daniel, posthumous son of the testator, died on 12 January, 1888, without having married and without children or the issue

of such and without brothers and sisters of the whole blood or issue of such, leaving him surviving his mother, Ann Brown, and the half brothers and sisters of the second marriage of his mother to said R. C. Brown. That plaintiffs are the next collateral relatives of John H. Daniel, Jr., to whom the land would descend but for the title claimed by defendants through John W. Daniel, the posthumous son of John H. Daniel, Jr.

Upon these the pertinent and controlling facts of the controversy we must approve the judgment of his Honor directing a nonsuit. In our opinion the will of John H. Daniel, Jr., by correct interpretation devises this property to his wife for life, remainder to his right heirs who would be such had he died unmarried and without a will, the purpose being to restrict the interest taken by his widow under the will to the life estate and to pass the remainder to his own descendants and heirs at law, whether lineal or collateral, exclusive of his widow, to be ascertained at the time of his death under the prevailing rules of law. *Witty v. Witty,* 184 N. C., p. 375. By this interpretation, the wife being then pregnant and subsequently delivered of a child of the marriage, such child, though in *ventre sa mere,* at the death of its father became seized as owner of a vested estate in remainder, and transmissible by descent under rules 7 and 12 of our canons. *Deal v. Sexton,* 144 N. C., p. 157; *Allen v. Parker,* 187 N. C., p. 376. And this child having later died without issue and without any brothers or sisters of hereditable blood, and his father being dead, his estate passed to his mother under Rules 4 and 6 of our canons of descent as construed and applied by our decisions on the subject. *Allen v. Parker, supra; Noble v. Williams,* 167 N. C., p. 112; *Poisson v. Pettaway,* 159 N. C., p. 650; *Watson v. Sullivan,* 153 N. C., p. 246; *Paul v. Carter,* 153 N. C., p. 26; *Little v. Buie,* 58 N. C., p. 10; *Dozier v. Grandy,* 66 N. C., p. 484; *McMichael v. Moore,* 56 N. C., p. 471.

The mother, the life tenant, having died in 1922, before this proceedings instituted, the property descended to her children, whose estate and interest has been acquired and is now held by defendants, who are the owners as his Honor ruled.

Even if the will should be interpreted as a devise to the collateral heirs, it would seem that the after-born child would take by virtue of section 4169 of Consolidated Statutes, which enacts that after-born children, unprovided for, shall inherit their share of the estate, in this instance the entire property, there being no express disinheritance of such child. *Flanner v. Flanner,* 160 N. C., p. 126; *Thomason v. Julian,* 133 N. C., p. 309.

It is urged for appellant that the construction approved in this case brings about the very result that the testator desired to avoid, giving

the property to the descendants of the wife instead of his own, but this effect is not wrought by the will. That is allowed and has full effect when the property vests in the child, the lineal descendant. The latter then becomes the owner and a new propositus, and the result complained of is caused by our statutes of descent applicable and controlling the question.

There is no error and the judgment of nonsuit is

Affirmed.

S. B. ROBERTS v. UNITED STATES FIDELITY & GUARANTY COMPANY.

(Filed 19 December, 1924.)

Husband and Wife — Negligence — Insurance—Indemnity Companies—Public Policy—Statutes.

The Legislature has the power to declare the public policy of the State as to permitting a wife to recover against her husband for an injury received by her from his negligent acts, and where she has recovered in her action against him damages for his negligently driving an automobile while she was a passenger, the husband may maintain his action for the same injury against an indemnity company which had issued to him its policy covering the same negligent act.

STACY, J., not sitting.

APPEAL by defendant from *McElroy, J.*, and a jury, October Term, 1924, of MADISON.

Guy V. Roberts, George M. Pritchard, and Martin, Rollins & Wright for plaintiff.

J. Coleman Ramsey and Harkins & Van Winkle for defendant.

PER CURIAM. On 13 May, 1922, the defendant, through its agent, A. W. Whitehurst, at Marshall, N. C., issued the policy sued on, No. U-45356, and on 30 May, 1922, the plaintiff, while driving his car in Madison County, accompanied by his wife and her sister, Mrs. R. S. Ramsey, and McKinley Pritchard, collided with another car and his wife sustained injuries. She instituted suit against her husband, the plaintiff in this case, and recovered $2,500 damages, and the judgment was affirmed by the Supreme Court (*Roberts v. Roberts,* 185 N. C., 566).

This action is brought by plaintiff against the defendant to recover on the Liability Insurance Policy issued to plaintiff by defendant on 13 May, 1922, for one year, on his Hupmobile touring car, insuring him "Against loss or expense, arising or resulting from claims upon the assured for damages in consequence of an accident occurring within the limits of the United States and Canada during the term of this

policy, by reason of the ownership, maintenance or use (including the carrying of goods thereon and the loading and unloading thereof when commercially used) of the automobile or any of the automobiles enumerated and described herein resulting in

INJURY TO PERSONS

Bodily injuries or death resulting at any time therefrom, suffered by any person or persons other than any employee or employees of the assured while engaged in the care, operation or maintenance of any of the assured's automobiles. The company's liability is limited to five thousand dollars ($5,000.00) to any one person. . . . "

DEFENSE OF SUITS

"In addition to the above, the company does hereby agree:

(1) To defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, on account of damages suffered or alleged to be suffered under the circumstances hereinbefore described.

PAYMENT OF EXPENSES

(2) To pay the expenses incurred in defending any suit described in the preceding paragraph, also the interest on any judgment within the limits of the insurance hereby granted and any costs taxed against the assured on account thereof;

REIMBURSEMENT EXPENSES

(3) To reimburse the assured for the expense incurred in providing such immediate surgical relief as is imperative at the time of any accident covered hereunder.

OMNIBUS COVERAGE

(4) To extend the insurance provided by this policy so as to be available, in the same manner and under the same conditions as it is available to the named assured, to any person or persons while riding in or legally operating any of the automobiles covered hereunder, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured; or, if the named assured is an individual, with the permission of an adult member of the named assured's household other than the chauffeur or a domestic servant."

While the policy was in full force the plaintiff, while driving his car, described in the policy, had a collision with another automobile on 30 May, 1922, causing serious and permanent injuries to his wife who was

a passenger in his car at the time. The plaintiff immediately reported the accident to the insurance company, but the insurance company refused to settle the claim of Mrs. Orla Roberts and she brought suit against her husband, the plaintiff, for damages, alleging that her injuries were caused by his negligent operation of the car, and recovered judgment against her husband for $2,500 damages and costs.

The defendant contended "that it is against public policy and sound morals to permit the plaintiff to recover in this case."

This Court said in *Roberts v. Roberts, supra,* at p. 569: "We have said that certain rights, duties and disabilities of husband and wife were produced by the joint operation of public policy and a common-law fiction; and as it is the prerogative of the Legislature to change or modify the common law, and to declare what acts shall be contrary to or in keeping with public policy, it is necessary to determine in what way, if any, and to what extent the relation of husband and wife has been modified in this jurisdiction by legislative enactment."

The Court held that under the legislative enactments in this State, the wife could sue the husband in tort and he was liable for his negligent act which caused his wife a personal injury.

The contract made by defendant protects the plaintiff. The defendant can change its contract in the future, if it desires to do so, so as not to cover a negligent injury to the wife. The question of public policy and sound morals must be addressed to the legislative branch of the Government.

We heard the argument of counsel for both plaintiff and defendant, read critically the record and briefs, and can find,

No error.

STACY, J., not sitting.

J. W. McCULLOCH, ADMR., v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 19 December, 1924.)

Carriers—Railroads—Negligence—Contributory Negligence—Evidence—Nonsuit.

In an action against a railroad company to recover for the wrongful death of plaintiff's intestate, evidence tending only to show that deceased was killed by the defendant's passing train where the view was unobstructed both to the intestate and to the employees on defendant's train, which approached without signal and warning, and the deceased was a lad in full possession of his faculties and could have readily reached a place of safety, and thus have avoided the injury, a judgment as of nonsuit was properly rendered.

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Bryson, J.*, at July Term, 1924, of DAVIDSON.

Civil action to recover damages for death of Alfred Beck, alleged to have been caused by negligence of defendant. From judgment of nonsuit at close of plaintiff's evidence, plaintiff appealed. The only assignment of error is based upon exceptions to the judgment of nonsuit.

Hollingsworth & Nance and J. R. McCrary for plaintiff.
Lynn & Lynn for defendant.

CONNOR, J. The body of plaintiff's intestate was found about 4 p. m. on 13 June, 1922, beside the track of defendant, about three miles south of Lexington, N. C., and about 125 feet south of a crossing. His left arm and left leg were broken and there was a hole on the left side of his head. The leg was broken above the knee and there was a bruise on his left arm. Deceased was 14 years of age, weighed about 85 pounds and was nearly 5 feet tall. He was a bright, intelligent boy, in good health, active and alert. He had left his mother's home about nine o'clock that morning to go to his sister's house. A witness testified that he saw him walking along the public road about an hour before he was killed, with a bucket on his arm. The body, when witnesses first saw it, was lying about 6 or 7 feet from the coss-ties, his cap and bucket nearby.

Just before the body was found, a freight train containing seventy-five cars, running down-grade at a speed of 25 or 30 miles per hour, going south from Lexington toward Salisbury, had passed the point at which the body was found. As the train came around a sharp curve, about 1,200 feet from where the body was found, the engineer saw plaintiff's intestate standing on the end of a cross-tie on the southbound track. There was nothing to prevent the engineer from seeing him from this time until the engine reached the point at which his body was found. There is evidence that he was standing on the cross-tie when he was struck by the train. If deceased had "looked and listened," there was nothing to prevent his leaving the place of peril where he was standing.

The distance from the point where the body was found to the curve was about 1,200 feet. The train stopped 1,862 feet beyond this point. It is about 6 feet between the northbound and the southbound track. The body was found on the right side of the track, going south. From the end of the cross-ties to the rail of the track was about 18 inches, and a person could not stand on the end of a cross-tie without being struck by a passing train. There was nothing to prevent the deceased, standing on the cross-tie near where the body was found, from

seeing the train as it came around the curve, nor was there anything to prevent the engineer from seeing a person standing on the cross-tie or near the track at that point. The track is straight from the curve south something over a mile. The deceased was killed between two curves. The body was found about 125 feet from the first crossing. Witnesses who testified that they saw and heard the train as it came around the curve and continued in a southerly direction; did not hear any signal given, by either bell or whistle, of the approach of a train, nor did these witnesses hear any sound indicating that the brakes were applied at any time prior to the time the train reached the point where the body was found.

There was no path provided for people to walk on where the deceased was killed. There were crossings some distance from the point. Notices are posted all along the track—one near where the body was found—warning people of the danger of walking on the track.

The judgment of nonsuit is sustained upon the authority of *Davis v. R. R.*, 187 N. C., 147. The principle of law applicable to the facts which the jury could have found from the evidence offered in this case are fully stated in the opinion filed by *Chief Justice Hoke* in that case. There is no evidence, from which facts could be found, making the qualifications of the general rule stated in the opinion applicable to this case.

Recovery is denied, not upon the ground that the defendant owed the plaintiff's intestate no duty, but upon the ground that plaintiff's intestate was guilty of contributory negligence, continuing up to and necessarily proximately producing the injury.

The judgment is

Affirmed.

CLARKSON, J., dissenting.

STATE v. ROLLIN CRISP.

(Filed 19 December, 1924.)

1. Criminal Law—Defense—Pleas—Former Acquittal—Indictment—Evidence—Variance.

Where a defendant in a criminal action is acquitted upon a variance between the offense charged in the indictment and the evidence upon the trial, upon another trial for substantially the same offense under a correct indictment, he may not successfully plead a former acquittal.

2. Criminal Law—Burglary—Intent—Statutes.

Under the provisions of C. S., 4235, the burglarious, etc., intent of breaking into a storehouse, dwelling, etc., is necessary to a conviction.

STATE *v.* CRISP.

APPEAL by defendant from *Ray, J.*, at September Term, 1924, of GRAHAM.

Criminal prosecution, tried upon an indictment charging the defendant with the unlawful, willful and felonious breaking and entering of a certain storehouse in the possession of G. W. Shuler, sheriff of Graham County, with intent to commit the crime of larceny therein, in violation of the provisions of C. S., 4235.

From an adverse verdict and judgment pronounced thereon, the defendant appeals, assigning errors.

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

T. M. Jenkins, R. L. Phillips, and Moody & Moody for defendant.

STACY, J. At the same term of court, and on the day before the present trial was had, the defendant was tried under a different bill of indictment, in which the possession of the property was laid in one C. D. Mort. At the close of the evidence on the first trial, and on motion of the defendant, there was a judgment as of nonsuit entered under C. S., 4643. Thereupon, the solicitor sent the present bill before the grand jury, in which the possession of the property is laid in G. W. Shuler, sheriff of Graham County. When called upon to plead, the defendant entered a plea of former acquittal, or former jeopardy, and not guilty.

His plea of former acquittal, or former jeopardy, was properly overruled. *S. v. Drakeford,* 162 N. C., 667; *S. v. Harbert,* 185 N. C., 760; *S. v. Gibson,* 170 N. C., 697.

The law applicable is stated in 12 Cyc., 266, as follows: "If the accused is acquitted by direction of the court on the ground of material variance, he cannot plead the acquittal as a bar, for he has never been in jeopardy, and when tried on a new indictment the crime then alleged is not the same crime as in the former indictment. And it has been held that if the accused on the prior trial maintained that the variance was material, and the court directed a verdict of acquittal on that ground, he cannot subsequently on his plea of former acquittal allege or prove that it was not material." And this is supported by a long citation of authorities, including, among others from this State, *S. v. Birmingham,* 44 N. C., 120; *S. v. Revels,* 44 N. C., 200. The *Revels case* was disapproved in *S. v. Lytle,* 117 N. C., 799, on another point, but not on the question now in hand. See, also, *S. v. Hooker,* 145 N. C., 581; *S. v. Nash,* 86 N. C., 650; *S. v. Jesse,* 20 N. C., 105.

In construing the statute, his Honor stated in the presence of the jury that the intent with which the defendant entered the storehouse in

question was not material to the case; and later he instructed the jury that if they believed the evidence they would find the defendant guilty. This entitles the defendant to a new trial.

The trial court was doubtless misled by the *dictum* in *S. v. Hooker,* 145 N. C., 582, to the effect that, as used in section 3333 of the Revisal, the words, "with intent to commit a felony or other infamous crime therein," applied only to the clause with which it was closely connected, and not to all the clauses in the section; but this was expressly disapproved in *S. v. Spear,* 164 N. C., 452. And, further, it should be noted that this section of the Revisal has been restated in accordance with the decision in the *Spear case,* brought forward as section 4235 in the Consolidated Statutes, and now reads as follows: "If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling-house of another otherwise than by a burglarious breaking, or any storehouse, shop, warehouse, banking-house, counting-house or other building where any merchandise, chattel, money, valuable security or other personal property shall be, or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the State's Prison or county jail not less than four months nor more than ten years."

It is clear, we think, from a reading of the statute as now written, that the "intent to commit a felony or other infamous crime therein" is one of the essential elements of the offense charged and necessary to be shown in order to warrant a conviction. This having been eliminated on the trial, it becomes necessary to remand the cause for another hearing.

New trial.

H. R. BIRDWELL v. P. R. MOALE AND WILLIAM M. REDWOOD, TRADING AS AMERICAN SALES AND SERVICE COMPANY.

(Filed 19 December, 1924.)

Principal and Agent—Vendor and Vendee—Contracts—Respondeat Superior.

Where the defendants have sent their agents to see the plaintiff, following the latter's inquiry, in regard to a sale of merchandise, and the agents have made the sale, accepted by defendant, and the goods delivered thereunder, the defendant is liable to plaintiff for the breach of the written contract of sale, though the contract itself did not accompany the agents' order and the defendants were not made aware of its terms.

APPEAL by defendant from judgment rendered by *Finley, J.,* at July Term, 1924, of BUNCOMBE.

On 29 November, 1920, defendants, residing at Asheville, N. C., replied to a letter from plaintiff, residing at Birmingham, Ala., acknowledging the receipt of a letter inquiring as to certain weighing machines and scales manufactured and sold by defendants. In this letter plaintiff was advised as follows: "We will have our Mr. F. A. McKenney call on you in the very near future and take up the matter in full. Accept our thanks for your inquiry."

On 17 December, 1920, F. A. McKenney, as salesman for defendants, made a contract with plaintiff, at Birmingham, Ala., by which defendants agreed to sell to plaintiff certain weighing machines and scales, upon terms and stipulations fully set out therein. This contract was executed in duplicate, one copy being delivered to plaintiff, the other retained by McKenney. On same date plaintiff delivered to McKenney an order for the weighing machines and scales. The copy of the contract was not forwarded to defendants by McKenney, but the order was forwarded to and received by defendants. It was stipulated in the order that it was subject to approval and acceptance by the defendants. This order was accepted by defendants, and the weighing machines and scales shipped by them to plaintiff.

Defendants contend that they are not bound by the contract which their agent made with the plaintiff, as a duplicate of same was not sent to them by McKenney. They contend that the order, signed by plaintiff, forwarded to them by their agent, and accepted by them, contains all of the terms and stipulations of the contract between plaintiff and themselves.

The jury has found that the contract was as alleged by the plaintiff; that there was a breach of this contract by defendants, and that plaintiff is entitled to recover of defendants as damages for such breach $952.13. From judgment in accordance with verdict defendants appealed.

Martin, Rollins & Wright for plaintiff.
Lee, Ford & Coxe for defendants.

PER CURIAM. Assignments of error made by appellants cannot be sustained. The contract between plaintiff and defendants was negotiated by the agent of the defendants, who had expressly notified plaintiff that such agent would call to see him for the purpose of negotiating such contract. The failure of the agent to forward to defendants a duplicate of the contract, as signed by plaintiff and by the agent acting for the defendants, cannot affect the liability of defendants. It was stipulated in the order that same was subject to approval by defendants. The contract and the order were executed contemporaneously, and the

rights and liabilities of plaintiff and defendants are fixed and determined by the contract and the order construed together. The breach of the contract, as alleged by the plaintiff, has been found by the jury upon competent evidence.

Defendants' exceptions are not sustained. The judgment must be affirmed. There is

No error.

STATE v. R. A. McLAMB.

(Filed 19 December, 1924.)

Criminal Law—Indictment — Amendments — Statutes—Assault—Deadly Weapon—Serious Injury.

Held, the amendment to the indictment allowed by the court in this case was sufficient for a conviction of the defendant of violating C. S., 1481, charging an assault with a deadly weapon, inflicting serious injury.

APPEAL by defendant from *Barnhill, J.,* at September Term, 1924, of JOHNSTON.

A justice of the peace issued a warrant, returnable before the recorder, charging the defendant with an assault with a knife on John Smith. Upon conviction in the recorder's court, the defendant appealed to the Superior Court; and before any evidence was offered, the court granted a motion, made by the State, to amend the warrant so as to make it read, "assault with a deadly weapon and serious injury." The solicitor drafted the amendment; it was not read or exhibited to the defendant or his counsel, but the defendant did not request either the reading or the exhibition of the amendment. The defendant was tried upon the charge of an assault with a deadly weapon and an assault, whereby serious bodily injury was inflicted.

The jury returned for its verdict, "Guilty of assault, serious injury inflicted." It was adjudged that the defendant be confined in jail for twelve months and assigned to work on the roads.

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

Parker & Martin for defendant.

PER CURIAM. All the exceptions are based, directly or indirectly, on the single proposition that the warrant as amended is not sufficient to sustain the verdict. The exceptions cannot be sustained. The amended warrant charges the defendant not only with an assault with a deadly

weapon, but with an assault, whereby serious damage was done, and sets forth with sufficient particularity the nature and extent of the serious damage or injury alleged to have been inflicted. C. S., 1481, 4215; *S. v. Huntley,* 91 N. C., 617; *S. v. Cunningham,* 94 N. C., 824; *S. v. Shelley,* 98 N. C., 673.

We find

No error.

STATE v. GEORGE PORTER.

(Filed 19 December, 1924.)

1. Criminal Law—Statutes—Carnal Knowledge of a Female Child.

Upon the trial of the criminal offense of carnally knowing a female child over twelve and under sixteen years of age (C. S., 4209, and amendment of 1923), the defendant may not enter a plea of guilty and thereafter withdraw the plea and enter a defense as a matter of right, and the sentence will be sustained in the absence of abuse of the court's discretion.

2. Same—Amendments to Statutes.

When the defendant would not be guilty of the offense prohibited by C. S., 4209, but has since continued to carnally know a female child thereafter, the plea that his continued acts after the passage of the amendment of 1923 would not make him guilty thereunder cannot be sustained.

3. Appeal and Error—Criminal Law—Burden to Show Error—Record.

On defendant's appeal from judgment against him in violation of the provisions of C. S., 4209, amended in 1923, he must show error upon the face of the record, or his exception to the judgment cannot be sustained.

APPEAL by defendant from *Midyette, J.,* at May Term, 1924, of HARNETT.

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

Young, Best & Young for defendant.

PER CURIAM. The defendant was indicted for carnally knowing and abusing a female child, over twelve and under sixteen years of age, in breach of C. S., 4209, as amended by Public Laws 1923, ch. 140. When the case was called for trial the defendant, who was represented by counsel, entered a plea of guilty, which was accepted on behalf of the prosecution. For the information of the court, the State then examined the prosecutrix, whose testimony was corroborated and whose character was shown to be good. She testified that the defendant was her father's

second cousin; that he first had intercourse with her in April, 1923, and afterwards on several occasions, the last of which was immediately prior to the finding of the indictment, and that she was born on 20 April, 1908. The bill was returned by the grand jury at the May Term of 1924.

At the conclusion of the evidence the defendant moved for permission to withdraw his plea, on the ground that he had been misinformed as to the age of the prosecutrix and that his submission had been inadvisedly entered.

The amendment of 1923, *supra,* raising the age of consent from fourteen to sixteen years, went into effect on 1 July, 1923. The defendant contends that if his plea were withdrawn he could not be convicted on the State's evidence, for two reasons: (1) because the first act of intercourse occurred in April, 1923, and the prosecutrix was then over the age of fourteen; (2) because similar acts taking place after the amendment became effective would not constitute a breach of the statute, the prosecutrix having previously had intercourse with the defendant.

Whatever may be said of the first proposition, the second cannot be maintained. *S. v. Hopper,* 186 N. C., 405, *Hardin v. Davis,* 183 N. C., 46; *S. v. Johnson,* 182 N. C., 883.

The defendant had no right to withdraw his plea as a matter of law, and there was no abuse of discretion on the part of the court.

The appellant has not pointed out any error on the face of the record, and his motion in arrest of judgment was properly denied. *S. v. Lanier,* 90 N. C., 714; *S. v. Bryan,* 89 N. C., 531.

The judgment, to which exception was noted, is sustained by *S. v. Rippy,* 127 N. C., 517.

We find

No error.

J. C. METCALFE v. CHAMBERS & WEAVER COMPANY.

(Filed 19 December, 1924.)

Appeal and Error—Laches—Death of Trial Judge—New Trials—Appellee Offers to Accept Appellant's Case.

Offer of appellee to accept appellant's case does not, under the circumstances, vary the opinion in *Rector v. Mfg. Co., post,* 807.

ABOVE-ENTITLED action was commenced by summons, issued 23 February, 1924. It came on for trial at March Term, 1924, of MADISON, before *Ray, J.,* and a jury.

At the close of plaintiff's evidence, judgment was rendered, upon motion of defendant, as of nonsuit. Defendant also demurred *ore tenus.* Demurrer sustained. Plaintiff excepted and appealed to the Supreme Court. By consent, appellant was allowed until 19 May, 1924, to make and serve statement of case on appeal. Case on appeal was served 14 May, 1924. Appellee served countercase within time agreed upon. Thereafter, at the request of attorneys, Judge Ray fixed time and place for settling case on appeal. Attorneys for appellant and appellee appeared at said time and place, but the judge, being engaged in the trial of a cause, was unable to consider the matter, and thereupon, by consent, fixed another time and place. Attorney for appellant appeared at such time and place, but the judge was unable to be present. All the papers in the action were thereafter sent to Judge Ray at Waynesville, N. C., where he was holding court, during the month of July, 1924. No other or further notice of time or place was given to counsel by the judge.

The judge was engaged continuously in holding courts until on or about the first of October, when, on account of his ill health, he went to Johns Hopkins Hospital, in Baltimore, Md., where he died, on 6 October, 1924. No case on appeal has been agreed upon or settled. Appellant has caused the record of the action to be docketed in this Court, and now moves for a new trial. All the papers in the case were in the possession of Judge Ray at the time of his death. They have not been returned to appellant or his attorneys.

John A. Hendricks and G. M. Prichard for plaintiff.
F. W. Thomas for defendants.

CONNOR, J. It appears from affidavits filed in this Court in support of appellant's motion that the case on appeal has not been agreed upon or settled; that there has been no laches on the part of appellant, but that on the contrary appellant has been diligent in his efforts to get the case on appeal settled in accordance with the statute and with the rules of this Court. The illness and untimely death of the judge has rendered it impossible for appellant to get the case on appeal settled. Having docketed the case in this Court, he now moves for a new trial.

Appellee filed an affidavit in this Court, in which he offers to withdraw his countercase and accept appellant's case on appeal. Both the case on appeal and the countercase as filed with Judge Ray were in his possession at the time of his death. It does not appear that appellant and appellee have agreed that a copy of said case on appeal in the possession of either of them is a true copy of the case as filed with the judge. Judge Ray became ill while holding court, and left at once for

the hospital in Baltimore. Whether or not the papers in his possession can now be found does not appear. The offer of appellee to withdraw the countercase and to accept appellant's case on appeal as filed with the judge, or a copy of same, was not made until the hearing of the motion in this Court. Appellant has a right to have his appeal from the judgment of nonsuit reviewed by this Court. C. S., 632. This cannot be done without a statement of the evidence submitted at the trial. This cause, in accordance with the practice of the Court (*Rector v. Mfg. Co., post,* 807), must be remanded, in order that there may be a

New trial.

HELMA RECTOR, BY HER NEXT FRIEND W. L. RECTOR, *v.* CAPITOLA MANUFACTURING COMPANY.

(Filed 19 December, 1924.)

Appeal and Error—Laches—Death of Trial Judge—New Trial.

Where the appellant to the Supreme Court has not been guilty of laches in presenting his appeal, and the death of the judge has prevented the settling of the case on appeal, as required by statute and rules of procedure in such instances, a new trial will be ordered.

ABOVE-ENTITLED action was commenced by the issuance of summons, dated 8 March, 1923. It came on for trial before *Ray, J.*, and a jury, at May Term, 1924 of MADISON.

There was a verdict for plaintiff. Defendant appealed from judgment in accordance with verdict. Appellant was allowed sixty days within which to prepare and serve case on appeal, and appellee sixty days thereafter to serve countercase or exceptions.

The case on appeal and countercase were served, respectively, within the time allowed. Both were sent to Judge Ray on 13 August, 1924, with notice that appellant and appellee were unable to agree on case on appeal. The judge was requested by appellant to fix time and place for settling the case before him, as provided by statute. In accordance with this request, the judge fixed time and place and so notified both appellant and appellee. On account of the death of a relative of attorney for appellee, by consent the time was continued and another day set by the judge. Thereafter the judge became sick and subsequently died. The case on appeal has not been agreed upon or settled. Appellant has caused the record in this case to be docketed in this Court, and now moves for a new trial, for the reason that the case on appeal has not been settled.

John A. Hendricks for plaintiff.
Merrimon, Adams & Johnston for defendant.

CONNOR, J. It appears from affidavits filed in this Court in support of appellant's motion that the case on appeal has not been agreed upon or settled; that there has been no laches on the part of appellant, but that on the contrary appellant has been diligent in its efforts to get the case on appeal settled in accordance with the statute and with the rules of this Court. The illness and untimely death of the judge has rendered it impossible for appellant to get the case on appeal settled, and it now moves for a new trial.

The motion is allowed, in accordance with the practice in this Court. *S. v. Parks,* 107 N. C., 821; *Parker v. Coggins,* 116 N. C., 71. The action must be remanded, in order that there may be a

New trial.

JOHN P. LEDFORD v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(Filed 19 December, 1924.)

Carriers—Railroads—Ejecting Passenger—Improper Place—Damages—Proximate Cause.

A railroad company, having the lawful right to put a passenger off the coach of its train for his failure to pay his fare, is nevertheless answerable in damages when it does so at a place and under circumstances that import serious menace to him, and injury is thereby proximately caused.

CIVIL ACTION, tried before *McElroy, J.,* and a jury, at March-April Term, 1924, of CHEROKEE.

Plaintiff sued on two causes of action:

1. That, being a passenger, he was, in August, 1922, wrongfully expelled from defendant's train.

2. That he was expelled from said train in a wrongful and negligent manner, thereby causing substantial physical injury.

On denial of liability, the cause was submitted and verdict rendered on issues as follows:

"1. Was the plaintiff, John P. Ledford, wrongfully ejected from defendant's passenger train, as alleged in the first cause of action in the plaintiff's complaint? Answer: 'No.'

"2. If so, what damages is plaintiff entitled to recover? Answer: 'None.'

"3. Was the plaintiff injured by the negligence and wrongful conduct of the defendant, as alleged in plaintiff's second cause of action? Answer: 'Yes.'

"4. If so, what damages, if any, is plaintiff entitled to recover? Answer: '$500.00.'"

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

Dillard & Hill and Moody & Moody for plaintiff.

M. W. Bell for defendant.

HOKE, C. J. The evidence of plaintiff tended to show that in August, 1922, at Murphy, N. C., plaintiff, having failed to get a ticket because defendant's agent was not properly in his place, was wrongfully put off defendant's train because he refused to pay the fare due from passengers without a ticket.

On second cause of action there was evidence on part of plaintiff tending to show that at the time stated and in or near the town of Murphy, N. C., he was put off defendant's train by the conductor or other agents of defendant before the train had come to a full stop and at a point where there was a ditch of some depth in a bad and muddy condition, and as plaintiff endeavored to get out of this ditch and to avoid the moving train which threatened, he slipped, falling against a rock sticking out of the bank, causing plaintiff substantial physical injuries.

There was evidence for defendant in denial of plaintiff's testimony and tending to show that defendant company and its agents were free from all blame in the matter. On this conflict of evidence, the jury on the first cause of action have rendered their verdict for defendant, and plaintiff not appealing, no question as to the first cause of action is presented, nor as to the right of the company to eject defendant from its train.

On the second cause of action the jury have accepted the plaintiff's version of the matter and this being true, plaintiff's claim is clearly made out. As heretofore stated, the verdict on the first cause of action has established the right of defendant and its agents to eject plaintiff, but even where such right exists it must be exercised in reasonable regard for the would be passenger's safety, and if, in breach of this duty, defendant company, through its agents, has expelled the claimant at a time and place and under circumstances that import menace of substantial physical injury, and such injury results, an action properly lies. 5th R. C. L. pp. 134, 135. In this citation the author states the general principle as follows: "Even though a person has no right on

the vehicle or premises of the carrier and the latter clearly has the right to eject him therefrom, such right must be exercised in a reasonable and prudent manner and with due care for the safety of the offender, and for a failure so to act resulting in injury to the person ejected, the carrier will be liable."

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

No error.

CHARLIE KINSLAND v. S. J. KINSLAND ET AL.

(Filed 19 December, 1924.)

Injunction—Pleadings—Allegations — Surface Waters—Damages—Trespass—Insolvency.

The demand for damages in the complaint for ponding water upon and injuring the lands of the upper proprietor required by C. S., 2556, is not necessary when the relief sought is to enjoin the maintenance of a dam on the plaintiff's own land by the defendant's trespass thereon, and the abatement of the nuisance thus caused, and the trespass being continuing, the allegation of defendant's insolvency is not necessary for the continuance of the restraining order to the final hearing before the jury.

APPEAL by plaintiff from *McElroy, J.*, at April Term, 1924, of MACON.

The plaintiff's allegations are substantially these: The plaintiff is the owner of the land described in the complaint, and defendants are the owners of the land below and adjoining the plaintiff's, on which there is a grist mill about 800 or 1,000 feet from the dividing line; defendants have trespassed on the land of the plaintiff and have constructed or begun the construction of a dam upon it, and have ponded water, obstructed his ditches and rendered a part of his land useless for cultivation; they have also committed other acts of trespass which have caused, and will cause, injury to his property.

The defendants admit the plaintiff's title and their ownership of the mill and the adjoining land, but they deny the trespass. At the close of the evidence, the action was dismissed as in case of nonsuit. The plaintiff excepted and appealed.

H. G. Robertson, A. W. Horne and J. F. Ray for plaintiff.

T. J. Johnston and Gilmer A. Jones for defendants.

ADAMS, J. Upon a former appeal the restraining order was dissolved without prejudice to the rights of the plaintiff to renew his motion upon

definitely establishing the facts at the final hearing. 186 N. C., 760. Afterwards, the cause came on for trial upon an amended complaint, in which the plaintiff prayed that the dam be declared a trespass and a nuisance and that an order be issued restraining the defendants from wrongful entry upon the plaintiff's land.

The theory upon which the action was dismissed is not stated in the judgment, but from the defendant's brief, we infer it rests on the contention that as no damages, annual or otherwise, were demanded in the complaint, the dam cannot be abated or the defendant restrained until damages are assessed under the statute.

True, this seems to be a substantial requirement of section 2556 of the Consolidated Statutes. *Hester v. Broach,* 84 N. C., 252. But this section, we apprehend, applies where water is ponded upon the plaintiff's land by a dam constructed on the property of another or where a trespass of like character is committed, because at common law an action could be brought each day so long as the trespass continued. But the statute does not apply and was never intended to apply to an actual entry upon the complainant's premises and the construction thereon of a dam for the purpose of ponding water and retaining possession.

The unauthorized entry upon the possession of another entitles him to nominal damages at least (*Lee v. Lee,* 180 N. C., 86) and it may be such as to evoke the equitable jurisdiction of the courts or it may result in the creation of a nuisance which the law will abate.

There is evidence tending to show that the defendant after invading the plaintiff's possession, built the dam on the plaintiff's land, and that the alleged trespass is continuous in its nature. There is evidence to the contrary. The issues raised should be submitted to the jury and the verdict will determine the questions whether the defendants have committed the alleged trespass and whether the plaintiff is entitled to an order restraining a continuance of the trespass and a mandatory injunction to compel the defendant to remove the dam, although actual damages are not demanded. If a trespass is continuous it is not necessary to allege the insolvency of the defendant. C. S., 844; *Lyerly v. Wheeler,* 45 N. C., 267; *Bond v. Wool,* 107 N. C., 139; *Cobb v. R. R.,* 172 N. C., 58; *Woolen Mills v. Land Co.,* 183 N. C., 511; 26 R. C. L., 943 (17); 14 *ibid.,* 444 (145); *ibid.,* 453 (153); *ibid.,* 455 (156).

The judgment of nonsuit and dismissal is reversed and the cause is remanded for further proceedings.

Reversed.

STATE v. B. F. DICKERSON.

(Filed 10 September, 1924.)

APPEAL by defendant from *Bond, J.*, at February Term, 1924, of WILSON.

Criminal prosecution, tried upon an indictment charging the defendant, in three separate counts, with violations of the prohibition laws.

From an adverse verdict, and judgment pronounced thereon, the defendant appeals.

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

O. P. Dickinson and W. A. Lucas for defendant.

PER CURIAM. The chief exception presented on the record is the one directed to the refusal of the trial court to grant the defendant's motion for dismissal of the action or for judgment as of nonsuit, made under C. S., 4643, after the State had produced its evidence and rested its case. Viewing the evidence in the light most favorable to the State, 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 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.

FARMERS BANKING & TRUST CO., ADMR., v. GEORGE M. FOUNTAIN ET AL.

(Filed 10 September, 1924.)

APPEAL by plaintiff from *Bond, J.*, at June Term, 1924, of EDGECOMBE.

Allsbrook & Philips for plaintiff.

Don Gilliam and George M. Fountain for defendants.

PER CURIAM. This is the same case which was heard and determined by us at the last term under the title of *Cobb v. Fountain,* 187 N. C., 335. The change in the title of the cause is occasioned by the death of

Mr. D. E. Cobb, who was administrator of the estate of Nancy L. Hargrove, deceased, and the appointment of the plaintiff as his successor, administrator *de bonis non* of the estate of Nancy L. Hargrove, and the substitution of the latter, by consent, as plaintiff herein.

A careful perusal of the record leaves us with the impression that the case has been tried substantially in agreement with the opinion heretofore rendered. The vital question presented by the appeal is whether the evidence, offered by the defendants, shows such rare and exceptional circumstances as to justify the guardian in investing his ward's funds outside of the State. Viewing the evidence in its entirety and as a whole, we think the case was properly submitted to the jury, and they have found for the defendants.

No benefit would be derived from detailing the testimony of the several witnesses, as the chief question is whether it is sufficient to be submitted to the jury, and we think it is. There is certainly more than a scintilla of evidence to support the defendants' position.

We have discovered no ruling or action on the part of the trial court which we apprehend should be held for reversible error. Hence, the verdict and judgment as rendered will be upheld.

No error.

STATE v. WILLIAM PRESLEY.

(Filed 10 September, 1924.)

APPEAL by defendant from *Bond, J.*, at March Term, 1924, of EDGECOMBE.

Criminal prosecution, tried upon a warrant charging the defendant with manufacturing spirituous liquors and with aiding and abetting in their manufacture, contrary to the statutes in such cases made and provided, etc.

From an adverse verdict, and judgment pronounced thereon, the defendant appeals.

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

James P. Bunn and Lyn Bond for defendant.

PER CURIAM. There was ample evidence to carry the case to the jury. The exception based on the court's refusal to grant the defendant's motion for dismissal of the action or for judgment as of nonsuit, made

first at the close of the State's evidence, and renewed at the close of all the evidence, must be overruled.

The remaining exceptions relating to the admission of certain evidence are fully met by what was said in *S. v. Crouse,* 182 N. C., 835.

The record presents no new or novel point of law, not heretofore settled by our decisions on the subject. The trial and judgment must be upheld.

No error.

J. W. HIGHT v. W. J. TAYLOR ET AL.

(Filed 17 September, 1924.)

APPEAL by plaintiff from *Barnhill, J.,* at chambers in Rocky Mount, 26 July, 1924, from MARTIN.

Civil action to restrain the defendants from proceeding under execution and supplemental proceedings on judgment rendered by default against plaintiff and in favor of defendants.

From a judgment dissolving the temporary restraining order, the plaintiff appeals.

Critcher & Critcher for plaintiff.
Dunning, Moore & Horton for defendants.

PER CURIAM. Embodied in the judgment rendered herein are the following findings of facts:

"1. The defendants in this cause in April, 1924, instituted an action against the plaintiff in this cause in the Recorder's Court of Martin County, and the plaintiff herein having failed to answer, judgment was rendered against the plaintiff here for $648.

"2. That the plaintiff in this cause has not appeared and moved to set aside said judgment for excusable neglect or any other cause to the end that he might file answer and set up his counterclaim, although one year has not elapsed since the rendition of said judgment. This finding is by consent.

"3. That the defendant has filed answer in this cause denying every material allegation in plaintiff's complaint.

"4. This is an independent action instituted by the plaintiff against the defendant upon a cause of action that could have been set up as a counterclaim in the suit instituted by the defendant against the plaintiff in the Recorder's Court of Martin County."

Upon these, the facts chiefly pertinent, the court being of opinion that the plaintiff was not entitled to injunctive relief, dissolved the temporary restraining order previously granted in the cause. In this there was no error. Plaintiff has not made out a case calling for injunctive relief.

Affirmed.

J. B. COLT CO., INC., v. J. S. PROCTOR.

(Filed 17 September, 1924.)

APPEAL by defendant from *Bond, J.,* at February Term, 1924, of NASH.

Civil action tried upon the following issue: "Is the defendant, Proctor, indebted to the plaintiff company, and if so, in what amount?" "Yes, $196.35, with interest."

Judgment on the verdict for plaintiff. Defendant appeals.

Battle & Winslow, J. B. Ramsey and J. M. Alexander for plaintiff.
E. B. Grantham for defendant.

PER CURIAM. This is a simple action of debt. The contract between the parties was in writing, and is identical in terms with the instrument which was construed in *Colt v. Turlington,* 184 N. C., 137. We have found nothing on the record which entitles the defendant to a new trial. The verdict and judgment will be upheld.

No error.

C. B. BRANTLEY ET AL. v. G. D. RICKS ET AL.

(Filed 17 September, 1924.)

APPEAL by plaintiff from *Bond, J.,* at February Term, 1924, of NASH.

Civil action to recover of the defendant, G. D. Ricks, the sum of $116.30 for merchandise furnished his tenant, James Crudup, during the year 1918, and which it is alleged he agreed to assume responsibility for its payment.

The case was commenced in a court of a justice of the peace, and tried *de novo* on appeal to the Superior Court.

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

O. B. Moss for plaintiff.
Finch & Vaughan and Manning & Manning for defendant.

PER CURIAM. On a controverted issue of fact, the jury has taken the defendant's version of the matter. A careful perusal of the record leaves us with the impression that the case has been tried substantially in agreement with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court, as presented by the exceptions, which we apprehend should be held for reversible error. The verdict and judgment will be upheld.

No error.

ATLANTIC COAST LINE RAILROAD COMPANY v. TOWN OF SANFORD ET AL.

(Filed 24 September, 1924.)

APPEAL by defendants from *Midyette, J.*, at chambers in Goldsboro, 4 June, 1924, continuing a restraining order to the final hearing. From LEE.

Charles G. Rose and Hoyle & Hoyle for plaintiff.
Williams & Williams for defendants.

ADAMS, J. The plaintiff filed an affidavit that the defendants, purporting to act by virtue of final assessments against the plaintiff, had advertised certain of its tracks and other property for sale. We have held in the preceding case that the alleged assessments were improperly made, and it follows that his Honor's judgment should be

Affirmed.

FERRIS B. THORNTON v. W. RANSOM SANDERS, T. C. YOUNG, AND D. W. PARRISH, TRADING AS THE SANDERS MOTOR CO.

(Filed 24 September, 1924.)

APPEAL by defendants from *Lyon, J.*, at February Special Term, 1924, of WAYNE.

Civil action tried upon the following issue: "Are the defendants indebted to the plaintiff, if so, what amount? Answer: $400.00."

Judgment on the verdict in favor of plaintiff. Defendants appeal.

D. H. Bland for plaintiff.
A. M. Noble for defendants.

PER CURIAM. A careful perusal of the record leaves us with the impression that the case has been tried substantially in compliance with the law bearing on the subject; and we have found no action or ruling on the part of the trial court which we apprehend should be held for reversible error.

The chief contention of the defendants is that there is a variance between the cause of action alleged and the one established by the proof, but we do not so construe the evidence and the pleadings.

The verdict and judgment will be upheld.

No error.

STATE v. ELIAS RABIL, ALIAS KID ELLIS.

(Filed 24 September, 1924.)

INDICTMENT for abandonment, conviction and sentence, at January Term, 1924, of WAYNE.

Appeal of defendant. Appeal dismissed at Fall Term, 1924, of the Supreme Court. Motion to reinstate.

Attorney-General Manning and Assistant Attorney-General Nash for the State.
W. S. O'B. Robinson for defendant.

PER CURIAM. It appears from an inspection of the record that defendant was convicted of abandonment at January Term, 1924, of the Superior Court of Wayne County, and, on conviction, sentenced to the county roads on 24 January, 1924, from which said judgment defendant appealed; that the record of said appeal was not docketed in this Court until 4 September, 1924, after commencement of Fall Term of the Court, nor was there any proceedings, by writ of *certiorari* or otherwise, by which the time for docketing said appeal was extended. The appeal, therefore, not having been brought to the next term of the Supreme Court after trial and sentence had, same was dismissed, on motion, in accordance with Rule 5 of Supreme Court, appertaining to appeals; and no valid reason therefor having been made to appear, defendant's motion to reinstate is denied. *S. v. Farmer, ante,* 243, and authorities cited.

Motion to reinstate denied.

W. D. THOMAS v. WILL BUTLER ET AL.

(Filed 24 September, 1924.)

APPEAL by defendants from *Pittman, J.*, at November Term, 1923, of BERTIE.

Civil action to recover damages for an alleged trespass, and to establish the true dividing line between the lands of plaintiff and defendants, adjoining landowners.

From a verdict and judgment in favor of plaintiff, the defendants appeal, assigning errors.

Craig & Pritchett for plaintiff.
Winston & Matthews and Gilliam & Davenport 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 principal. Therefore, the judgment rendered by the Superior Court will be affirmed. The appeal presents no new or novel point of law which would seem to warrant an extended discussion, or which we apprehend would be helpful to the profession. No reversible error having been made to appear, the verdict and judgment will be sustained.

No error.

A. C. PRICE ET AL. v. E. N. RICKS.

(Filed 24 September, 1924.)

APPEAL by defendant from *Lyon, J.*, at February Special Term, 1924, of WAYNE.

Plaintiffs brought suit to recover a certificate of storage for ten bales of cotton in the Cotton Storage Warehouse at Mount Olive, or, if the certificate could not be had, for $750, the value of the cotton. The verdict was as follows:

"1. Are the plaintiffs the owners and entitled to the certificate for the ten bales of cotton mentioned in the complaint? Answer: 'Yes.'

"2. What is the value of said ten bales of cotton? Answer: '$750.'"

W. S. O'B. Robinson and D. H. Bland for plaintiffs.
J. Faison Thompson and A. W. Byrd for defendant.

PER CURIAM. We are satisfied by inspection of the record that the controversy, which involved almost entirely issues of fact, was tried in substantial compliance with the law, and that there is no error in the judgment.

No error.

CHARLES F. DUNN v. A. W. TAYLOR, SHERIFF OF LENOIR COUNTY.

(Filed 1 October, 1924.)

APPEAL by plaintiff from *Horton, J.*, at June Term, 1924, of LENOIR.

Charles F. Dunn in propria persona.
F. E. Wallace and John G. Dawson for defendant.

PER CURIAM. This is the fourth appeal in this cause. See 186 N. C., 254; 187 N. C., 385; 187 N. C., 865. In the present appeal it appears that the jury found that the land had been redeemed from the tax sale in due time by those who had a lien upon or an interest in it, and that the law was properly applied to the various questions arising upon the evidence.

We find

No error.

IN RE WILL OF JERRE HENDERSON.

(Filed 1 October, 1924.)

APPEAL by propounders from *Horton, J.*, at March Term, 1924, of DUPLIN.

Issue of *devisavit vel non*, raised by a caveat to the will of Jerre Henderson. Alleged undue influence is the ground upon which the caveat is based.

From a verdict and judgment in favor of caveators the propounders appeal.

George R. Ward and H. D. Williams for caveators.
O. B. Turner and Stevens, Beasley & Stevens for propounders.

PER CURIAM. The trial of this cause reduced itself to a controversy over an issue of fact which the jury alone could determine. A careful

perusal of the record leaves us with the impression that the issue has been tried substantially in agreement with the law bearing on the subject, and no ruling or action on the part of the trial court has been discovered by us which we apprehend should be held for legal or reversible error. The appeal presents no new or novel point of law not heretofore settled by our decisions. The verdict and judgment will be upheld.

No error.

ASA CROOM ET ALS. v. CHARLES F. DUNN.

(Filed 1 October, 1924.)

APPEAL by defendant from *Allen, J.*, made at chambers in LENOIR, 2 July, 1924.

Cowper, Whitaker & Allen for plaintiffs.
Charles F. Dunn in propria persona.

PER CURIAM. From a careful examination of the record, we think the judgment of the court below was in accordance with law.

No error.

MILLARD MIAL v. H. A. UNDERWOOD.

(Filed 8 October, 1924.)

APPEAL by defendant from *Grady, J.*, at March Term, 1924, of WAKE.

J. W. Bailey and W. B. Jones for plaintiff.
Willis Smith and R. C. Maxwell for defendant.

PER CURIAM. A careful examination of the record convinces us that this case has been tried in substantial compliance with the law, and that sufficient cause for a new trial has not been shown.

No error.

FARMERS SUPPLY COMPANY v. ROBERT WILLIAMS.

(Filed 15 October, 1924.)

CIVIL ACTION, tried before *Horton, J.*, and a jury, at February Term, 1924, of LENOIR.

Plaintiff appealed.

Rouse & Rouse for plaintiff.
Cowper, Whitaker & Allen for defendant.

PER CURIAM. We have examined the record and the briefs, and have found no error in the trial.

No error.

P. H. SASSER v. HINER SPECIALTY AND MANUFACTURING COMPANY AND C. N. HINER.

(Filed 15 October, 1924.)

APPEAL by defendants from *Daniels, J.*, at February Term, 1924, of WAKE.

Civil action to rescind a stock-subscription contract, the execution of which, it is alleged, was induced by fraud, consisting of false and fraudulent representations of the defendant C. N. Hiner, agent of his codefendant, and to recover back the moneys paid on said stock subscription.

Upon denial of liability, and issues joined, there was a verdict and judgment for the plaintiff, from which the defendants appeal, assigning errors.

John W. Hinsdale and Murray Allen for plaintiff.
C. A. Gosney for defendants.

PER CURIAM. The controversy on trial narrowed itself principally to issues of facts, which the jury alone could determine. The chief assignment of error, or the one most strongly urged on the argument and in the brief, is the exception directed to the refusal of the court to grant the defendants' 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 its most favorable light for 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 fully warranted thereby.

No benefit would be derived from detailing the testimony of the several witnesses, as the only material question before us is whether it is sufficient to carry the case to the jury, and we think it is.

The verdict and judgment will be upheld.

No error.

J. W. FRETWELL v. GILMERS, INCORPORATED.

(Filed 15 October, 1924.)

APPEAL by defendant from *Calvert, J.*, and a jury, at October Term, 1923, of WAKE.

Winston & Brassfield for plaintiff.

J. Crawford Biggs and Ratcliff & Hudson for defendant.

PER CURIAM. From a careful inspection of the record, we can find no reversible or prejudicial error.

The judgment must stand.

No error.

IN RE WILL OF MRS. ROWENA ELIZABETH COLLINS.

(Filed 15 October, 1924.)

APPEAL by propounders from *Midyette, J.*, at February Term, 1924, of HARNETT.

Issue of *devisavit vel non*, raised by a caveat to the will of Rowena Elizabeth Collins. Alleged mental incapacity and undue influence are the grounds upon which the caveat is based.

From a verdict and judgment in favor of caveators the propounders appeal, assigning errors.

Marshall T. Spears, Clifford & Townsend, and John R. Hood for caveators.

Young, Best & Young, Franklin T. Dupree, and Charles Ross for propounders.

PER CURIAM. Several serious exceptions have been entered on the record, but after a careful perusal of the whole case we are confirmed in the belief that substantial justice has been done, without violence to

any legal principle. Therefore, the verdict and judgment as rendered below will be upheld. The appeal 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.

Sufficient merit has not been shown to upset the validity of the proceeding.

No error.

T. H. ALLEN v. JAMES C. DAVIS, APPOINTED BY THE PRESIDENT, UNDER SECTION 206, TRANSPORTATION ACT OF 1920.

(Filed 15 October, 1924.)

APPEAL by plaintiff from *Calvert, J.*, and a jury, at April Term, 1924, of COLUMBUS.

Powell & Lewis and E. K. Bryan for plaintiff.
Rountree & Carr and L. J. Poisson for defendant.

PER CURIAM. The usual issues were submitted to the jury in an action for damages for personal injury. The jury, under proper instructions from the court below, answered the issue, "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" "No."

The issue was one of fact to be determined by a jury. They having found in favor of the defendant, we do not think the verdict and judgment should be disturbed.

No error.

STATE v. WILLIE DURHAM.

(Filed 22 October, 1924.)

APPEAL by defendant from *Sinclair, J.*, at March Term, 1924, of ORANGE.

Attorney-General Manning and Assistant Attorney-General Nash for the State.
R. O. Everett and J. A. Giles for defendant.

PER CURIAM. The defendant was indicted for a violation of the prohibition law. The assignments of error relate to the judge's refusal to dismiss the action as in case of nonsuit and to set aside the verdict.

His Honor's ruling was obviously correct. *S. v. Sykes,* 180 N. C., 679.

No error.

STATE v. C. C. JOHNSON ET AL.

(Filed 29 October, 1924.)

APPEAL by defendant, C. C. Johnson, from *Lyon, J.,* at March Special Term, 1924, of FORSYTH.

Criminal prosecution, tried upon an indictment charging the defendant with the larceny of an automobile.

From an adverse verdict, and judgment pronounced thereon, the defendant appeals, assigning errors.

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

John D. Slawter, W. E. Brock, and William Graves for defendant.

PER CURIAM. The case on trial narrowed itself to a controverted question of fact. We are convinced, from a careful perusal of the record, that the cause has been tried in substantial compliance with the law bearing on the subject, and no ruling or action on the part of the trial court has been discovered by us which we apprehend should be held for reversible or prejudicial error. The exceptions deal almost exclusively with questions of evidence and motions for dismissal. The validity of the trial must be upheld.

No error.

STATE v. MONK ROSE.

(Filed 29 October, 1924.)

APPEAL by defendant from *Sinclair, J.,* and a jury, heard at February Term, 1924, of DURHAM.

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

J. W. Barbee for defendant.

PER CURIAM. We have gone over the record carefully, examined the briefs in the case, and can see no error in law.

It was a question of fact for the jury. They have rendered their verdict of "Guilty." We cannot disturb their verdict or the judgment of the court below.

We find

No error.

STATE v. JOE EDWARDS.

(Filed 29 October, 1924.)

APPEAL by defendant from *McElroy, J.*, at August Term, 1924, of ROCKINGHAM.

The defendant was charged with having liquor in his possession for the purpose of sale. He was convicted, and from the judgment he appealed.

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

PER CURIAM. We find no error. The trial involved merely an issue of fact, which was determined by the verdict.

No error.

C. M. SOLES, ADMR., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 November, 1924.)

APPEAL by defendant from *Calvert, J.*, at February Term, 1924, of COLUMBUS.

Civil action, to recover damages for an alleged negligent injury, caused by defendant's wrongful act, and resulting in the death of plaintiff's intestate.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered by them in favor of the plaintiff. Defendant appeals, assigning errors.

H. L. Lyon and Tucker & Proctor for plaintiff.

Rountree & Carr for defendant.

PER CURIAM. This case was before us at a former term (184 N. C., 283). The first appeal was from a judgment of nonsuit, entered on motion of the defendant at the close of plaintiff's evidence, and this was reversed by us. We are not now permitted to review any question which was then decided, as a party who loses in this Court may not have his case reheard by a second appeal. *Holland v. R. R.*, 143 N. C., 435. Where a judgment of nonsuit has been reversed, and on a second trial the plaintiff's evidence is substantially the same as it was on the first hearing, the cause should be submitted to the jury, as the former decision has become the law of the case, so far as the question of nonsuit is concerned. *Ray v. Veneer Co., ante,* 414.

The exceptions relating to the question of assumption of risk are not materially different from those presented in *Cobia v. R. R., ante,* 487, and they are controlled by what is said in that case. It would only be a work of supererogation to repeat here what was said there. See, also, *Reed v. Director-General,* 258 U. S., 92.

We have found no reversible error on the record, and hence the validity of the trial must be sustained.

No error.

W. J. LEWIS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 November, 1924.)

APPEAL by plaintiff from *Grady, J.,* at November Term, 1923, of ONSLOW.

Nere E. Day and Wright & Stevens for plaintiff.
Rountree & Carr for defendant.

PER CURIAM. This was an appeal by plaintiff from a judgment of nonsuit. The motion to nonsuit admits the truth of plaintiff's evidence in the light most favorable to plaintiff. From a careful reading of the evidence in this case, we think there was sufficient evidence to be submitted to a jury. There is no new principle of law involved. It is a question, as appears from the record, of fact for a jury to determine.

The judgment in the court below is

Reversed.

CONTINENTAL ALUMINUM COMPANY v. F. C. & J. J. STONE.

(Filed 5 November, 1924.)

APPEAL by defendants from *Sinclair, J.*, at March Term, 1924, of DURHAM.

Civil action, to recover damages for an alleged breach of contract arising out of the sale by the plaintiff to the defendants of certain goods, wares and merchandise.

From a verdict and judgment in favor of plaintiff the defendants appeal, assigning errors.

R. H. Sykes for plaintiff.
J. W. Barbee for defendants.

PER CURIAM. A careful perusal of the present record leaves us with the impression that the case has been tried substantially in agreement 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 court's charge on the burden of proof is supported by the case of *Tobacco Growers Assn. v. Moss,* 187 N. C., 421.

The verdict and judgment will be upheld.

No error.

MANUFACTURERS FINANCE COMPANY AND SUPERIOR MOTOR TRUCK COMPANY v. AMAZON COTTON MILLS COMPANY AND R. E. ZIMMERMAN.

(Filed 12 November, 1924.)

APPEAL by Amazon Cotton Mills Company from *Bryson, J.*, and a jury, at July Term, 1924, of DAVIDSON.

Brooks, Parker & Smith for plaintiffs.
Raper & Raper and H. R. Kyser for defendants.

PER CURIAM. This case has been in this Court twice before—*Finance Co. v. Cotton Mills Co.,* 182 N. C., p. 408, and *Finance Co. v. Cotton Mills Co.,* 187 N. C., p. 233.

In the latter case we said: "We think, from the facts and circumstances of this case, and the view we take, that the evidence above set

forth, which was excluded, and like evidence as appears from the record, there was error, and on another trial the evidence should be held competent."

From a careful reading of the record and briefs, and considering the exceptions and assignments of error, we think the case was substantially tried out in accordance with the opinion heretofore rendered. The material issue submitted to the jury was, "Did the Manufacturers Finance Company purchase said note and contract, retaining title to the motor truck herein sued for, from the Superior Motor Truck Company, for value and before maturity, in good faith and in due course of business, without notice of the claim or equity of the Amazon Cotton Mills, as alleged in the complaint?" The jury answered this issue "Yes." This was a question of fact. We can see no prejudicial or reversible error.

No error.

L. E. MILLER v. ACORN REFINING COMPANY ET AL.

(Filed 12 November, 1924.)

APPEAL by defendant from *Lane, J.*, at May Term, 1924, of DAVIDSON.

Civil action, to recover balance due on salary, or wages, it being alleged that plaintiff was employed by the defendant to render certain services in connection with the sale of its products in North Carolina.

From a verdict and judgment for the plaintiff in the sum of $187.00, the defendant appeals.

Phillips & Bower for plaintiff.
Walser & Walser and Z. I. Walser for defendant.

PER CURIAM. The first assignment of error is as follows: "Exceptions 1 to 16, inclusive, relate to the introduction of evidence. (R., pp. 6 to 14, inclusive.)" And the third assignment of error is of the same tenor. We are precluded from considering these exceptions, as they do not comply with the rules of practice prescribed for the presentation of exceptions on appeal. Rules are of no value unless they are to be observed uniformly and without exception, in the absence of some valid reason therefor. *Leonard v. Davis,* 187 N. C., 471.

The defendant's motion for judgment as of nonsuit, made at the close of plaintiff's evidence, was properly overruled.

The verdict and judgment will be upheld.

No error.

J. K. RAY v. MRS. A. D. ROSS.

(Filed 12 November, 1924.)

APPEAL by plaintiff from *Sinclair, J.*, at March Term, 1924, of DURHAM.

Brogden, Reade & Bryant for plaintiff.
R. H. Sykes for defendant.

PER CURIAM. This was an appeal from a judgment of nonsuit in the court below. From the evidence set out in the record, taken in a light most favorable to plaintiff, we think the case should have been submitted to a jury. The evidence excluded was competent.

We think the case is governed by the principle laid down in *Taylor v. Lee*, 187 N. C., p. 393.

For the reasons given, the judgment must be

Reversed.

A. J. CHESSON v. S. L. LYNCH AND J. P. LYNCH.

(Filed 12 November, 1924.)

APPEAL by defendants from *Horton, J.*, and a jury, at February Term, 1924, of LENOIR.

Rouse & Rouse, and Shaw, Jones & Jones, and Cowper, Whitaker & Allen for plaintiff.
George M. Lindsay and O. H. Guion for defendants.

PER CURIAM. When this case was here before (186 N. C., p. 625) we said: "The nonsuit as to J. P. Lynch will be reversed and the entire case remanded for a general new trial."

The material issue presented to the jury for consideration was as follows: "Did the defendants unlawfully, willfully and wantonly conspire together to injure and injure the plaintiff in his property rights and position with the A. J. Chesson Agricultural Company, as alleged in the complaint?" The jury answered this issue "Yes."

We have examined the record carefully, and the exceptions and assignments of error. We have heard the arguments of counsel and examined their briefs, but can find no prejudicial or reversible error.

The defendants' assignments of error were:

"The defendants assign as error the refusal of the court to nonsuit the plaintiffs upon the grounds that upon the entire evidence in the case the plaintiff was not entitled to maintain the action set out in the complaint against the defendants.

"For that his Honor declined to set aside the verdict of the jury, for that as a matter of law the jury was not justified in answering the issues as found in the record, for that upon the entire evidence in the case the plaintiff was not entitled to damages upon the cause of action appearing in the evidence."

We think the pleadings and evidence showed a good cause of action. The facts were for the jury. They decided against the defendants. We can find

No error.

T. C. RUSSELL AND C. W. RUSSELL, TRADING AS DENTON MARBLE WORKS, v. W. E. BOONE, B. I. HARRISON, L. E. WORKMAN, MILBA HILL, A. A. ANDERSON, C. C. CHANDLER, J. M. DANIEL, SR., B. E. MORRIS, L. C. WOOD, A. A. HILL, AND WILSON HILL.

(Filed 19 November, 1924.)

APPEAL by defendants from *Lane, J.*, and a jury, at February Term, 1924, of DAVIDSON.

Phillips & Bower and Holton & Holton for plaintiffs.

Raper & Raper, J. R. McCrary, and J. M. Durant, Jr., for defendants.

PER CURIAM. The following were the issues submitted to the jury, and the answers thereto:

"1. Did the defendants, or either of them, negligently fail to perform their duties as directors of the Bank of Denton, as alleged in the complaint; and, if so, which ones? Answer: 'Yes.'

"2. If so, did the plaintiffs sustain damage thereby, as alleged in the complaint? Answer: 'Yes.'

"3. What amount are the plaintiffs entitled to recover? Answer: '$824.39.'"

We have examined the record, exceptions, assignments of error, and able briefs of the attorneys, and can find no prejudicial or reversible error.

The cause was tried out on the principle laid down in *Houston v. Thornton,* 122 N. C., p. 365.

We can find

No error.

STATE v. BILL JUDD.

(Filed 26 November, 1924.)

APPEAL by defendant from *Barnhill, J.*, at July Term, 1924, of CHATHAM.

The defendant was indicted for a violation of the prohibition law. There were three counts in the bill, upon which the jury returned a general verdict, finding the defendant guilty. Judgment. Appeal by defendant.

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

A. C. Ray for defendant.

ADAMS, J. The defendant moved in this Court for a new trial, on the ground of newly discovered evidence; but it has often been held that a new trial will not be awarded in a criminal action on this ground. *S. v. Jenkins,* 182 N. C., 818.

There was sufficient evidence to justify the verdict, and the defendant's motion to dismiss as in case of nonsuit was properly overruled. *S. v. Carlson,* 171 N. C., 823.

No particular formula is prescribed for the definition of a reasonable doubt, and no error is pointed out in his Honor's charge.

We find

No error.

STATE v. A. W. (BUD) HILTON.

(Filed 26 November, 1924.)

APPEAL by defendant from *Long, J.*, at February Term, 1924, of CATAWBA.

Criminal prosecution tried upon an indictment charging the defendant with wantonly, willfully and feloniously setting fire to and burning a certain barn, the property of one D. T. Huss, in violation of C. S., 4242.

From an adverse verdict, and judgment pronounced thereon, the defendant appeals, assigning errors.

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

W. C. Newland and Wilson Warlick for defendant.

PER CURIAM. The only material exceptions presented on the record are the ones directed to the refusal of the trial court to grant the defendant's motion for dismissal of the action or for judgment as of nonsuit, made under C. S., 4643, after the State had produced its evidence and rested its case, and again at the close of all the evidence. *S. v. Killian,* 173 N. C., 792.

Viewing the evidence in the light most favorable to the State, 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 supported by the evidence, though the testimony upon which the defendant was convicted may not be as convincing to us as it was to the jury. However, our inquiry is not directed to the weight of the evidence, but to its sufficiency to warrant a verdict. The jury alone may consider its credibility. *S. v. Levy,* 187 N. C., 581.

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.

The evidence was conflicting; it was purely a question of fact; the jury has determined the matter against the defendant; we can find no error in the trial; the verdict and judgment will be upheld.

No error.

J. C. HOLLINGSWORTH v. TOWN OF MOUNT AIRY ET AL.

(Filed 26 November, 1924.)

APPEAL by plaintiff from *Lyon, J.,* at April Term, 1924, of SURRY.

Civil action to restrain the sale of plaintiff's property for the nonpayment of a street assessment, made and levied against said property for the improvement and paving of a street in the town of Mount Airy.

From a judgment dissolving the temporary restraining order previously entered in the cause, plaintiff appeals.

J. H. Folger for plaintiff.
E. C. Bivens for defendant.

PER CURIAM. All the questions presented and raised on this appeal were considered by us and determined against the plaintiff's position in the case of *Tarboro v. Forbes,* 185 N. C., 59. The judgment must be affirmed on authority of that case.

Affirmed.

R. T. HEATON AND D. F. MEHAFFEY v. S. J. CALHOUN AND G. I. CALHOUN.

(Filed 19 December, 1924.)

APPEAL by defendant, G. I. Calhoun, from *Ray, J.*, and a jury, August Term, 1924, of CHEROKEE.

D. H. Tillett and D. Witherspoon for plaintiffs.
Moody & Moody for defendant.

PER CURIAM. We have heard the arguments of counsel on both sides in this case, and read carefully the record and briefs. We think it was a question of fact for the jury to determine. We can find no reversible or prejudicial error.

No error.

H. H. TABOR ET AL. v. W. A. BURNETT ET AL.

(Filed 19 December, 1924.)

APPEAL by plaintiffs from *McElroy, J.*, at April Term, 1924, of MACON.

Civil action in ejectment and to recover damages for wrongful possession.

From a verdict and judgment in favor of defendants, the plaintiffs appeal.

T. J. Johnson and A. W. Horn for plaintiffs.
Ray & Ray and R. D. Sisk for defendants.

PER CURIAM. Plaintiffs *in limine* lodge a motion for a new trial upon the ground of newly discovered evidence. It is alleged that the information, which plaintiffs consider vital and important to their cause, came to their attention after the adjournment of the term of court at which the case was tried, and after the appeal was docketed here. *Allen v. Gooding,* 174 N. C., 271. The showing made by plaintiffs in this respect seems to meet the requirements laid down in *Johnson v. R. R.,* 163 N. C., p. 453, for the granting of new trials upon the ground of newly discovered evidence. Upon this ground, the cause will be remanded for another hearing.

New trial.

F. L. DUVALL v. P. O. ELLIOTT ET AL.

(Filed 19 December, 1924.)

APPEAL by defendants from *Ray, J.*, at July Term, 1924, of SWAIN.

Civil action in ejectment and to recover damages for wrongful possession.

From a verdict and judgment in favor of plaintiff, the defendants appeal, assigning errors.

S. W. Black for plaintiff.
Dillard & Hill for defendants.

PER CURIAM. Appellants' exceptive assignments of error relate chiefly to questions of evidence and to portions of the charge. A careful perusal of the record leaves us with the impression that the cause has been tried in substantial accord with the decisions bearing upon the questions involved. The case presents no new matter which would seem to warrant an extended discussion, or which we apprehend would be helpful or beneficial to the profession. We are of opinion that the errors assigned should be resolved in favor of the validity of the trial. The verdict and judgment will be upheld.

No error.

JOHN WHITT v. R. G. RAND AND JOHN WARD, TRADING AS RAND & WARD CONSTRUCTION CO.

(Filed 19 December, 1924.)

APPEAL by defendant from *McElroy, J.*, at October Term, 1924, of MADISON.

Civil action tried upon the following issues:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? A. 'Yes.'

"2. Did the plaintiff assume the risk of being injured, as alleged in the answer? A. 'No.'

"3. What damages, if any, is the plaintiff entitled to recover? A. '$2,500.00.'"

Judgment on the verdict for plaintiff. Defendant appeals.

Geo. M. Pritchard for plaintiff.
J. Coleman Ramsey and Harkins & Van Winkle for defendant.

PER CURIAM. This case was before us at a former term, 187 N. C., 805. On the first appeal a new trial was granted for error in the charge. The question of nonsuit was presented and passed upon at that time. The plaintiff's evidence being substantially the same as it was on the first hearing, the case was properly submitted to the jury, as the former decision had become the law of the case so far as the question of nonsuit was concerned. *Ray v. Veneer Co., ante,* 414.

A careful perusal of the record leaves us with the impression that the case has been tried substantially in agreement with the principles of law applicable, 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.

CASES FILED WITHOUT WRITTEN OPINIONS

Dickens v. Roanoke Development Co. (96)

Harrison Wholesale Co. v. Marrow. (65)

Hill v. West. (222)

Riley v. Kearney. (337)

State v. Reed. (380)

APPEALS FROM SUPREME COURT OF NORTH CAROLINA

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

American Trust Company, Plaintiff in Error, v. McNinch. Dismissed for want of jurisdiction, on 5 March, 1923.

Farmers and Merchants Bank of Monroe, Petitioner, v. Federal Reserve Bank of Richmond, Va. Reversed, 11 June, 1923.

Norfolk Southern Railroad Company, Petitioner, v. Gordon. Petition denied, 12 March, 1923.

OCTOBER TERM, 1923

Southern Express Company, Petitioner, v. Parke-Cramer Company. Petition denied, on 7 January, 1924.

Davis, Director General, Petitioner, v. Barbee. Petition denied, 10 March, 1924.

Greensboro Warehouse and Storage Company, Petitioner, v. Davis, Director General. Petition denied, 14 April, 1923.

OCTOBER TERM, 1924

Southern Railway Company, Plaintiff in Error, v. City of Durham. Pending.

Yadkin Railroad Company, Petitioner, v. Sigmon. Pending.

Seaboard Air Line Railway Company, Plaintiff in Error, v. Belshe. Pending.

Rhode Island Hospital Trust Company, Executor, Plaintiff in Error, v. Doughton, Commissioner of Revenue of North Carolina. Pending.

APPLICATION FOR LICENSE TO PRACTICE LAW

1. Applicants for license to practice law will be examined on the last Monday in January and the Monday preceding the last Monday in August of each year, and at no other time. Examination will be in writing.

2. Applicants must have attained the age of twenty-one years and must have studied:

Blackstone's Commentaries as contained in Vol. 1 of Ewell's Essentials of the Law;

Bispham's Equity;

Vol. 1, Consolidated Statutes of N. C. (1919);

Constitution of North Carolina;

Constitution of the United States;

Creasy's English Constitution;

Sharswood's Legal Ethics;

Sheppard's Constitutional Text-book;

Cooley's Principles of Constitutional Law;

Also some approved text-book on each of the following subjects:

Agency, Bailments, Carriers, Contracts, Corporations, Evidence, Executors, Negotiable Instruments, Partnership, Real Property, and Sales.

Applicants for license to practice law in North Carolina must have continuously studied law for two years at least, and shall, thirty days before the day of examination, notify the Clerk of the Supreme Court of the applicant's intention to undergo the examination of applicants for license to practice law, such notice to be given by the use of a blank form to be furnished by the Clerk on request of the applicant. The applicant shall file with the Clerk a certificate of his good moral character signed by two members of the bar who are practicing attorneys in the Supreme Court.

The applicant shall also file, NOT LATER THAN NOON OF TUESDAY preceding the day of examination, a certificate of the dean of a law school or a certificate of a member of the bar of this Court that the applicant has studied law under his instruction or to his knowledge or satisfaction, for two years, and that upon an examination by such instructor the applicant has been found competent and proficient in said course. Such certificate, while indispensable, will not be regarded as conclusive evidence of proficiency.

An applicant FROM ANOTHER STATE may file a certificate of good moral character signed by any Judicial or Executive State officer of the State from which the applicant comes, but such certificate must be attested by a notary public or some person authorized to make such attestation. An applicant who has been licensed to practice law in another State, but who does not come within the requirements of the Comity Act, may file, in lieu of the certificate of proficiency, the law license issued to him, and such license will be later returned to him.

3. Each applicant shall deposit with the Clerk a sum of money sufficient to pay the license fee before he shall be examined, and if upon examination he shall fail to entitle himself to receive a license, the money will be returned to him. The amount required is $23.50, twenty dollars of which is the tax prescribed by statute, $1.50 registration fee, and $2.00 due printers for the parchment upon which certificates of license are issued. This deposit must be made in money, by postoffice money order or cashier's check. The applicant's personal check will be received only when properly certified.

The above requirements apply also to lawyers from other States wishing to locate and engage in the practice here except those who can meet the requirements of Chapter 44, Public Laws of Extra Session 1920. The applicant must file certificate of proficiency, certificate of moral character and make deposit required not later than noon of Tuesday preceding day of examination, either by mail or in person.

CHAPTER 44, PUBLIC LAWS OF THE EXTRA SESSION OF 1920.

AN ACT TO AMEND CHAPTER 5 OF THE CONSOLIDATED STATUTES, RELATING TO APPLICANTS FOR LICENSE TO PRACTICE LAW.

The General Assembly of North Carolina do enact:

SECTION 1. That section one of chapter five, entitled "Attorneys at Law," of the Consolidated Statutes be and the same is amended by adding at the end of said section the following: "*Provided, however*, any person duly licensed to practice law in another state may be licensed to practice law in this State without examination, if attorneys who are licensed in this State may be licensed without examination in the state from which he comes, upon said applicant furnishing to the Supreme Court a certificate from a member of the court of last resort of such state that he is duly licensed to practice law therein, and that he has been actively engaged in the practice of law for five years or more, and is of good moral character and a proper person to be licensed to practice law, together with a certificate from two practicing attorneys of such state, practicing in said court of last resort, as to the applicant's good moral character, whose signatures shall be attested by the clerk of said court, and upon said applicant satisfying the court that he is a *bona fide* resident and citizen of North Carolina, or intends immediately to become such: *Provided further*, that said applicant shall be required to deposit with the Clerk of the Supreme Court the same amount required of applicants who stand the examination."

SEC. 2. That all laws in conflict with this act are hereby repealed.

SEC. 3. This act shall be in force from and after its ratification.

Ratified this 25th day of August, A.D., 1920.

The following amendment shall be added to the rules:

3½. As a condition precedent to his right to apply for license, every applicant for license to practice law in this State, either under the Comity Act or by taking the prescribed examination, shall notify the clerk of his intention to become an applicant at least thirty days prior to the day of examination. Immediately upon receipt of such notice, the clerk shall furnish said applicant with blank forms for his certificates, as required by Rules 2 and 3. The names of those who have thus signified their intention of becoming applicants for license to practice law shall be open to inspection in the clerk's office during the thirty-day perior prior to the examination.

This notice to the clerk is not in lieu of, but in addition to, the requirements relating to certificates of proficiency and good moral character; and as to these, the time for filing same shall be changed from "not later than noon of Friday preceding the day of examination" to "not later than noon of Tuesday preceding the day of examination."

PRESENTATION OF THE PORTRAIT

OF THE LATE CHIEF JUSTICE OF THE SUPREME COURT

WALTER CLARK

BY THE

HONORABLE JAMES A. LOCKHART

OCTOBER 28TH, 1924

May it Please the Court: Commissioned by the family of the late CHIEF JUSTICE WALTER CLARK, I herewith present a portrait of that distinguished jurist, that his likeness upon these walls may constitute a perpetual and visible memorial of his virtues and achievements. The late Cyrus Watson said that the average North Carolinian slept sounder because he knew that WALTER CLARK stood guard at the outer door of the temple of justice, and it is fitting that his image should look down upon the labors of those who succeed him in his exalted duties.

WALTER CLARK was born 19 August, 1846, on the plantation of his father, in Halifax County, N. C. The son of Gen. David Clark, the only general officer called into the service of the Confederate States from the State troops of North Carolina, and his wife, Anna Maria Thorne, he inherited the strong physical and mental characteristics of a pure British stock who had been for four generations transplanted to Carolina soil. His early youth was spent upon the vast plantation which had been the property of his ancestors for many generations, amid surroundings now gone, but which tended to develop qualities of leadership and habits of command almost from infancy. He here learned to fear God, revere womanhood, and respect the rights of his fellow-man.

In the fall of 1860 he entered Tew Military School, at Hillsboro, N. C., and was engaged in his academic and military training when North Carolina seceded from the Union and became a party to the War Between the States. He deemed it his duty to answer the call to arms and entered the service in May, 1861, at the age of 14, being appointed lieutenant and drill master by the Governor, and was attached to Pettigrew's 22d N. C. Regiment, went with it in August, 1861, to Virginia, and served on the Potomac, where it supported the land batteries at Evansport; 1st August, 1862, was appointed adjutant and first lieutenant of the 35th N. C. Regiment, commanded by Col. Matt. W. Ransom (afterwards United States Senator); was in hearing of the guns, but not engaged at the battle of Second Manassas; served in the first Maryland campaign; was at the capture of Harper's Ferry, 15th September, and at the battle of Sharpsburg, Md., 17th September,

where he was wounded, and was at the battle of Fredericksburg, where his command was stationed on Marye's Heights, and drove back in several successive charges Magher's Irish Brigade and other commands in Franklin's Corps. Ransom's Brigade being ordered back to North Carolina in 1863, he resigned and went to the University about September 1st of that year and joined the senior class; graduated 2d June, 1864, with the first honor, and the next day, 3d June, was elected major of 6th Battalion (five companies), N. C. Junior Reserves. On July 4th was elected lieutenant-colonel of the 70th N. C. Regiment (1st Junior Reserves), at the age of 17, being the youngest officer of that rank in either army. Commanded the post at Williamston, N. C., in face of the enemy in the fall of 1864, commanding five companies of the infantry; was in the battle of Fort Branch, Christmas, 1864, when the enemy fleet was driven back; was at the battle of Southwest Creek, below Kinston, 2d March, 1865, and at Bentonville in the three-days battle, 19-21 March, 1865, when Johnson repulsed Sherman's army, and on the second and third days commanded the skirmish line of Nethercutt's Brigade, Hoke's Division; was on the retreat from Smithfield to High Point, and at the latter place was paroled with the army on 2d May, 1865—more than three weeks after Lee surrendered. His diligence commanded the approbation of his superiors; his courage drew the affection of those under him. His military service developed his inherent aptitude for leadership and command, and seeing men tested by the red fires of battle impressed him with the great truth that real merit, courage, and patriotism are confined to no rank, caste, or set of men. The necessities of such arduous service gave to him the systematic habits which largely contributed to his ability to perform his unparalleled labors and the courage to face any situation which might arise. He saw men tested in the fiery crucible, and learned that the intelligence, character, courage and patriotism of North Carolinians can be relied upon. The confidence in his fellow-man he there acquired he never lost, and throughout his subsequent career his speeches and writings demonstrated his faith that people can be trusted, and, while they are hard to drive, if courageously and intelligently led, no man will regret the confidence he reposes in the masses of men.

In 1867 he received the degree of A.M. from the University of North Carolina, later serving as trustee of this institution for many years, and always evincing an active interest in its welfare and progress. Entering Columbian Law School, Washington, D. C., he was graduated in 1867, and in the same year licensed to practice law. In early life he joined the Methodist Episcopal Church, South, and continued as a consistent member and active worker during his entire life. The influence of Wesley's disapprobation of the waste of time on frivolous amusements bore

its impress upon his character, restricting his activities to that which was useful, preventing the dissipation of energy and converting work into recreation. No man believed more firmly that a change of labor was the truest rest, and no man more nearly practised his beliefs. He was a delegate to the General Conference of his church at St. Louis in 1890, and again at Memphis in 1894, and was instrumental in procuring the transfers to the North Carolina Conference of those parts of the State which had formerly been embraced in the Holston and Virginia conferences. In 1881 he was a delegate to the Eccumenical Council of all the Methodist churches in the world, at London. At this time he traveled extensively in Europe, observing closely the laws, customs and social and economic conditions of the peoples in other lands.

At all times keeping an open mind, unprejudiced by ancient custom or early environment, his observations broadened his knowledge and increased his understanding of the problems of civilization and the remedies to be applied for its evils. He saw at first hand the experiments being tried by the different nations of the earth, and the results of these experiments. A tour of Mexico in 1899, and numerous trips throughout America and Canada, served a similar purpose in the development of his character and learning.

Admitted to the bar in 1867, he located at Scotland Neck, Halifax County. Nor was the prophet without honor in his own country. The people of that section realized his ability and his devotion to the matters committed to his care, and within a short time he had developed an extensive business in that and neighboring counties. In 1872 he removed to Halifax, but his training and abilities were such as to broaden his horizon, and no pent-up Ithica could restrain his talents. He removed to Raleigh, N. C., in November, 1873, and there engaged in the general practise of law. His reputation had preceded him, and there was no dreary wait for clients, but business of important character was at once directed to his office, and until his elevation to the bench his services as advocate and counselor were in constant demand.

In addition, he was a director and general counsel for several railroads, the last being the Raleigh and Gaston and the Raleigh and Augusta railroads, the stem from which the present Seaboard Air Line system sprung. During this time he engaged extensively in newspaper work, directing the editorial policy of the *Raleigh News*. This was an era when a prostrate people were the prey to the avarice and corruption of enemies from abroad and traitors from within. WALTER CLARK, from his training and sacrifice, had learned to love his State and its people with a devotion as clear-sighted as it was strong, and as intelligent as it was ardent. His journalistic work was merciless, unsparing, and overwhelming in its cold, logical, and indiscriminate exposure of

the acts of the exploiters. By nature he was fearless. By his early training he was awed by no man. By his military service it had been burned into his mind that all men, in their rights and before the law, were equal; and when he discovered that a wrong was being done or attempted against the people of the State, wealth, social standing, political power and personal friendship were alike useless as shields against his editorial shafts. To the last he frequently and strenuously urged his views through the press where he saw a public injury threatened or an unjust policy about to be pursued.

January 28, 1874, he was happily married to Miss Susan Washington Graham, the daughter of William A. Graham, former Governor, United States Senator, and Secretary of the Navy. For half a century his home in Raleigh was a center of cultured Southern hospitality, and he was never too busy to devote time to the entertainment and information of his friends who might call for the sake of spending a time in his company. Realizing that the old South had passed, in an industrial sense, he sought to hold on to the spiritual and intellectual old South and apply to the new industrial era the principles and ideals of the firmness, chivalry, and justice which had been the glory of a passing age. Mr. Jefferson constituted the model for his life; and, thoroughly imbued with Jefferson's democratic ideals, he, like Jefferson, informed himself on each current subject, whether in agriculture, commerce, manufacturing, or finance; and in the solution of the various grave problems which presented themselves in the different fields of human endeavor, he brought to bear a judgment informed by a most extensive study of the history of the actions of men in former times, realizing that there is no sure guide to determine the result of our action, except a record of the results of similar actions under circumstances as nearly similar as it is possible to discover. He approached each subject with an open mind, seeking after the discovery of the truth. Disregarding forms and prejudices, he went straight to the heart of the question, dissecting the most intricate problems with the careful skill of the expert surgeon.

Acquiring by inheritance and purchase a large plantation in Halifax County, he directed and managed its operation with a marked degree of success, constantly improving agricultural methods, and each year making the land which ministered to his wants richer rather than poorer by reason of his ownership.

These had been his trainings and contacts with men and their problems when Governor Scales appointed him judge of the Superior Courts, to take effect April 15, 1885, a position to which he was elected in November, 1886, and in which he continued until his elevation to the Supreme Court bench. In the administration of the duties of judge of

the Superior Courts he inaugurated a new era in efficiency in the administration of *nisi prius* trials. He established the rule that courts should open on time. Witnesses, jurors, lawyers, and court officials must be present in the courtroom. No action or proceeding should be delayed to suit the convenience or whim of individuals who considered their personal affairs more important than the administration of justice. Clocks were installed in courtrooms, and court ran by the clock. A firm believer in strict justice, technicalities met short shrift, and violators of the criminal law sought in vain a loophole to escape the consequences of their acts.

Physically a man of handsome and commanding presence, 5 feet 7½ inches in height, with large head, firm chin, brilliant dark grey eyes, with the curl of humor at their corners and the penetrating quality which seems to see through sham and detect deception; with deep chest and firm, well-cared-for body; neat in his attire—his appearance upon the bench impressed bar and laity with the dignity of the court and the solemnity of its session.

November 14, 1889, he was appointed by Governor Fowle Associate Justice of the Supreme Court of North Carolina; elected to fill the unexpired term in November, 1890; elected to the full term in 1894; in 1902, after a vigorous campaign, he was nominated for Chief Justice of the Supreme Court of North Carolina by a majority so overwhelming that in 1910 and again in 1918 he was nominated without opposition. After each of these nominations, he was elected to this position, which he held until his death, on May 19, 1924. The late Claude Kitchin, in placing his name before the Democratic Convention in 1902, dramatically declared, "His worst enemy dare not assert that he has been influenced by wealth, awed by power, or swayed by personal friendship!" It is as a Justice and Chief Justice of the Supreme Court that JUDGE CLARK will be longest remembered. He was, as he once said of Judge Ruffin,

> "A man resolved and steady to his trust,
> Inflexible to ill and obstinately just."

Four years six months and twenty-nine days judge of the Superior Courts; twelve years one month and seventeen days Associate Justice, and twenty-two years four months and eighteen days Chief Justice of the Supreme Court—a total of thirty-nine years one month and four days as a judicial officer, of which thirty-four years six months and five days were as a member of this Court. His service was longer than that of any other judge, the next being Pearson, twenty-nine years and three weeks, and Ruffin, nearly twenty-five years—each for nineteen years Chief Justice. During his long tenure of these positions, which in-

cluded one-third the life of this Court, during which more than one-half of its opinions were written, he never missed a session of court and was never a moment late. He systematized the business of the Court—wrote the present rules, and so guided its business that it is the only appellate court which is habitually up with its work. Here there is no denial of justice by delay. He wrote more opinions than any other judge of an American appellate court has ever written. When the end came, his lamps were trimmed, and each opinion assigned him had been written and signed. These opinions were marked by a clear, trenchant style, which cut through technicalities and maizes of conflicting precedent, going straight to the real core of the case to be decided, and without evasion setting forth the real point at issue and applying to it the recognized principles of law, equity, and justice. Perhaps the most learned man in black-letter law in a generation, his great service to North Carolina was in interpreting precedents in accordance with modern conditions, and discarding the chaff in order to arrive at the kernel. One of his favorite maxims was, "He who sticks in the letter, sticks in the bark." Another, "Where the reason ceases, the rule itself shall cease." And "There is no wrong without a remedy." His ideas were progressive, but never destructive. Among the great principles, the adoption of which he secured in this State, is the principle laid down in *Greenlee v. Railroad,* 122 N. C., 977, establishing the continuing liability of railroads for failure to have proper equipments to safeguard their employees; *Whitsell v. Railroad,* 120 N. C., 539, which defined what were proper appliances; *Arrowood v. Railroad,* 126 N. C., 632, which required railroads to use proper care for the general public; and a long line of cases which recognized that modern industry, being differently organized from ancient industry, owed greater obligations to those who were in their employ; that he who utilizes complicated machinery for his profit must safeguard others against injury. No man can compute how many lives and limbs such decisions have saved. Soon after his elevation to the bench, he seized the bludgeons on behalf of married women and their property rights. The manifest intention of the Constitution of 1868 had been to fully guarantee women's contractual independence; but even after this Constitution the judges were not prepared to accept so complete a revolution in marital relations, and had practically annulled this provision. JUDGE CLARK first secured a reversal of the doctrine that a man had the right to whip his wife. He was the first prominent Southerner to advocate woman's suffrage, and the case of *Crowell v. Crowell,* 180 N. C., 516, completely removes the last vestige of the inequality of women in North Carolina and fulfills JUDGE CLARK's early prediction, in a dissenting opinion, that the

time would come when women would not in any particular be classed with infants, idiots, convicts, and persons *non compos mentis.*

Having sprung from England, it required long for us to shake off all idea of official superiority and prerogative. We had accepted the idea that a public office was private property, and in a struggle extending over many years the Chief Justice was finally successful in the case of *Mial v. Ellington,* 134 N. C., 131, in having it adopted as the policy of North Carolina that a public office is a public trust, belonging to the people who gave it, and that no man can have private property in that which of right belongs to the whole body of people. Our educational system had been hampered by a decision that, though the Constitution required a four-months school term, yet if circumstances were such that this could not be obtained without exceeding another constitutional provision that taxation should not exceed two-thirds of one per cent, the provision against higher taxes should be first regarded. It was largely by reason of the efforts of JUDGE CLARK that our courts adopted the principle that where there was a conflict between the right of taxpayer and the right of a child to receive a chance in life, the right of the child should be first regarded, and to this decision is largely due the great educational advancement in North Carolina, which in turn has so promoted all internal improvements and industrial progress. This was in line with the humane decisions which he had rendered exploding the doctrine that the negligence of the parent should be imputed to the child, and holding to strict accountability the employers of those of tender years for injuries inflicted upon the little ones who aided in their businesses, and the opinions holding that a little child, incapable of discretion, could not be guilty of contributory negligence. The case, *Public Service Company v. Power Company,* 179 N. C., p. 18, laid down the doctrines that hydro-electric companies were subject to regulation by the State, and that while those who developed the resources of the State should be accorded every facility for doing so, they should never be permitted to discriminate among their patrons or charge unreasonable sums for their service. This decision removed any danger which might exist from consolidation of great plants whose services are necessary in a State remote from coal, and who without restraint would have the power, if they desired to exercise it, to kill or make alive.

Believing the human body to be the temple of the spirit and the support of the brain, JUDGE CLARK abhorred whatever detracted from physical perfection and the highest degree of physical efficiency. He never used tobacco or alcohol in any form, and consistently rendered opinions to carry out the spirit as well as the letter of the laws designed first to lessen and then to end the traffic in alcoholic liquors. His opinions

uniformly placed the rich man's club upon the same level as the poor man's club. The dissenting opinion in *State v. Barksdale,* 181 N. C., p. 621, ended the last ingenuous devices for selling liquor by subtle subterfuge—in that case, a pretense that it was a cooking extract.

If a person desires to learn something of versatility in style, he should study the lofty and tender sentiment in *Fitzgerald v. Manufacturing Co.,* 131 N. C., 643, which could only have been written by a man who loved children; the classic style in *Miller v. Bank,* 176 N. C., 156; and no humor is more delicious than that in *State v. Neal,* 120 N. C., 617; *State v. Good,* 130 N. C., 656; and *State v. Cox,* 153 N. C., 641.

His opinions appear in eighty-five volumes of North Carolina Reports—*i. e.,* 104-188, inclusive, have been quoted with approval and praise wherever the English system of jurisprudence prevails, and their influence has been and, so long as our civilization endures, will be toward liberalizing and making more humane the system under which we live. These labors incorporated into our jurisprudence the principles of progressive humanity, and converted our legal system into a living agency for the elevation of mankind.

Throughout his long service upon the bench he was keenly interested in the young members of the bar, and it is not probable that there is now in the State a lawyer who does not recall with pleasure some act of kindness or some words of encouragement and advice from him.

During his long career upon the Supreme Court bench, Merrimon, Shephard, Faircloth, and Furches were Chief Justices; Avery, Davis, Shephard, McRae, Burwell, Furches, Douglas, Montgomery, Cook, Connor, Walker, Brown, Hoke, Manning, Allen, Stacy, Adams, and Clarkson were Associate Justices—all men of positive convictions, who held to firm opinions. The Chief Justice was exceeded by no man in the firmness of his convictions and the vigor with which he expressed them, but he fought for what he conceived to be good principles, and against what he conceived to be bad principles, and such was his tact and consideration for the opinions of others that he maintained the most cordial personal relations with his associates, however strongly he might differ from their opinions; respecting them, he commanded their respect and drew their affections.

Coke conceived the law to be a procrustean bed and declared, "Judges are bound as firmly by precedent as the Roman Deities were supposed to be by the decrees of the fates." CLARK conceived the law to be founded upon immutable principles of justice, the application of which to any given case should be determined in the light of changed conditions and altered customs, that law should develop in such manner as to keep pace with the development of our civilization and be interpreted in the light

of existing condition, nor should we forever bivouac by the ashes of the camp fires of more progressive sciences. "The law is not fossilized. It is a growth. It grows more just with the growing humanity of the age and broadens with the process of the suns." The static system of Coke was followed by a bloody and devastating revolution. The dynamic system of our Chief Justice enables society to smoothly and almost imperceptibly pass from one stage of human development to the next stage. His opinions breath a deep sympathy and serve as a strong shield to each individual, race, sect, creed, and class, whose rights or liberties are threatened or impinged by wealth, power, prejudice, bigotry or immemorial custom. He might well have exclaimed with Demosthenes, "I have never preferred the favor of the wealthy to the rights of the many."

He edited and issued the Annotated Code of Civil Procedure which passed through three editions and annotated one hundred and fifty-four volumes reprints of North Carolina Reports; was editor of the article on Appeal and Error, in Cyc.

From its founding in 1902, he was active in the work of the State Bar Association, attending and taking part in each of its sessions.

In 1917 and 1918, he was umpire of the U. S. War and Labor Board, devoting great time and care to the preparation of his decisions, that in the case of Iron Molders Union, No. 364 (Wheeling W. Va.) versus the Wheeling Mold & Foundry Company, expressing clearly his sentiment in the question between capital and labor and having been printed by the American Federation of Labor.

An address delivered at Cooper Union in New York City on 27 January, 1914, on "Government by Judges," was printed as a Senate document at the request of Senator Overman. An address delivered at the University of Pennsylvania, 27 April, 1906, "Some Defects in the Constitution of the United States," was printed as a Senate document on request of Senator Owens. "Back to the Constitution," was so printed on motion of Senator LaFollette; "Some Myths of the Law," was also printed as a Senate document on motion of Senator Owens. In the 117th volume of the N. C. Reports, appears JUDGE CLARK'S History of the first hundred years of the life of this Court.

The unequal burdens of taxation brought trenchant articles from his pen on behalf of the farmer and small property holder.

An accomplished scholar of French, in 1895, he translated Constant's Memoirs of Napoleon in three volumes. It is not probable that any book upon Napoleon, or his era, was ever written which JUDGE CLARK had not read with care. He studied the great campaigns not only with regard to tactics and strategy, but with reference to the social and economic forces which lay back of the struggle upon the field. His

knowledge of the causes and science of war was exhaustive, and like most men, of great intellect, the more he learned of it, the less he liked it.

At the request of the Governor and Counsel of State, without compensation, between 1895 and 1906, he compiled and edited the State Records of North Carolina in 16 volumes, and in 1901 to 1904, the Governor and Counsel of State and Confederate Veteran's Association, having requested, he compiled and edited in 5 volumes, The History of North Carolina Regiments in the Civil War, likewise without compensation to him. His tribute to Hon. Charles M. Stedman is a classic worthy of preservation throughout all times and the addresses upon Capt. Ottoway Burns and General Martin, are high marks in commemorative oratory. As a speaker, he seized the attention of his audience and impressed his subject upon them. His addresses and articles cover a wide range of subjects. "Indian Massacre and Tuscarora War," "North Carolina Troops in South America," (Harper's Magazine), "North Carolina's Record in War," "Where the Governing Power Reside," (Address to the University College of Medicine, Richmond, Va.), "The Right to Regulate Railroad Fares and Freight Rates," (Address before the law class of Wake Forest College), "Political Teachings of the Gospel," (Address before Sunday School Convention at Franklinton), "Revision of the Constitution of the United States," (Address to the Bar Association of Tennessee), "San Miguel de Guandape—Jamestown Settled 81 Years Before John Smith," (Wake Forest Student), "Progress of the Law," (American Law Review), "Maladministration of the Post Office Department," (Arena), "Why the Telegraph Should be Restored to the Post Office," (New Time), "Reform in Law and Legal Procedure," (Address before North Carolina Bar Association, 1914), "Pleading and Practice," (One of the lecture series of the American Correspondence School of Law), "The Legal Status of Women in North Carolina," (An address before the federation of Women's Clubs at New Bern, N. C., 8 May, 1913), "Equal Suffrage," (An address before the Equal Suffrage League at Greensboro, N. C., 22 February, 1915), "The Electoral College and Presidential Suffrage," (Penn. Law Review, June 1917), "Labor Day Address," (at Wilmington, N. C., 1914), "The Legal Profession," (delivered in accepting portrait of Hon. Wm. T. Dortch), "The Legal Aspect of Telegraph and Telephone," (Printed by order of United States Senate, being a reprint from the American Law Review), "Election of Federal Judges by the People," "Address on William A. Graham," "Address on Thomas Ruffin," (delivered in the hall of the House of Representatives, 1 February, 1915), an article on the "Career of Gen. James Hogan," an article on "The Forgotten Law of Burning Slaves for Petty Treason," an address

on Roanoke Island, (before the State Historical Association, 4 July, 1922), "Raising, Organization and Equipment of N. C. Troops During the Civil War," (Address before North Carolina Historical Association, 1917), "Old Foes With New Faces," (Address before the Bar Association of Virginia, 25 August, 1903), "The Gospel of Progress," (an address at Elon College, 6 June, 1911), "Coke, Blackstone and the Common Law," (Case and Comment), "Letters From Mexico," (Raleigh News and Observer), "Legal Cobwebs and Judicial Aggrandizement," "An Open Letter to the North Carolina Corporation Commission Upon Railway Rates," (News and Observer), "The Bible in Public Schools," the foregoing list of a portion of the titles of the articles and addresses which were the children of his brain, give some idea of the versatility and wide range of subjects which his learning covered, and he never spoke or wrote upon any question until he had fully mastered the subject in all its details.

For many years he was chairman of the Judiciary Committee of North Carolina Grand Lodge of Masons.

His activities did much to encourage the dissemination of information in regard to the History of North Carolina and he was at one time president of the State Literary and Historical Society. Through his efforts, the two dates, 20 May, 1775 and 12 April, 1776, were written upon the State Flag, and North Carolina adopted as its motto, the test he applied to each proposition and the rule by which he guided his conduct, *"Esse Quam Videri."*

In the life of him to whom we now do honor, good seed had fallen on fertile soil. Sound stock, firmly, righteously and humanely trained, produced the diligent student and affectionate son—the patriot who endured the hardships and dangers of battle; partook of the privations of his despoiled State, developed into the able advocate, wise counsellor, skillful farmer, bold journalist, accurate author, accomplished linguist, learned scientist, profound economist and jurist who with knowledge judged righteously between men. Reflecting so many phases of life in our State, the champion of the weak, the mantle of Vance fell upon his shoulders, and now that he has passed, there is none to receive it from him. So large a figure cannot now be rightly measured. It remains to posterity to rightly appraise the towering statute of his intellect.

In the contemplation of his public achievements and his mental attainments, we should not lose sight of the tender and affectionate relations he bore to his friends and to his family. His wife had preceded him upon the last journey. He left five noble sons and two charming daughters who are monuments bearing witness to the truth of the statement that he gave freely of his time and attention to the training of his children. Those who attended the last rites were touched to see

his nephew, two sons-in-law and five sons,—the active pall bearers of one who in every phase of life had written himself a man.

The world is richer that he has lived and poorer that his labors have ceased. The father of Greek philosophy told the richest of rulers, "Count no man happy till he be dead," the mighty monarch scorned the sage's advice and proved it by dying a slave. A career of public service in war and peace extending over a period of 63 years is ended and now that it is closed, we may count WALTER CLARK happy. The last Confederate Veteran has sat as a Judicial Officer, the last of that courageous and patriotic band who served our State so well as a State Officer, has passed. WALTER CLARK, the man is dead. WALTER CLARK, the spirit of progressive enlightened jurisprudence is immortal.

REMARKS OF CHIEF JUSTICE HOKE, UPON ACCEPTING PORTRAIT OF THE LATE CHIEF JUSTICE WALTER CLARK, IN SUPREME COURT ROOM, 28 OCTOBER, 1924

The Court has heard in fullest sympathy the fine tribute to our late Chief Justice. His was indeed a commanding personality whose thought and work impressed itself on the life and jurisprudence of the State in a most remarkable degree.

He had strong personal convictions on the public questions of the day and supported them always with such learning and power that even when his views were too advanced for immediate adoption by judicial opinion, they not infrequently prevailed by reason of legislation deemed necessary for the public good.

In addition to his many unusual qualities as man, citizen and jurist, which have just been so impressively stated, the Court desires further to express its appreciation of his great merit as a presiding officer. While direct and positive, he was also both considerate and courteous, and ever ready to spend himself to the uttermost in promoting the work of his Court and in the assistance of each individual member of it. And I am justified in saying that it is due to his great diligence and the methods established by him that the Court has thus far been able to efficiently dispatch its business and keep abreast with its docket.

Able, learned, patriotic and in all things courageous and dutiful, in his death North Carolina has lost a great public servant who wrought diligently for the good of the State and its people, and who had their welfare always at heart.

The Marshal will cause the portrait to be hung in its appropriate place, and these proceedings will be printed in the forthcoming volume of our reports and spread upon the minutes of the Court.

REMARKS OF CHIEF JUSTICE HOKE, ON BEHALF OF THE SUPREME COURT, FROM THE BENCH, TUESDAY MORNING, 25 NOVEMBER, 1924

Before proceeding to the usual work of the Court, we desire to express and put on our records our profound appreciation of the great loss that has come to the State and its people in the death of Judge Henry Groves Connor, United States Judge for the Eastern District of North Carolina, and formerly an Associate Justice of this Court, and the deep sense of personal sorrow that it brings to each one of us.

A sentiment that will be shared in throughout the entire State, and among all classes and conditions of men.

A wise and capable Legislator,
An upright and learned Judge,
A devoted husband and father,
A loyal hearted friend, and broad-minded, patriotic citizen.

In all of the duties and relationships of a long and useful life, he proved faithful to the uttermost, and we are well assured that he has gone to his reward.

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ABATEMENT. See Criminal Law, 12.

ABSENCE. See State Highways, 4.

ABUSE. See Courts, 9.

ACCEPTANCE. See Appeal and Error, 26.

ACCIDENT. See Insurance, 5, 8.

ACCOUNTS. See Limitation of Actions, 2; Trial by Jury, 2.

ACTIONS. See Carriers, 2; Limitation of Actions, 1; Counties, 4; Banks and Banking, 2; Corporations, 3; Wills, 11; Taxation, 4; Injunctions, 4; Insurance, 3; Parties, 1.

1. *Actions—Inconsistent Defenses.*—Inconsistent defenses may be set up in the same action, and a plea of infancy may be interposed to avoid a contract, together with a counterclaim for breach of warranty therein. *Hight v. Harris*, 329.

2. *Actions—Pendency of Actions—Waiver.—Held*, upon the facts of this case, the place of the pendency of another action was waived by the party. *Ibid.*

3. *Actions—Carriers—Railroads—Negligence— Damages — Parties — Consignor and Consignee—Title.*—While ordinarily the title to a shipment by common carrier by rail, on an open bill of lading, is in the consignee, nothing else appearing thereon, the contrary may be shown by the evidence; and where the consignee refuses the shipment for damages, the consignor is the party aggrieved and may maintain his action against the carrier upon the ground that the latter's actionable negligence caused the damage to the shipment. *Piner Brothers v. R. R.*, 339.

4. *Actions—Executors and Administrators—Heirs at Law.*—After the administrator has duly settled the estate of his intestate, an action may be sustained against his heirs at law upon his unpaid notes, or a debt due by the estate. *Bank v. Felton*, 384.

5. *Actions — Controversies — Anticipated Damages — Equity — Actions at Law.*—An action brought by the seller of a cotton-scale beam may not be maintained against the purchaser thereof in anticipation of the latter's claim for damages arising upon the breach of an implied warranty against defects that caused damage to the purchaser, and upon demurrer the controversy may not be considered by the court as upon a case agreed. C. S., 626. Equitable rights of bills of peace, *quia timet*, and to remove clouds on title to lands, distinguished. *Hardware Co. v. Cotton Co.*, 442.

6. *Actions—Appearance—Courts —Jurisdiction —Waiver.*—An appearance is general when the defendant answers to the merits of the case and thus acknowledges the jurisdiction of the court, by whatever name, whether special or otherwise, the pleader calls it, and all defects in the service of the summons are thereby waived by him.—*McCollum v. Stark*, 462.

ACTIONS—*Continued.*

7. *Same—Appeal—Exceptions.*—Where a defendant enters a special appearance for the purpose of a motion to dismiss the action, he loses whatever right he may thereby have acquired by failing to except to the order of court denying his motion, and may also acquiesce in the jurisdiction of the court by his conduct thereafter. *Ibid.*

8. *Actions—Case Submitted—Statutes—Controversies—Appeal and Error—Dismissal.*—For the courts to pass upon a controversy submitted under the provisions of C. S., 626, the interest of the parties must be antagonistic, and the case will be dismissed if it appears that the parties are one in interest, or desire the same relief. *Burton v. Realty Co.*, 473.

9. *Actions—Parties — Bankruptcy — Statutes — Motions.*—The trustee in bankruptcy, or the creditors he represents acting with him, may waive a doubtful claim in favor of a bankrupt's estate by having notice thereof in the schedule or otherwise and not pressing the claim for a period of time; and where the trustee has thus proceeded to settle the estate in accordance with the proceedings prescribed by the act, and he has long since been discharged by the court, after having filed his final account, a motion to dismiss the action of his heirs at law as not being the real parties in interest will be denied. C. S., 446. This principle especially applies where the deceased and the plaintiffs in the action were beneficiaries in a trust, the subject of the action. *Cunningham v. Long*, 613.

ACTS. See Roads and Highways, 7; Constitutional Law, 7; Insurance, 8.

ADMINISTRATION.

1. *Administration—Clerks of Court—Jurisdiction—Executors and Administrators — Proceedings to Revoke Letters — Domicile — Findings of Fact—Appeal and Error.*—The finding of fact by the clerk of the Superior Court, upon petition to revoke letters of administration, upon the ground that intestate was domiciled in a different county from the one having issued the letters, is conclusive in the Supreme Court on appeal from the judgment of the Superior Court adopting the affirmative findings of fact found by the clerk and sustaining his judgment as to jurisdiction, when there is legal evidence upon which his findings may be sustained. *Tyer v. Lumber Co.*, 268.

2. *Administration—Executors and Administrators—Clerks of Court—Appointment by Clerk—Priority of Rights.*—Upon petition to revoke letters of administration, the petitioner may not avail himself of the fact that the deceased left a widow who was entitled to administer upon his estate instead of a brother of deceased to whom the letters were duly granted, when she has shown no disposition to set up this right before the clerk having issued the letters and has apparently acquiesced in the appointment of the clerk. C. S., 8 (2). *Ibid.*

3. *Administration—Letters—Clerks of Court—Executors and Administrators—Jurisdiction.*—Where applied for and granted to separate applicants for letters of administration in two counties, the one first acquiring jurisdiction has the sole and exclusive jurisdiction, though the decedent, at the time of his death, had his fixed domicile in both counties. [C. S., 2, subsec. 1 (2)]; and this jurisdiction, when once acquired, cannot be collaterally impeached. *Tyer v. Lumber Co.*, 274.

ADMINISTRATION—*Continued.*

4. *Same—Appeal and Error.*—Where the clerks of two counties have granted letters of administration to separate parties, and in the Superior Court of each county the judgment of the respective clerks has been affirmed, the Superior Court will determine which of the letters were properly granted. *Ibid.*

ADMISSIONS. See Criminal Law, 3; Evidence, 5; Issues, 1.

ADVERSE POSSESSION. See Deeds and Conveyances, 2.

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1. *Appeal and Error—Rehearing—Laches—Procedure—Rules of Court.*—A petition to rehear a case in the Supreme Court will not be granted when the alleged error is attributable solely to the petitioner's own laches or want of attention in looking after his case, or he has neglected to follow the rules of procedure necessary to a proper presentment thereof, and especially when there is nothing to warrant the assurance that substantial relief would otherwise be afforded him. *Battle v. Mercer*, 116.

2. *Appeal and Error—Petition to Rehear—Error.*—Upon a petition to rehear, the case will be corrected when it appears that the petitioner has thereby been erroneously deprived of its property. *S. v. Martin*, 119.

3. *Appeal and Error—Instructions—Objections and Exceptions—Verdict—Contentions.*—An exception to the statement of the contention of the parties after verdict comes too late to be considered on appeal. *S. v. Jones*, 143.

APPEAL AND ERROR—*Continued.*

4. *Appeal and Error — Evidence — Trials—Prejudice.*—Where the instrument relied upon by the appellant as sufficient to create a lien on the leased property is not sufficient for this purpose, the admission of evidence excepted to on the grounds that it tended to vary, etc., the written instrument of lease, is not reversible error. *Bank v. Tobacco Co.*, 178.

5. *Appeal and Error—Certificates of Opinions—Procedure.*—Where an appeal has been taken to, and decided by, the Supreme Court, wherein an incorporated city has been enjoined from enforcing an order assessing the abutting owner of lands upon a street for improvements thereon, any further action of the city therein before the decision has been certified down to the trial court is void. *R. R. v. Sanford*, 218.

6. *Appeal and Error—Rules of Court—Docketing Appeals—Certiorari—Record Proper.*—The rules of practice regulating the docketing of appeals in the Supreme Court will be enforced uniformly, regardless of any agreement to the contrary that the attorneys for the parties may have made in any particular case; and when for any reason the case itself may not reasonably have been docketed by the appellant within the time prescribed by the rules, he must docket the record proper within that time, and move for a *certiorari*, which may be allowed by the court on sufficient showing made. Constitution, Art. IV, sec. 8. *S. v. Farmer*, 243.

7. *Appeal and Error — Rules of Court — Docketing Appeals — Record Proper—Motions—Certiorari—Constitutional Law — Statutes—Agreement of Parties.*—The rules of practice regulating the docketing in the Supreme Court cases appealed thereto is exclusively left to that Court by the Constitution, Art. IV, secs. 8 and 12, which cannot be affected or changed, either by statute or the agreement of parties; and in order to properly bring the case before the Court for it to exercise its discretionary power to afford relief under peculiar circumstances arising in a particular case, the record proper must be docketed in strict accordance with the requirements of the rule, and a *certiorari* accordingly applied for on motion to the Court and in the time required. *Hardy v. Heath*, 271.

8. *Appeal and Error—Evidence—Competent in Part—Objections and Exceptions.*—Where evidence is competent for some purposes, the party objecting should request that it be confined to that purpose, and his general exception to its admission will not be sustained on appeal. *In re Southerland*, 325.

9. *Appeal and Error—Evidence—Harmless Error.*—Where the evidence itself, and when taken in connection with the verdict, cannot have been to the prejudice of appellant, reversible error will not be held by the Supreme Court on appeal. *Ibid.*

10. *Appeal and Error — New Trials — Motions — Newly Discovered Evidence—Procedure.*—The Supreme Court, on appeal in criminal cases, will not entertain a motion for a new trial for newly discovered evidence, though it may be entertained in the Superior Court at least during the term at which the case was tried, and allowed or not, in the discretion of the judge presiding there. *S. v. Hartsfield*, 357.

APPEAL AND ERROR—*Continued.*

11. *Same—Facts Found by the Trial Judge.*—The facts found upon the evidence by the trial judge, upon a motion for a new trial for newly discovered evidence, are not subject to review on appeal. *Ibid.*

12. *Same—Criminal Law.*—As a matter of right, the State cannot introduce depositions as evidence against the prisoner, the constitutional right of the prisoner to confront his accusers including his right of cross-examination in the presence of the jury impaneled to try him. *Ibid.*

13. *Same—Waiver—Objections and Exceptions.*—The prisoner, upon his trial for a crime less than a capital offense, waives his right to have a State's witness present before the jury impaneled to try his case by not objecting to the State's introducing depositions of the witness, and this may be done by the prisoner's attorney in the presence of the prisoner during the trial. The distinction between this case and the waiver of the right to a trial by jury drawn by *Stacy, J. Ibid.*

14. *Appeal and Error—Fragmentary Appeals—Judgments.*—An appeal from the intimation of the trial judge that upon the evidence the plaintiff could not recover a part of his demand is premature, and will be dismissed in the Supreme Court. The course to be pursued in such instances is to proceed to final judgment and then appeal under plaintiff's exception, should the matter still be adverse to him. *Bailey v. Barnes*, 378.

15. *Appeal and Error — Judgment — Nonsuit—Second Appeal—Evidence—Review.*—Where the Supreme Court, on appeal, has reversed the Superior Court in granting defendant's motion as of nonsuit upon the evidence, under the provisions of the statute, and upon the retrial, upon the same evidence, the defendant has again entered his motion thereof at the close of the plaintiff's evidence and at the close of all the evidence, the decision in the former appeal is the law of the case, and the law as therein determined will not thus be reviewed in the Supreme Court. *Ray v. Veneer Co.*, 414.

16. *Appeal and Error—Instructions.*—An instruction to the jury will be construed contextually as a whole, on appeal, and if when so construed it is a correct exposition of the law upon the evidence, no error will be found because of disjointed parts thereof, which may have been erroneous when considered disconnectedly. *Cobia v. R. R.*, 488.

17. *Appeal and Error—Objections and Exceptions—Brief.*—Under the rule regulating appeals, errors assigned in the record will be deemed as abandoned if not mentioned in the brief of appellant. *Ibid.*

18. *Appeal and Error—Objections and Exceptions—Briefs.*—Exceptions not mentioned in the appellant's brief are deemed abandoned on appeal to the Supreme Court, under the rule. *S. v. Godette*, 497.

19. *Appeal and Error — Constitutional Law — Review.*—On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. Const., Art. IV, sec. 8. *Bank v. Howard*, 544.

20. *Appeal and Error—Objections and Exceptions—Record—Evidence.*—An exception to the exclusion of evidence on the trial will not be con-

APPEAL AND ERROR—*Continued.*

sidered on appeal when the record is silent as to what this evidence was expected to be, and its competency or materiality does not appear. *Smith v. Myers*, 551.

21. *Appeal and Error—Second Appeal—Review—Supreme Court.*—A party to an action may not have the decision of the Supreme Court again reviewed by it, upon a second appeal, upon the same state of facts, the former decisions having become the law of the case. *Strunks v. R. R.*, 567.

22. *Appeal and Error—Objections and Exceptions—Contentions.*—The appellant must at the time call the attention of the trial judge to errors he is alleged to have committed in stating the contentions of the parties to the jury, and an exception after verdict comes too late to be considered on appeal. *S. v. Beavers*, 595.

23. *Appeal and Error—Briefs—Objections and Exceptions.*—To be considered on appeal under the rule of court, exceptions of appellant appearing of record must be mentioned and discussed in his brief. *In re Westfeldt*, 702.

24. *Appeal and Error—Objections and Exceptions.*—Exceptions on appeal that do not relate to the controversy between the parties and are to matters entirely collateral to the issues will not be sustained on appeal. *Beck v. Chair Co.*, 743.

25. *Appeal and Error—Criminal Law—Burden to Show Error—Record.*—On defendant's appeal from judgment against him in violation of the provisions of C. S., 4209, amended in 1923, he must show error upon the face of the record, or his exception to the judgment cannot be sustained. *S. v. Porter*, 804.

26. *Appeal and Error—Laches—Death of Trial Judge—New Trials—Appellee Offers to Accept Appellant's Case.*—Offer of appellee to accept appellant's case does not, under the circumstances, vary the opinion in *Rector v. Mfg. Co.*, *post*, 807. *Metcalfe v. Chambers*, 805.

27. *Appeal and Error—Laches—Death of Trial Judge—New Trial.*—Where the appellant to the Supreme Court has not been guilty of laches in presenting his appeal, and the death of the judge has prevented the settling of the case on appeal, as required by statute and rules of procedure in such instances, a new trial will be ordered. *Rector v. Mfg. Co.*, 807.

APPEARANCE. See Actions, 6.

APPLICATION. See Banks and Banking, 7.

APPLICANTS. See Attorney at Law, 1.

APPOINTMENT. See Administration, 2.

ARREST. See Constitutional Law, 4; Criminal Law, 12.

ASSAULT. See Criminal Law, 6, 21; Assault and Battery.

ASSAULT AND BATTERY.

1. *Assault and Battery—Civil Actions—Punitive Damages—Evidence—Appeal and Error.*—In a civil action to recover damages for assault and battery, the exclusion of the record of conviction of defendant in

ASSAULT AND BATTERY—*Continued.*

the criminal action as evidence is not prejudicial to the plaintiff upon the issue of punitive damages; damages of this character being largely discretionary with the court, and the evidence excluded not relating to an aggravation of actual damages on the question of willfulness, malice, or reckless and wanton disregard of the plaintiff's rights, etc. *Smith v. Myers*, 551.

2. *Assault and Battery—Civil Actions—Costs.*—Where the recovery of damages in a civil action of assault is less than fifty dollars, the plaintiff recovers no more costs than damages. C. S., 1241 (4). *Ibid.*

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ASSIGNMENTS.

1. *Assignments — Debtor and Creditor — Mortgages—Statutes—Liens.*—A chattel mortgage, attempted to be executed by an insolvent corporation owing other creditors, to secure a preëxisting debt on practically all of its property, will be treated as an assignment, and void, unless the requirements of the statute have been complied with, and no lien otherwise on the property described therein can be thereby created. C. S., 1609. *Bank v. Tobacco Co.*, 177.

2. *Same—Leases—Covenants.*—A clause in a lease of a tobacco sales warehouse, providing that machinery, material, etc., placed therein by the lessor shall belong to it at the termination of the lease, upon "satisfaction of any and all indebtedness or liens that may be due 'the lessee,'" etc., is a personal covenant of the lessee and cannot alone have the effect of creating a lien on the leased property to secure the lessor's obligation to pay the rents as stipulated in the lease. *Ibid.*

ASSUMPTION OF RISKS. See Employer and Employee, 1, 3.

ATTACHMENT. See Deeds and Conveyances, 6.

ATTENDANCE. See Schools, 3.

ATTORNEYS AT LAW.

1. *Attorneys at Law—License to Practice—Applicants—Protest—Procedure.*—Where an applicant to practice law has complied with the preliminary requirements of the statute and the rules of Court as to his ability and moral character, etc., to stand for his examination by the Court, and, pending his examination, a protest has been filed as to his moral fitness to practice this profession, the matter of granting him a license becomes one of general interest, and he may not then voluntarily withdraw his application and stop the inquiry of the Court entered upon under the protest filed. *In re Application of Dillingham*, 162.

2. *Same—Burden of Proof.*—The burden is upon the protestants to show the moral unfitness of an applicant for examination to practice law when the applicant has complied with the preliminaries of the statute and the rules of Court relating thereto. *Ibid.*

3. *Same—Statutes—Rules of Court—Character.*—Where protest has been made in the Supreme Court to granting applicant a license to practice law, and the protestant has shown that the applicant has been convicted, in the near past, of violating the criminal law of the State,

ATTORNEYS AT LAW—*Continued.*

which is not denied, evidence offered by him tending to show that he has since for a period of twelve months lived a proper life is insufficient to show that his character has been restored or that he is now entitled to his license. Attention to the new rules regulating the admission of applicants to practice law is called to the attention of the profession by *Hoke, C. J.*, and the observance of such rules emphasized by him.

AUTOMOBILES. See Constitutional Law, 1; Insurance, 1, 15; Homicide, 3.

BAILMENT. See Contracts, 13.

BANKRUPTCY. See Actions, 9.

BANKS AND BANKING. See Constitutional Law, 2; Usury, 4; Principal and Agent, 3; Bills and Notes, 11, 16; Issues, 3; Corporations, 7.

1. *Banks and Banking—Corporation Commission—Bank Examiner—Conditions Under Which Bank May Continue.*—Among other powers conferred by statute, the Corporation Commission may, without taking possession of the business and property of a State bank, upon its appearing to the commission to be in imminent danger of insolvency, direct upon what conditions its officers may continue in its management and control, and thus, upon the bank's complying therewith, avoid losses to depositors, creditors, and stockholders, necessarily incident to the closing of its doors. *Taylor v. Everett*, 247.

2. *Same—Impairment of Capital Stock—Directors—Stockholders—Agreement—Contracts—Actions—Parties.*—Where, upon the examination of a State bank by the chief examiner of the Corporation Commission, it appears that its continued management by its officers would result in loss to its creditors, depositors, or stockholders, unless upon compliance with certain conditions, and the directors, also stockholders therein, have passed a resolution and have separately and individually agreed to restore the impairment of its capital stock, as directed by the bank examiner, according to their several holdings of shares of stock therein, the members thus assenting become liable to the bank under the terms of their agreement as the beneficiaries of the agreement, jointly and severally, to the extent they have assumed the liability; and where some of them have paid the liability of others under this agreement, each one of them may maintain his action against each of the defaulting members (C. S., 446), and such is not a misjoinder of parties prohibited by statute. *Ibid.*

3. *Same—Stockholder's Liability.*—The agreement of the directors to make good the impairment of the capital stock of a State bank as a condition precedent to the management of its business by its own officers, and, at the instance of the State Bank Examiner, acting according to the power conferred by the statute upon the Corporation Commission, renders such directors, as stockholders, liable to the extent of the obligations they have thus assumed, this liability is independent of, and not contemplated by, the statute creating an additional liability to the amount of stock held by them in the banking corporation. *Ibid.*

4. *Same—Subrogation.*—An agreement of the board of directors of a State bank, both by resolution and individually, to comply with the order of the State Bank Examiner in making good an impairment of the

BANKS AND BANKING—*Continued.*

capital stock of the bank and putting the bank in a safe condition for the continuance of its business, may be enforced by the bank, or in subrogation to its rights by those of the directors who have paid the obligations of others who have failed in the performance of their individual agreement, the contract thus made being for the benefit of them all. *Ibid.*

5. *Banks and Banking — Officers — False Entries — Criminal Law — Evidence—Questions for Jury—Statutes.*—Upon a trial of an officer of a bank for willfully and fraudulently making a false entry on its books, etc. (chapter 4, section 83, Public Laws 1921), evidence is sufficient to sustain a verdict of conviction which tends to show that the officer charged therewith made out a certificate of deposit for about $2,000, and the stub was made out in his own handwriting, leaving a blank for the amount, which was filled out by another, in pencil, for $20, and that the officer and a subordinate were in exclusive control of the bank at the time, permitting a reasonable inference that he was aware of the false entry on the stub of the amount of the certificate. *S. v. George*, 611.

6. *Banks and Banking—Purchase of Bad Debt—Partnership—Ultra Vires Act.*—Conceding, however, that the plaintiff company has only the ordinary powers of a banking corporation, and, as such, may not usually engage as a partner in an unrelated business enterprise, this rule is subject to the limitation that a bank that has acquired and taken over property pledged to secure an indebtedness contracted in the regular course of its business may at times enter into a separate and established business enterprise to an extent reasonably required to enable it to realize on the property with a view of converting the same into bankable asset. *Bank v. Odom*, 673.

7. *Banks and Banking—Banking Company—Partnership—Application of Investment to Creditors.*—In such case, and in any event, a banking corporation should be held liable to creditors at the instance of the copartner to the extent of the property put in the business, the arrangement to the amount of the investment being an executed contract giving such copartners the equitable right to have the assets so applied. *Ibid.*

8. *Banks and Banking—Bills and Notes—Negotiable Instruments—Guarantor of Payment.*—Where a bank sends a note of its customer to another bank for discount, in a letter stating that the note was perfectly good, and that it will see that the note is promptly taken care of at maturity, the bank thus discounting the note becomes a guarantor of payment, and has the right to charge the same against the account of the debtor bank when not so paid. *Trust Co. v. Trust Co.*, 766.

9. *Same—Purchaser for Value.*—And where the creditor bank has been bought by another and its assets accordingly transferred, such assets pass to the transferee with the note in question as security therefor, and the purchasing bank acquires the right that the selling bank had therein. *Ibid.*

10. *Same—Debtor and Creditor.*—Where a bank is a depositor of another bank and has the latter to discount a note of its customer under its guaranty of payment, upon the nonpayment of the note at maturity

BANKS AND BANKING—*Continued.*

the relation of debtor and creditor is established, and the bank discounting the note may charge it to the account of the debtor bank. *Ibid.*

11. *Same—Notice.*—A cashier of a bank has implied authority in the ordinary course of his employment to guarantee the payment, in behalf of the bank, of its customer's note he has had another bank to discount for it; and where the debtor bank has been taken over by another bank, the latter acquires subject to this liability as shown on the books of the selling bank. *Ibid.*

BANK EXAMINER. See Banks and Banking, 1.

BENEFICIARIES. See Wills, 1, 14; Estates, 14.

BENEFITS. See Condemnation, 2.

BILLS OF LADING. See Carriers, 1, 8.

BILLS AND NOTES. See Corporations, 2; Judgments, 5; Statutes, 11; Banks and Banking, 8.

1. *Bills and Notes—Negotiable Instruments—Renewal.*—A renewal note taken by a bank is not necessarily an extinguishment of the note it is given to renew, and, nothing else appearing, the bank takes with notice of the infirmity when it has purchased the original one after maturity, and the maker may set up the infirmity existing between himself and the payee named therein who has negotiated it to the bank. *Grace v. Strickland*, 369.

2. *Same Holder—Infirmity of Instrument—Notice.*—While ordinarily one who has acquired a negotiable instrument is prima facie presumed to be a holder in due course (C. S., 3033), yet when the title is shown to be defective, the burden is on him to show that he, or some person under whom he claims, acquired the title as a holder in due course. *Ibid.*

3. *Same—Prima Facie Case—Fraud.*—The principle upon which an unlettered person may not disclaim liability on a note signed by his cross-mark without requiring that it first be read to him does not apply as to those taking with notice of the fraud, when the one who induced its execution by his acts of fraud, misrepresentations or deceit had fraudulently lulled him into a feeling of security and induced him to execute the instrument. *Ibid.*

4. *Same—Evidence.*—Evidence that an illiterate maker of a note was lulled into security in signing a negotiable instrument which had been fraudulently misrepresented to him is sufficient as to those taking with notice of the fraud, without positive or direct assertions, when the fraud may be inferred from circumstances surrounding the transaction. *Ibid.*

5. *Same—Instructions.*—Upon the evidence in this case: *Held*, a requested prayer for instruction was properly refused that denied the defense of fraud in the procurement of defendant's note. *Ibid.*

6. *Bills and Notes — Negotiable Instruments — Renewal — Principal and Agent.*—The payee of a note acts as the agent of the holder when, with the latter's consent, he obtains a renewal note from the maker thereof. *Ibid.*

BILLS AND NOTES—*Continued.*

7. *Bills and Notes — Negotiable Instruments — Corporations — Shares of Stock—Blue-Sky Law.*—Where a note has been given for shares of stock solicited in violation of the Blue-Sky Law, and the holder has acquired it with notice of its illegality, he may not maintain his action thereon. *Ibid.*

8. *Bills and Notes — Negotiable Instruments — Infirmity—Holder—Prima Facie Case—Evidence.*—While a holder of a negotiable instrument, regular on its face, is prima facie presumed to be one in due course, he is required to show that he has not obtained it with notice of a prior infirmity therein, when evidence of the infirmity of the instrument is introduced on the trial, and under such conditions the question of such notice is one for the jury. For the effect upon the negotiable instrument given for shares of stock in a corporation, solicited in violation of the Blue-Sky Law, see *Bank and Trust Co. v. Felton, post*, 384. *Bank v. Wester*, 374.

9. *Bills and Notes—Negotiable Instruments—Statutes—Blue-Sky Law—Illegality—Due Course—Notice.*—Where a note is given for shares of stock sold in violation of the Blue-Sky Law (C. S., 6367), it is voidable only, and a recovery may be had thereon by a purchaser for value in due course, in good faith, without notice of the illegality of the instrument. *Bank and Trust Co. v. Felton, post*, 384. *Bank v. Hunt*, 377.

10. *Bills and Notes—Negotiable Instruments—Fraud—Notice.*—Under the provisions of our statute, the procurement by fraud of a negotiable note will avoid it in the hands of those who have previously acquired with notice, which may be shown to rebut the prima facie case made out by a holder after proving the genuineness of the instrument. *Bank v. Felton*, 384.

11. *Same—Illegality—Blue-Sky Law—Banks and Banking.*—Where a bank has acquired a negotiable instrument, procured by fraud and in violation of a criminal statute, in this case the Blue-Sky Law, evidence that some of the officers of the bank had acted in selling the notes on commission, and others thereof upon the loaning committee had knowledge of the illegality of the corporation in soliciting the sale of the shares of stock for which the notes were given, is sufficient to take the case to the jury in defense of an action upon the notes. *Ibid.*

12. *Same—Due Course.*—Where a negotiable note is given for shares of stock in a corporation, solicited in violation of the Blue-Sky Law, the note is voidable against a holder who has acquired it with notice of the illegality or fraud in the procurement of the instrument. *Ibid.*

13. *Bills and Notes—Negotiable Instruments—Infirmity—Evidence.*—Upon the defense in an action upon a note for illegality in its procurement for a purchase of stock solicited in violation of the Blue-Sky Law, it is competent to show by a witness that he had also been solicited under like circumstances by the agent of the same party. *Phosphate Co. v. Johnson*, 419.

14. *Same — Blue-Sky Law — Statutes — Corporations — Domestic Corporations.*—The requirements of C. S., 6367, as to soliciting the purchase of shares of stock in a certain corporation, in accordance with cer-

BILLS AND NOTES—*Continued.*

tain conditions, applies, by statutory amendment of 1919, not only to corporations formed in other States, but also to domestic corporations. C. S., 8107. *Ibid.*

15. *Same—Remedial Laws.*—The statutes for the protection of the people of this State in being solicited for the purchase of shares of stock in certain classes of corporations is remedial in its effect, and will be construed to advance the remedy. *Ibid.*

16. *Bills and Notes—Negotiable Instruments—Banks and Banking—Due Course—Evidence—Principal and Agent—Questions for Jury.*—Evidence that a bank received a negotiable note from the payee, credited him therewith, but with the right to charge it back to his account, should the maker fail to pay it, is of an agency for collection; and where there is other evidence which tends to show that the bank, the plaintiff in an action upon the note, was a holder for value in due course, before maturity, it is reversible error for the trial judge to direct a verdict upon the appropriate issue in the plaintiff's favor. *Bank v. Monroe*, 446.

17. *Bills and Notes—Negotiable Instruments—Due Course—Infirmity—Notice—Statutes.*—Where a purchaser of a note is one before maturity for value, but with notice of an infirmity therein which would render it invalid, he is not such a holder in due course that would sustain his action thereon. C. S., 3033, 3038, 3039. *Bank v. Howard*, 543.

18. *Same—Renewals.*—A note taken in renewal does not extinguish the original note, and those who acquire the latter with knowledge of the infirmity that would vitiate the former may not recover thereon. *Ibid.*

19. *Bills and Notes—Negotiable Instruments—Statutes.*—In order to come within the intent and meaning of our negotiable instrument law, a note must be payable to the order of a specified person or to bearer. C. S., 2982. *Hunt v. Eure*, 716.

BLUE-SKY LAW. See Bills and Notes, 7, 9, 11, 14; Corporations, 1.

BOARD OF EQUALIZATION. See Taxation, 8.

BONDS. See Sanitation, 1; Schools, 1; Statutes, 1.

BOUNDARIES. See Sanitation, 2; Public Lands, 3; Deeds and Conveyances, 3.

BRIEFS. See Appeal and Error, 17, 18, 23.

BURDEN OF PROOF. See Telegraphs, 1; Wills, 6; Attorney at Law, 2; Indictment, 2; Landlord and Tenant, 1; New Trials, 1; Express Companies, 4; Insurance, 3; Employer and Employee, 5; Liens, 3; Usury, 5; Issues, 2; Deeds and Conveyances, 8; Corporations, 8; Statutes, 11; Appeal and Error, 25.

BURGLARLY. See Criminal Law, 20.

CARNAL KNOWLEDGE. See Criminal Law, 22.

CARRIERS. See Contracts, 4; Actions, 3; Express Companies, 1; Statutes, 4, 5.

1. *Carriers—Railroads—Title—Order, Notify Consigner—Bills of Lading Attached to Draft.*—In a shipment by common carrier, the title is ordinarily in the consignee upon delivery for transportation; and where the shipment is order, notify consignor, and bill of lading is sent through the bank attached to draft, upon the payment of the draft by the consignee and delivery of the bill of lading to him, the title to the shipment is in him.—*Davis v. Gulley*, 80.

2. *Same—Vendor and Purchaser—Actions—Shortage in Shipment.*—Where the consignee of an interstate shipment, bill of lading attached to draft, has paid the draft and presents the bill of lading to the carrier, pays the freight, and obtains the shipment, in the carrier's action to recover the proper freight charges as established by the Interstate Commerce Commission, he is liable therefore. *Ibid.*

3. *Same—Commerce—Interstate Commerce Commission—Discrimination—Freight Rates—Contract of Carriage.*—The rates established by the Interstate Commerce Commission on interstate shipments are controlling, and to prevent discrimination, and where the carrier has collected a less amount on the shipment from the consignee than that so prescribed, the carrier in its action may recover the difference from the consignee, he being bound by the rates lawfully established. *Ibid.*

4. *Carriers—Railroads—Custom—Evidence—Demurrage — Through Shipments.*—In an action by a railroad company to recover demurrage on certain shipments made by the consignor to himself and reshipped over another line, evidence is competent to show that it was the custom established between the parties that the consignor mark the cars by a certain method to show destination over the connecting carrier, and thus transport it over the connecting carrier as a through shipment, and that therefore he was not required to handle the shipment at the transfer point. *R. R. v. Fertilizer Co.*, 137.

5. *Carriers—Railroads — Negligence — Livestock — Evidence — Presumptions—Rebuttal.*—In an action against the railroad to recover damages for the death of a mule, in a carload livestock shipment, in the bill of lading for which was a provision exempting the carrier from liability for injuries caused by the inherent viciousness of the animals, etc., the receipt of the stock and the death of the mule while in the carrier's possession raises a presumption of its actionable negligence, which the carrier may rebut by showing that the shipment was made in a proper car and that the carrier exercised due care in its transportation. *Davis Livestock Co. v. Davis*, 220.

6. *Same Instructions—Appeal and Error.*—Where the bill of lading issued by the carrier for the transportation and delivery of a carload shipment of livestock contains the usual provision exempting the carrier from liability for injuries caused by the inherent viciousness of the animals, etc., and there was evidence on the trial tending to show that one of them had kicked over the transom of the car and was thrown to the floor and found injured *in transitu* by the carrier's employee, a charge of the court that relieves the carrier from exercising due care after discovering the condition of the mule is reversible error. *Ibid.*

CARRIERS—*Continued.*

7. *Carriers—Railroads—Crossings—Negligence—Evidence—Nonsuit.*—It is the duty of a person driving an auto-truck to look and listen in both directions for approaching trains before attempting to drive across a railroad track; and in an action to recover damages to the truck, caused by colliding with a passing train, under such circumstances, a motion as of nonsuit should be granted when it appears from all the evidence that the proximate cause of the injury was his attempting to cross the track when there were no obstructions to his view and he had heard the train approaching and could have perceived it in time to have prevented the injury if he had observed the duty required of him. *Holton v. R. R.*, 277.

8. *Carriers—Railroads—Negligence—Rates—Classification—Bills of Lading—Contracts.*—Where a railroad company, with the knowledge of its agent for the purpose, knowingly accepted leaf tobacco arranged on sticks along with a shipment of household goods, and issued a bill of lading therefor as a shipment of household goods at a lower freight rate than the classification on leaf tobacco: *Held*, a bill of lading is not an essential to a valid shipment and the liability of the carrier may attach on a shipment by parol; and the carrier was responsible in damages to the tobacco caused by its reloading and shipment *en route* on a leaky car which caused damage to the tobacco. *Newman v. R. R.*, 341.

9. *Same—Waiver—Interstate Commerce Commission.*—Where the railroad agent knowingly receives a carload shipment of household goods and leaf tobacco from the consignor, and issues a bill of lading for household goods at a lower classification rate: *Held*, the provision in the bill of lading, approved by the Interstate Commerce Commission, requiring that the tobacco be shipped in a certain manner of packing, was inserted for the benefit of the carrier, which was waived by the carrier's agent, and was properly deducted from the amount of the consignor's damages in his action, caused to the tobacco by its negligence, there being no element of fraud on the plaintiff's part. And the consignor being in no willful default, the only penalty to be enforced will be the difference between the freight rate charged and that fixed by law for the classification; and where this has been properly allowed for in the verdict of the jury, no reversible error will appear on appeal. *Ibid.*

10. *Carriers—Railroads — Negligence — Evidence — Questions for Jury — Trials.*—While a passenger upon a mixed train is required to use the proper degree of care attending upon travel of this character, it is also the duty of the carrier to exercise that degree of reasonable care incident to the increased risk to the passenger; and upon evidence tending to show that the conductor while helping a female passenger on such train with a baby at a regular station and assisting her to get to her seat on the car, signalled the engineer to go ahead before the passenger could reach the seat, thereby causing her to be thrown against the arm of a seat and injured, the question of the carrier's actionable negligence therein is one for the jury. *Riggs v. R. R.*, 366.

11. *Carriers—Railroads—Negligence—Contributory Negligence—Evidence—Nonsuit.*—Evidence in this case that plaintiff's intestate was killed on a dark night by defendant's train approaching without light or

CARRIERS—*Continued.*

warning, while crossing its track, raised issues as to defendant's negligence, and the contributory negligence of the intestate, and defendant's motions to nonsuit after the close of the plaintiff's evidence and renewed after the close of all the evidence, were properly denied. *Manuel v. R. R.*, 559.

12. *Carriers—Railroads—Negligence—War.*—Where under war control an excavation was made on railroad lands near a publicly used road, which without a protecting rail, was a menace to travel, and after the release of the carrier from such control, the railroad company left this dangerous condition for an unreasonable length of time, and proximately caused damages to the plaintiff's automobile and personal injuries to himself, without contributory negligence on his part, the fact that the excavation was made while the railroad was under war control does not prevent a recovery. *Goldstein v. R. R.*, 636.

13. *Same—Notice—Evidence.*—Where a railroad company has maintained a menacing and dangerous condition on its own land near a publicly used street of a city, and is sued for alleged negligent damages by one injured thereby, it is competent for the plaintiff to show that the mayor of the town had previously called this condition to the attention of the defendant company, and requested the defendant to properly safeguard the public from the danger. *Ibid.*

14. *Same—Roads and Highways—Permissive User—Nonsuit — Questions for Jury.*—Evidence tending to show that defendant railroad company had continuously maintained a menacing and dangerous condition on its land near a road used by the public, and that the plaintiff received injuries caused thereby, is sufficient under the facts of this case to take the case to the jury upon the issue of defendant's actionable negligence, though the road had not been dedicated by the owner to the public. *Ibid.*

15. *Carriers—Railroads—Merger—Connected Lines — Statutes — Unlawful Combinations—Presumptions.*—A railroad company operating in this State, when expressly or impliedly authorized by State statute, may purchase and absorb within its system another such corporation physically connected with its lines within the State when the latter corporation is likewise authorized to sell; and the presumption obtains, nothing else appearing, that the legislative intent was not to thereby authorize a monopoly or any act on the part of the railroads against the public policy of the State. *Manning v. R. R.*, 648.

16. *Same Intent.*—The legislative intent is to be gathered from the language used in the statute, and not by the debates upon the floor during its passage, or the understanding of those concerned therein who are not members. *Ibid.*

17. *Carriers—Railroads—Entire System—Mortgages — Foreclosure — Purchasers—Laches—Estoppel—Counts—Judgment.* — Where the State and localities along the route of a railroad have acquired an interest therein by subscription to its shares of stock under statutory requirement that the road be operated or sold as an entirety, and in foreclosure proceedings the court has so ordered the sale, and the road has been purchased by another railroad company authorized by statute to sell, and which does thereafter sell to two separate corpora-

CARRIERS—*Continued.*

tions, which divide and separately operate it, each as a part of its own system: *Held*, the corporations so purchasing and independently operating the separate portions are not in violation of the statutory provisions that the road should be operated or sold as a whole, and the Federal requirements as to interstate carriers in such matters become immaterial. As to whether the State, under the facts of this case, had lost its rights by its laches, *Quere? Ibid.*

18. *Carriers—Railroads—Federal Statutes and Decisions — Negligence — Employer and Employee—Trials.*—The Federal statutes and decisions control in an action brought in the State court to recover damages for a personal injury alleged to have been negligently caused to a railroad employee while engaged in interstate commerce, in the course of his duties to the defendant railroad company, his employer therein. *Mangum v. R. R.*, 689.

19. *Carriers—Railroads—Negligence—Contributory Negligence—Evidence—Nonsuit.*—In an action against a railroad company to recover for the wrongful death of plaintiff's intestate, evidence tending only to show that deceased was killed by the defendant's passing train where the view was unobstructed both to the intestate and to the employees on defendant's train, which approached without signal and warning, and the deceased was a lad in full possession of his faculties and could have readily reached a place of safety, and thus have avoided the injury, a judgment as of nonsuit was properly rendered. *McCulloch v. R. R.*, 797.

20. *Carriers—Railroads—Ejecting Passenger—Improper Place—Damages—Proximate Cause.*—A railroad company, having the lawful right to put a passenger off the coach of its train for his failure to pay his fare, is nevertheless answerable in damages when it does so at a place and under circumstances that import serious menace to him, and injury is thereby proximately caused. *Ledford v. R. R.*, 808.

CASE. See Appeal and Error, 26.

CASHIER. See Principal and Agent, 3.

CAVEAT. See Judgments, 7; Wills, 11.

CAUSE OF ACTION. See Courts, 6.

CERTIFICATES. See Appeal and Error, 5.

CERTIORARI. See Appeal and Error, 6, 7.

1. *Certiorari—Discretion of Court—Constitutional Law—Statutes—Appeal and Error.*—The granting or refusing of a petition for a *certiorari*, under the provisions of our Constitution, Art. IV, sec. 8, and C. S., 630, passed in pursuance thereof, is a matter within the discretion of the Supreme Court, and will not be issued when it will serve no good purpose. *King v. Taylor*, 450.

2. *Same—Consent Judgments—Waiver.*—A writ of *certiorari* will not issue from the Supreme Court to bring up for review the action of the Superior Court judge in refusing to settle a case on appeal, when it appears that a judgment had been entered by the court upon the

CERTIORARI—*Continued.*

consent of the parties, such judgment being a waiver of the right of appeal. *Semble*, the only remedy is a motion in the lower court to set aside the judgment. *Ibid.*

CHALLENGE. See Jury, 1.

CHARACTER. See Attorney at Law, 3.

CHARTERS. See Contracts, 5; Banks and Banking, 6; Corporations, 6.

CHILD. See Criminal Law, 22.

CITIES AND TOWNS. See Municipal Corporations, 1, 5; Trespass, 1; Contracts, 6; Taxation, 6.

CIVIL ACTIONS. See Assault and Battery, 1, 2.

CLAIM AND DELIVERY.

1. *Claim and Delivery—Principal and Surety—Replevin Bond—Statutes—Defenses.*—The surety on a replevin bond in claim and delivery, under the requirements of the statute (C. S., 836) that the property shall be delivered to the plaintiff, or, if it cannot be, the value at the time it was delivered to the defendant, etc., may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or prevented by the act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise. *Garner v. Quakenbush*, 180.

CLASSIFICATION. See Carriers, 8.

CLERKS OF COURT. See Principal and Surety, 1; Administration, 1, 2, 3; Contempt, 1; Pleadings, 6.

CLOUD ON TITLE. See Parties, 1.

CODIFICATION. See Statutes, 3.

COLLATERAL SECURITY. See Constitutional Law, 2.

COLLECTIONS. See Express Companies, 2.

COLLISIONS. See Evidence, 7; Statutes, 7.

COLOR OF TITLE. See Deeds and Conveyances, 1.

COMBINATIONS. See Carriers, 15.

COMMERCE. See Carriers, 3; Railroads, 1, 2; Verdict, 1; Statutes, 5.

COMMISSION. See State Highways, 2.

COMMITMENT. See Insanity, 1.

COMMON LAW. See Express Companies, 2; Criminal Law, 14.

COMPANIES. See Insurance, 15; Husband and Wife, 6.

COMPARATIVE NEGLIGENCE. See Employer and Employee, 7.

COMPENSATION. See Condemnation, 1.

COMPETENCY. See Appeal and Error, 8.

COMPETITION. See Contracts, 6.

CONCURRING NEGLIGENCE. See Evidence, 11.

CONDEMNATION. See Trespass, 1; Waters, 4.

1. *Condemnation—Compensation — Damages — Statutes — Constitutional Law.*—The right of the owner of land to compensation for his land, taken by condemnation for a public use, is for compensation in the manner and to the extent fixed by the Legislature. *Wade v. Highway Commission*, 210.

2. *Same — Benefits — Offsets — Remedies — Amendatory Statutes.* — The method by which the owner of land is compensated for the taking thereof by condemnation for a public use is the remedy provided by the Legislature by statute to meet the constitutional requirement, which may be changed by the legislative will by allowing as an offset to the amount recoverable either all benefits or those specially accruing to the land, or none at all; and the statute in force at the time of trial is the one applicable, and not a former statute, of which the later one is amendatory. *Ibid.*

3. *Condemnation — Measure of Damages — Electricity — Transmission Lines—Instructions—Appeal and Error—Harmless Error.*—While the compensation for permanent damages to the owner for his lands, taken in condemnation for a designated location by an electrical power company for a single line of poles or towers thereon for the stringing of its wires, carrying its transmission current, is the fair market value of lands so taken, diminished by such restricted use, etc., a different rule may prevail, as in case of railroads, where a strip one hundred feet wide has been condemned across the owner's lands, that the power company may use in part or *in toto*, as it may deem necessary, wherein the rule applies in the admeasurement of such damages that a recovery may be had for the impaired value of the lands, including the market value actually covered by the right of way, with damages to the remainder of the tract or portion of the land if any used by the owner as one tract, deducting from the estimate pecuniary benefits or advantages which are special or peculiar to the tract, not common to the owners of other lands in the locality; and under the circumstances of this case an instruction that charged both of these principles was not held for reversible error, to the prejudice of the power company. *Power Co. v. Russell*, 725.

CONDITIONS. See Banks and Banking, 1.

CONDITIONAL ACCEPTANCE. See Contracts, 4.

CONDITIONAL SALE. See Constitutional Law, 2.

CONNECTING CARRIERS. See Carriers, 15.

CONSENT. See Judgments, 1; Courts, 15; Wills, 18; Certiorari, 2.

CONSIDERATION. See Contracts, 2, 10.

CONSIGNOR AND CONSIGNEE. See Carriers, 1; Actions, 3.

CONSOLIDATED STATUTES.

SEC.

2, subsec. 1 (2). Where jurisdiction has been acquired for appointment of administrator in a proper county, it cannot be collaterally impeached. *Tyer v. Lumber Co.*, 274.

8 (2). Where widow has acquiesced in appointment of another as administrator of husband's estate. *Tyer v. Lumber Co.*, 268.

357. The amount of liability of clerk's bond determines the liability of surety thereon. *S. v. Martin*, 119.

404, 405. Actions against carriers found three years from time of accrual not affected by war control of United States Government. *Vanderbilt v. R. R.*, 568.

421. Section applies to mutual running accounts. *McKinnie v. Wester*, 514.

443 (1). Dismissal of action against unlawful use of public funds for building railroads does not, on appeal, affect rights against railroad participating therein. *Brown v. R. R.*, 52.

443 (1). Statute of limitations does not apply to breach of official duty by officer of municipality. *Brown v. R. R.*, 52.

445. Common-law rule that no statute of limitations bars action for divorce obtains when not modified by this section. *Garris v. Garris*, 321.

446. Stockholders of bank agreeing to make good deficiency to comply with order of bank examiner may maintain action against others who failed to comply with agreement. *Taylor v. Everett*, 247.

446. Trustee in bankruptcy and creditors with notice may waive a debt due estate of bankrupt. *Cunningham v. Long*, 613.

446. Mortgagee who has since sold land with warranty of title may maintain suit to remove the mortgage as cloud on his vendor's title. *Plotkin v. Bank*, 711.

446. Persons not interested as beneficiary under will or as heir at law not proper or necessary parties in action to set will aside. *Bank v. Dustowe*, 777.

455-6. Bank necessary party in petition to remove cause from State to Federal court that has lent money to contractor under certain conditions. *Bank v. Hester*, 68.

534-7. Judge may allow defendant's motion, after answer filed, to make complaint more certain, etc. *Power Co. v. Elizabeth City*, 278.

537 (547). Judge may allow an amendment to allege a warranty in sale of automobile. *Wiggins v. Motor Co.*, 316.

547. Discretion of trial judge to allow amendments to pleadings. *Wiggins v. Motor Co.*, 316.

567. Where negligence of injured employee concurs with that of fellow-servant, motion to nonsuit denied. *Beck v. Chair Co.*, 743.

568, 572. When trial by jury may be waived. *Lumber Co. v. Pemberton*, 532.

573. By excepting to order of reference, party may waive right to trial by jury. *Lumber Co. v. Pemberton*, 532.

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SEC.

600. Excusable neglect not shown where defendant's attorney has not filed answer until after case calendared for trial, etc. *Gaster v. Thomas*, 346.

614, 654. Execution may not issue against estate presently held in entireties by husband and wife under judgment held by either one of them. *Johnson v. Leavitt*, 682.

626. An action in defense of anticipated damages for breach of contract is not maintainable. *Hardware Co. v. Cotton Co.*, 442.

626. Does not apply when parties are same in interest and seek same relief. *Burton v. Realty Co.*, 473.

630. *Certiorari* discretionary with Supreme Court on appeal. *King v. Taylor*, 450.

836. Defendant in replevin cannot avoid liability when he has taken possession of property. *Garner v. Quakenbush*, 180.

858. Injunctive relief a remedy for the assessment of illegal tax. *R. R. v. Comrs.*, 265.

970. Damages recoverable by owner of land for diminution of supply of percolating waters. *Rouse v. Kinston*, 1.

978, 981. Disposing of property in claim and delivery is contempt of court. *Bank v. Chamblee*, 417.

979. Contempt of court not committed in immediate presence of court is appealable. *Bank v. Chamblee*, 417.

987. Promise as to continuing credit to be given. *Novelty Co. v. Andrews*, 59.

987. Promise to pay debt of another after consideration paid is *nudum pactum;* otherwise if paid before then. *Novelty Co. v. Andrews*, 59.

987. Statute applies to contracts of guaranty. *Novelty Co. v. Andrews*, 59.

988. The vendor of land is party to be charged under the statute. *Clegg v. Bishop*, 564.

1179. Misrepresentations of selling agent as to dividend declared is evidence of fraud, under Blue-Sky Law. *Phosphate Co. v. Johnson*, 419.

1241 (4). Recovery of costs restricted when damage does not exceed fifty dollars. *Smith v. Myers*, 551.

1297. County is limited to powers given them in statute to purchase new *situs* for courthouse. *Hearne v. Comrs.*, 45.

1297 (18), (19), 1325. Public roads of county a necessary expense not requiring approval of electorate. *Lassiter v. Comrs.*, 379.

1436. The Superior Court retains jurisdiction over controversies *ex contractu* when amount alleged in good faith exceeds $200, etc. *Williams v. Williams*, 728.

1481. *Held*, amendment in this case sufficient for assault with deadly weapon with intent to inflict serious injury. *S. v. McLamb*, 803.

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SEC.

1500 (12), (13). Amendments to indictment (5758), when allowable. *S. v. Johnson*, 591.

1609. Where mortgage by corporation of practically all of its property is void. *Bank v. Tobacco Co.*, 177.

1666, 7. Necessary for wife to show facts sufficient, but unnecessary for judge to find facts to sustain order granting alimony. *Price v. Price*, 640.

1667. Statute of limitations does not run from time of separation of wife from husband for alimony *pendente lite*. *Garris v. Garris*, 321.

1706. Owner of lands may maintain his action for damages for construction of water pipe on highway as dominant owner, and denial of his right is waiver. *Rouse v. Kinston*, 1.

1743. Mortgagor who has conveyed the premises to another under warranty deed need not continue in possession to maintain suit to remove mortgage as cloud on his title. *Plotkin v. Bank*, 711.

1791. Wherein the mortgagee should hold proceeds of sale of land subject to terms of devise. *Brown v. Jennings*, 155.

1792, 1793. Beneficiary under holograph will may testify to establish it without losing benefits. *In re Westfeldt*, 702.

1795. Testimony of seller of goods tending to hold one responsible for promise to pay for goods sold and delivered to another is incompetent. *White v. Evans*, 212.

2306. Penalty for usury not enforcible when equitable relief by injunction is sought. *Waters v. Garris*, 305.

2306. To recover penalty for usury, an action at law and not enforcible in equity. Debtor must tender principal and interest. *Miller v. Dunn*, 397.

2309. Surety on bond of clerk of Superior Court is only liable within limits of bond for 6 per cent interest after judgment. *S. v. Martin*, 119.

2438. No materialman's lien acquired when owner pays contractor with legal notice, though he has done so in advance. *Rose v. Davis*, 355.

2507. Liability of wife for husband's negligence while acting as her agent. *Richardson v. Lieber*, 112.

2515. Section applies to wife's probate of conveyance of her interest in estates by entireties. *Davis v. Davis*, 200.

2515. Wife's conveyance of land to her husband, void under this statute, may be regarded as color of title. *Whitten v. Pearce*, 298.

2556. Upon injunction to restrain ponding water of plaintiff's land in continuing trespass, demand for damages in complaint unnecessary. *Kinsland v. Kinsland*, 810.

2588. Substantial description of land in advertisement under foreclosure sale is sufficient. *Douglass v. Rhodes*, 580.

2592. Mortgagee may relieve himself by paying fund into court. *Brown v. Jennings*, 155.

CONSOLIDATED STATUTES—*Continued.*

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2703, 2710 (1). Abutting owner on city improved cross streets, when liable to assessments. *Mount Olive v. R. R.*, 332.

2787 (6), (10), (27). Ordinance valid regulating sale of merchandise on Sunday. Coca-cola not included in allowing meals at restaurant. *S. v. Weddington*, 643.

2982. A negotiable instrument must be payable to order of specified person or bearer. *Hunt v. Eure*, 716.

3004. This section does not apply to nonnegotiable instruments. *Hunt v. Eure*, 716.

3033. One acquiring a defective negotiable instrument must show he is holder in due course. *Grace v. Strickland*, 369.

3033-8-9. Purchaser of note with notice of infirmity may not sustain action. *Bank v. Howard*, 543.

3040. Where infirmity of instrument is shown, burden on holder to show he purchased without notice. *Bank v. Howard*, 543.

3467. Contributory negligence not a complete defense in action against carrier for negligence. *Cobia v. R. R.*, 487.

3508. Offense under this statute does not of itself bar recovery for accident covered by insurance policy. *Pool v. Ins. Co.*, 468.

3580-93. These sections repealed in certain respects by Laws of 1921. *Lassiter v. Comrs.*, 379.

3718-21. County commissioners may levy tax for maintenance of roads, etc. *Road Comrs. v. Comrs.*, 362.

4103. Wife's right in husband's home site rests by statute with difference as to conveyance unexecuted by her. *Johnson v. Leavitt*, 682.

4131. An explanation attached to will of nonresident, without witness, can have no effect as to passing title to lands situated here. *Whitten v. Peace*, 298.

4138. Beneficiary under holograph will may testify to establish it without losing benefits. *In re Westfeldt*, 702.

4169. As to inheritance of mother from child *in ventre sa mere* at time of husband's death. *Dixon v. Pender*, 792.

4144. Issue of *devisavit vel non* properly submitted to the jury upon the evidence in this case. *In re Westfeldt*, 702.

4145-6. Will duly probated when not properly attacked is conclusive of validity. *Bank v. Dustowe*, 777.

4168. Devise to son who died during life of testator leaving children does not lapse. *Askew v. Dildy*, 147.

4201. Where the court instructs upon the less degree of crimes under indictment for murder, he is not required to charge upon the evidence of assault with deadly weapon. *S. v. Lutterloh*, 412.

4209. Since amendment of 1923, defendant may not afterwards withdraw plea of guilty as a matter of right, this being directed to court's discretion. Continued acts of carnal knowledge also constitutes offense. *S. v. Porter*, 804.

CONSOLIDATED STATUTES—*Continued.*

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4211-12. Inflicting a loss of an eye is not punishable as mayhem. *S. v. Wilson*, 781.

4235. Burglarious intent necessary for conviction. *S. v. Crisp*, 799.

4249. One taking property by another he has found with intent to misappropriate is guilty of felony. *S. v. Holder*, 561.

4339. The supported testimony of female in seduction should not be confined to her evidence as to the promise alone. *S. v. Doss*, 214.

4339. The weight of supporting evidence in seduction a question for jury. *S. v. Doss*, 214.

4343. Acquiescence of male defendant in declaration of feme defendant competent evidence. *S. v. Roberts*, 460.

4433. Certain evidence is not error as to promise of owners of interest in gaming table. *S. v. Galloway*, 416.

4526. For arrest in different county from the one the crime was committed justice of peace must endorse the warrant. *Stancill v. Underwood*, 475.

4640. Judgment required to charge upon assault with deadly weapon under indictment for manslaughter. *S. v. Lutterloh*, 412.

4640. Defendant is entitled to a charge upon a less degree of crime than that stated in indictment. *S. v. Robertson*, 784.

5758. What is necessary to be shown for conviction under this section as to attendance of child at school. *S. v. Johnson*, 591.

5924. Registrar and judges of election may determine whether votes cast in wrong ballot box shall be counted and may correct return before county board has determined results. *Bell v. Board of Elections*, 311.

6032-6336. Certificate must be certified as statute directs in primaries. Different in elections. *Bell v. Board of Elections*, 311.

6191-2-3. Omission of requirements some evidence of conspiracy in having one committed as lunatic. *Getsinger v. Corbell*, 553.

6367. Applies to domestic as well as foreign corporations. *Phosphate Co. v. Johnson*, 419.

6367. One acquiring notes given in violation of this statute may show he is holder in due course without notice. *Bank v. Hunt*, 377.

7897. This statute binding upon cities and towns within the same county. *R. R. v. Comrs.*, 265.

7897. Wherein notice was held sufficient of increase of taxes. *R. R. v. Comrs.*, 265.

7979. Taxpayer must pay amount of contested tax under protest. *R. R. v. Comrs.*, 265.

7987. Purchaser of plant of manufacturer of automobiles takes subject to lien for failure of his vendor to pay license or privilege tax. *Vaughan v. Lacy*, 123.

8107. See sec. 6367.

CONSTITUTION.

ART.

I, sec. 7. After expiration of contract rights with a city for water supply, a water company has no vested rights thereunder. *Power Co. v. Elizabeth City*, 279.

I, sec. 14. A two-year sentence under the Turlington Act is not excessive, etc. *S. v. Beavers*, 595.

I, secs. 11, 15. Seizure of liquor and vehicle transporting it is not unconstitutional. *S. v. Godette*, 497.

II, sec. 29. Statute relating to health in county divisions upheld. *Reed v. Engineering Co.*, 39.

IV, sec. 8. Rules of practice docketing appeals is binding upon parties. *S. v. Farmer*, 243.

IV, sec. 8. *Certiorari* discretionary with Supreme Court on appeal. *King v. Taylor*, 450.

IV, sec. 8. Only questions of law or legal inference reviewable in Supreme Court. *Bank v. Howard*, 543.

IV, secs. 8, 12. Docketing of record proper and motion for *certiorari* necessary to invoke the exercise of discretionary powers of Supreme Court in exceptional cases. *Hardy v. Heath*, 271.

IV, sec. 12. Legislature may distribute powers among inferior courts, but not that of Supreme Court. *Williams v. Williams*, 728.

IV, sec. 13. When trial by jury may be waived by the parties. *Lumber Co. v. Pemberton*, 532.

V, sec. 1. Distinction between legal and equitable remedies not abolished. *Waters v. Garris*, 305.

VII, sec. 2. Public roads of county a necessary expense when authorized by statute. *Lassiter v. Comrs.*, 379.

VII, sec. 7. Sewerage a necessary county expense. *Reed v. Engineering Co.*, 39.

VII, sec. 7. Tax for school improvements submitted to vote of district, and afterwards acquiesced in for 19 years estops taxpayers questioning validity. *Carr v. Little*, 100.

VIII, sec. 1. Except when vested rights have been acquired a corporation may not complain that its status has been changed by statute. *Power Co. v. Elizabeth City*, 278.

X, sec. 2. Execution may not issue against homestead held by husband and wife in intireties except laborers' and mechanics' liens. *Johnson v. Leavitt*, 682.

CONSTITUTIONAL LAW. See Sanitation, 1; Courts, 10; State Highways, 5; Schools, 4; Statutes, 1; Waters, 5; Taxation, 8; Appeal and Error, 7, 19; Condemnation, 1; Contracts, 5, 6; Roads and Highways, 2, 6; Estates, 10; Certiorari, 1; Trial by Jury, 1.

1. *Constitutional Law—Statutes, Unconstitutional in Part—Interpretation—Taxation—Automobiles—Sales—Trades—Privilege Tax.*—Where a tax statute offends against the commerce clause in the Federal

CONSTITUTIONAL LAW—*Continued.*

Constitution in discriminating against nonresident manufacturers and dealers in automobiles, according to investment of capital stock in this State, and it clearly appears that the statute is severable as to its constitutional and valid parts, the latter will be upheld, especially when the statute itself so declares, and it appears that the intent of the Legislature was not to render the entire provisions of the statute unconstitutional on that account. *Bank v. Lacy*, 25.

2. *Same—Banks and Banking—Contracts—Vendor and Purchaser— Conditional Sales—Collateral Security—Trusts—Principal and Agent.*—Where a dealer in automobiles has sold to the bank, to which he was indebted, his automobiles on hand, for the purpose of securing the debt, under further provisions that he was to sell and collect and hold the proceeds in trust for the purpose stated, and has thereafter left the State, and the bank has assumed to continue the sales and make collection therefor, the bank may not avoid payment of the tax upon the ground that it was not a dealer, etc., in contemplation of the statute, and thus evade the practical efficiency of the statute and reduce it to a nullity. *Ibid.*

3. *Constitutional Law—Amendments—Statutes—Repeal.*—An amendment to the Constitution will not invalidate an existing statute not expressly or impliedly repealed thereby, or unless its repugnancy is so manifest as to leave no room for a reasonable doubt of its unconstitutionality. *R. R. v. Forbes*, 151.

4. *Constitutional Law—Criminal Law—Arrests—Warrants.*—The first ten amendments to the Constitution of the United States are in recognition of the principles of the organic law as previously existing in England, the fourth amendment requiring warrants to be issued upon probable cause applying only to criminal actions in the Federal Courts, and the due process clause, etc., of the fifth amendment relating to the orderly procedure in the State Courts. The first ten amendments apply only to the Federal Government. *S. v. Godette*, 497.

5. *Same—Statutes—Turlington Act.*—The provisions of the Turlington Act, Public Laws of 1923, permitting the seizure of intoxicating liquor being unlawfully transported and of the conveyance in which it is being done, when the officer sees or has absolute knowledge that there is intoxicating liquor in such vehicle, do not contravene the provisions of the State Constitution, Art. I, secs. 11 and 15. *Ibid.*

6. *Same—Evidence—Questions for Jury.*—Where there is evidence that acting upon information previously received that intoxicating liquors are being unlawfully transported, the proper officers of the law lie in wait for and follow automobiles, and can see containers and smell the liquor, they have a right to arrest without warrant and seize the vehicle. *Ibid.*

7. *Same—Officers—Unlawful Acts.*—The arrest by the officer of the law of the defendant without a warrant, while unlawfully transporting intoxicating liquor, being valid under the provisions of our statute, it may not successfully be maintained that evidence thereof should have been excluded, and that upon a trial for unlawfully transporting liquors under the Turlington Act, his motion for nonsuit upon the evidence found therein should have been granted. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

8. *Constitutional Law — Criminal Law — Punishment — Intoxicating Liquor.*—A sentence for two years for violating the Turlington Act will not be held as inhibited by our State Constitution as cruel and unusual, by reason of the fact that the judge after the trial and before sentence, made inquiry into the character of the defendant, the sentence imposed being in conformity with the provisions of the statute. Constitution, Art. I, sec. 14. *S. v. Beavers*, 595.

CONTEMPT.

1. *Contempt—Clerks of Court—Supplementary Proceedings.*—Where in supplementary proceedings the defendant has willfully disobeyed an order of the clerk of the Superior Court having jurisdiction in disposing of his property, he is in contempt of court under the provisions of C. S., 978, 981. *Bank v. Chamblee*, 417.

2. *Same—Appeal and Error.*—An adjudication or contempt of court not committed within the immediate presence or verge of the court is appealable. C. S., 979. *Ibid.*

3. *Same—Findings—Evidence—Inferior Courts—Review.*—While the facts found by the Superior Court in an attachment for contempt when supported by evidence are conclusive upon the Supreme Court on appeal, the same principle does not apply on an appeal from an inferior to the Superior Court, and in such instances it is the duty of the judge hearing the matter, to review the findings of fact of the lower court as well as the conclusions of law, together with additional evidence should justice require it, and make his own findings thereon. *Ibid.*

CONTENTIONS. See Appeal and Error, 3, 22.

CONTINGENT INTERESTS. See Mortgages, 8; Courts, 8.

CONTINGENT REMAINDERS. See Wills, 2; Estates, 12.

CONTINUANCE. See Banks and Banking, 1; Elections, 3.

CONTINUING GUARANTY. See Contracts, 2.

CONTRACTS. See Carriers, 3, 8; Constitutional Law, 2; Banks and Banking, 2; Pleadings, 2; Infants, 1; Vendor and Purchaser, 1; Principal and Agent, 5; Roads and Highways, 4; Courts, 8; Express Companies, 2; Insurance, 2, 4, 7, 10, 14, 16; Injunction, 5.

1. *Contracts—Debtor and Creditor—Debt of Another—Statutes—Guaranty—Statute of Frauds.*—C. S., 987, requiring a writing signed, etc., by the party to be charged to make him legally responsible for the debt of another, applies to contracts of guaranty. *Novelty Co. v. Andrews*, 59.

2. *Same—Consideration—Continuing Credit.*—The promise to answer for the debt of another (C. S., 987), if made after the credit has been given, without new consideration, is *nudem pactum*, and unenforcible; but if made before, it is founded upon the consideration existing between the principal parties; and where the promise is to pay out of the debtor's funds in the possession of the promissor, or is in the nature of his original obligation, the statute has no application. *Ibid.*

CONTRACTS—*Continued.*

3. *Same—Evidence—Nonsuit.*—Where the promise to pay the debt of another is sufficient under the statute (C. S., 987), as to a continuing credit to be extended to the principal debtor, the intent of the promissor to become so bound may be shown by the surrounding circumstances and other transactions or written communications between the creditor and the promissor; and *held*, under the evidence of this case, it was reversible error for the trial judge to grant defendant's motion as of nonsuit. *Ibid.*

4. *Contracts—Vendor and Purchaser—Conditional Acceptance of Order of Purchase—Carriers.*—An offer to buy does not become a contract unless unconditionally accepted, or, when the acceptance is upon condition, until this condition is accepted by the proposed purchaser; and where a carload of potatoes has been ordered by telegraph to be shipped that day, but were shipped several days thereafter without further agreement, the proposed purchaser may refuse to receive it from the common carrier, and no contractual liability will attach to him. *Golding v. Foster*, 216.

5. *Contracts—Constitutional Law—Vested Rights—Statutes—Amendatory Statutes—Corporations—Charters.*—The provisions of Art. VIII, sec. 1, of the State Constitution, affecting the organization of corporations, and specifically providing that all "such laws or special acts may be altered from time to time or repealed," etc., enters into every charter taken out or corporation formed thereunder, and any such corporation may not complain when a statutory repeal or amendment has been made, on the ground that it works a hardship on it or impairs the value of its property, unless vested rights have been prior acquired by it which have been impaired or destroyed by the repealing or amendatory act complained of. *Power Co. v. Elizabeth City*, 278.

6. *Same—Municipal Corporations—Cities and Towns—Water Companies—Competition—Constitutional Law.*—An incorporated water company obtained a franchise from an incorporated city, and contracted with the city for furnishing it and its inhabitants a water supply for a term of years. Thereafter the city, by complying with the provisions of a statute authorizing it, undertook to furnish its own system such as water, sewerage, electric lights, etc., with certain charges therefor, and to take care of a bond issue, therefor, interest thereon, etc. *Held*, the plaintiff could not restrain the defendant city from operating its own water system upon the ground that it would create an unfair competition under circumstances that would destroy or impair the value of its property. *Ibid.*

7. *Same—Navigable Streams—Prescriptive Rights—Vested Rights.*—A water company cannot acquire a prescriptive right to the use of a dam on a navigable stream for its supply of water to its customers, and it may not prevent a city from the exercise of its valid right to enter into competition in supplying its own inhabitants, upon the ground that it would necessarily have to use the water of the navigable stream in like manner, and that the plaintiff had an exclusive right by prescription to such waters at a point where such use was alone available. *Ibid.*

8. *Same—Statutes—Amendments.*—Where a city has entered into a contract authorized by statute to contract with a water company for its

CONTRACTS—*Continued.*

water supply, etc., the city may, after the expiration of this contract, in pursuance of authority conferred by statute, erect and maintain its own water plant for this purpose, without impairing any vested right of the water company, under Article I, section 10, of the Federal Constitution, or under the Fourteenth Amendment thereof, known as the due-process clause, or under Article I, section 7, of the State Constitution, prohibiting the taking of private property for a public use except by the law of the land. The question of whether during the life of the contract with a water company the city could so act under a statute authorizing it, and the question of monopolies, discussed by CLARKSON, J. *Ibid.*

9. *Contracts, Written—Parol Evidence.*—As not contradictory of a written instrument, it may be shown that the whole contract was not reduced to writing, but that a part rested in parol, and it may thus be shown that, apart from the deed to lands purchased, the grantor and grantee agreed that upon the sale of the land by the latter, the former would release the grantee from his obligation on his note given for the balance of the purchase price, secured by second mortgage, and take his vendee's note, likewise secured, in lieu thereof. *Exum v. Lynch*, 392.

10. *Same—Promise—Consideration.*—Under the facts of this case: *Held*, the promise of the grantor to take the note secured by mortgage for the balance of the purchase price, made by the grantee's purchaser, was for a valuable consideration, sufficient in law to enforce the promise. It is different as to merely a good consideration, such as consanguinity, etc. *Ibid.*

11. *Same—Appeal and Error—Objections and Exceptions.*—A general exception to evidence which is competent in part will not be sustained on appeal. *Ibid.*

12. *Contracts, Written—Statute of Frauds—Evidence.*—The party to be charged in this suit for specific performance of a contract to convey lands, under the statute of frauds (C. S., 988), is the vendor therein, and the vendee, the plaintiff in the action, does not fulfill the duty imposed on him to show that the statute has been complied with by a writing by which he alone is bound. *Clegg v. Bishop*, 564.

13. *Contracts—Insurer—Bailment—Damages.*—Where a packing and storage company enters into a contract to pack and deliver to the railroad company plaintiff's household goods for shipment, and, for its own convenience in packing the same, removes them to its own warehouse, with an agreement to become "responsible" for the goods until delivered to the carrier, and the goods are destroyed by fire while in the warehouse of the storage company and in its possession, the storage company is, as an insurer, answerable in damages for the loss, by the terms of the special contract, irrespective of the question of negligence, and the principles of law relating to the liability of bailment, etc., have no application. *Sams v. Cochran*, 731.

14. *Contracts—Insurer—Insurance—Policies — Evidence — Trials — Appeal and Error.*—Where, under a special contract, the defendants are held liable as insurers for the loss of plaintiff's goods while in their possession in their warehouse, the admission of evidence that the goods were perhaps covered by a policy of fire insurance at the time is not reversible error to the defendant's prejudice. *Ibid.*

CONTRACTS, WRITTEN. See Contracts.

CONTRACTOR. See Liens, 1.

CONTRIBUTION. See Roads and Highways, 5.

CONTRIBUTORY NEGLIGENCE. See Employer and Employee, 6; Carriers, 11, 19.

CONVERSION. See Wills, 8.

CORPORATIONS. See Contracts, 5; Bills and Notes, 7, 14.

1. *Corporations — Statutes — Blue-Sky Law — Evidence — Questions for Jury — Instructions — Appeal and Error.*— Where there is evidence tending to show that the defendant had given his note sued on for shares of stock solicited by the plaintiff in violation of the provisions of C. S., 6367 (the Blue-Sky Law), it raises an issue for the determination of the jury, and it is reversible error for the court to hold, as a matter of law, that the plaintiff should recover. *Phosphate Co. v. Johnson*, 419.

2. *Same—Bills and Notes.*—Where a note is given in violation of a statute, it is not collectible by the payee, or other holders to whom it had been endorsed and who had acquired it with such notice of its illegality as would avoid it in the hands of the original payee. *Ibid.*

3. *Same—Receivers—Actions.*—The defense to an action brought upon a note given to a corporation is available to the defendant when the corporation has become insolvent and its receiver has instituted the action. *Ibid.*

4. *Corporations—Principal and Agent—Fraud—Evidence.*—Evidence that the agent for the sale of shares of stock in a corporation had induced the defendant to purchase by falsely representing that a dividend would be credited upon his note given for the shares is in effect a representation that the corporation had earned the dividend as represented (C. S., 1179), and it may be received as a circumstance of fraud, together with other evidence tending to establish it. *Ibid.*

5. *Corporations—Deeds and Conveyances—Debtor and Creditor—Distribution of Funds—Judgments.*—The sale of an insolvent corporation or manufacturing concern of practically its entire property for the payment of debts, and with the view of presently going out of business, amounts practically to a dissolution, and in such case the proper rule for distribution of the assets among creditors is that of equality of payment; and where the directors distribute the proceeds of sale for the payment of notes of the corporation, upon which they were individually bound, without recognition in the distribution of a judgment creditor, they take with notice of this unpaid debt, and are individually liable. *Bassett v. Cooperage Co.*, 511.

6. *Corporations — Statutes — Charter — Ultra Vires Acts—Partnership.*— While the principles of law constituting a partnership are not readily defined as applied to all instances, they are held ordinarily to exist when two or more persons contribute either property or money, or both, to carry on a joint business for their common benefit and to own and share in the profits thereof. *Bank v. Odom*, 672.

CORPORATIONS—*Continued.*

7. *Same — Banks and Banking—Trust Companies — Sales—Dissolution—Evidence—Questions for Jury.*—Where a banking and trust company has bought out a drug business to save a debt owed to the former by the latter, and has agreed with two others for its continued operation upon a division of the profits, the bank putting in the stock of goods and some money, and the others a certain sum each, the latter taking the active management, with privilege of buying out the interest of the bank, out of the profits or otherwise, this arrangement is in effect an agreement of partnership; and where the bank has since taken a mortgage for the amount of its investment, the question as to whether the partnership had been thereby dissolved on issue raised is one for the jury under the evidence. *Ibid.*

8. *Same—Appeal and Error—Record—Burden to Show Error.*—While the act of a corporation in acquiring an conducting a business distinct and separate from that contemplated or authorized by its charter is ordinarily considered void as an *ultra vires* act: *Held*, in this case, the burden of showing error being on the appellant, such error is not necessarily made to appear when the charter of a certain "banking and trust company" is not in evidence and no data given from which the powers thereby conferred may be ascertained. *Ibid.*

CORPORATION COMMISSION. See Banks and Banking, 1.

CORRECTION. See Taxation, 2; Elections, 2.

COSTS. See Assault and Battery, 2.

COUNTIES. See Highways, 1; Sanitation, 2; Taxation, 2; Roads and Highways, 5.

1. *Counties — Municipal Corporations — Change of Site of Courthouse — Statutes—Powers—Government—Agencies.*—There being no provision of law to the contrary, it is not required that a contract for the purchase of a new site for its courthouse should be presently put upon the minutes of the board of county commissioners to be binding; and in an action brought directly against a county or its commissioners involving this question, it may be shown by parol, in proper instances, that the defendants had duly and regularly enacted a proper order, and the minutes omitting this may be corrected to show the fact. *Hearne v. Comrs. of Stanly*, 45.

2. *Same—Express or Implied Powers.*—Municipal corporations, as agencies of local government of the State, are subject to almost unlimited legislative control, except when otherwise provided by the organic law, and cannot exercise powers not expressly given by statute or necessarily implied for the proper exercise of the duties expressly imposed upon them. *Ibid.*

3. *Same — Anticipated Power — Conditional Purchase of Site — Status Quo.*—C. S., 1297, limits the power of the county commissioners to abandon an existing courthouse and acquire a new site therefor to the methods therein stated, by a unanimous vote of the members of the board of county commissioners at their annual December meeting, and due notice given throughout the county that a final vote would

COUNTIES—*Continued.*

then be taken, so that the proposition, before final action, may be examined into; and where the county commissioners, in anticipation of the change, upon the recommendation of the grand jury, have conditionally purchased the new site, have given their note for the purchase price, upon which payments have subsequently been made, and this note and deed to the lands so to be acquired have been placed in escrow, compliance with these conditions is a positive statutory requirement, and the seller of the lands acquires no rights otherwise; and upon the failure of such legal requirements, both the deed and note are void and unenforceable, leaving the parties *in statu quo*. *Ibid.*

4. *Same—Damages—Actions.*—Where the county commissioners and the owner of lands have agreed for the purchase of a new site for its courthouse, conditioned upon the future compliance with the statute relating thereto, which had failed of compliance, and the county had made certain payments upon the purchase price, the county may recover the partial payments it had so made, with the legal interest thereon, subject to deductions as against the interest for its reasonable rental value while in the possession and control of the county authorities. *Ibid.*

5. *Same—Injunction.*—Pending the continuance of an injunction against the county commissioners purchasing a new site for the county courthouse, the action of the commissioners in attempting to validate their former action is unlawful and can have no effect, nor can proceedings under a later statute to submit the question of the change to the voters have a different effect when this proposition has been rejected by them. *Ibid.*

COUNTS. See Criminal Law, 11; Carriers, 17.

COUNTY BOARD. See Elections, 3.

COUNTY COMMISSIONERS. See Roads and Highways, 4.

COURTHOUSE. See Counties, 1.

COURTS. See State Highways, 3; Mortgages, 8; Actions, 6; Criminal Law, 7; Pleadings, 1; Judgments, 1; Indictment, 1; Wills, 17.

1. *Courts — Discretion — Trials — Criminal Law — Larceny — Appeal and Error.*—Exception by defendants, in a criminal action, that they were so hurried into the trial that they were deprived of the opportunity to get or prepare their evidence, is to a matter within the legal discretion of the trial judge, and is untenable on appeal in the absence of its manifest abuse, which must be made to appear to be available on appeal. *S. v. Riley*, 72.

2. *Courts — Discretion — Recent Possession—Evidence—Matters of Law—Jury — Appeal and Error — Harmless Error.*— The question as to whether the admissions of defendant, in a criminal action, were under disqualifying threats of the officers of the law, is in this jurisdiction a matter of law to be determined by the judge; but where he has ruled that the evidence is competent, his later submitting it to the jury is not prejudicial to the defendant, and will not be considered as reversible error on appeal. *Ibid.*

COURTS—*Continued.*

3. *Courts—Jurisdiction—Federal Government—Director General of Railroads—War.*—The United States Government is bound by the appearance of the Director General of Railroads, submitting to the jurisdiction of the State court, in an action against a railroad company under government control, only to the extent of his authority as authorized by the general Federal statute on the subject. *Byrd v. Davis*, 150.

4. *Courts—Federal Government—Decisions—State Courts.*—The decision of the Supreme Court of the United States is controlling in the State court upon Federal questions involving the liability of the United States Government in matters relating to the liability of carriers under the control of the Federal Government as a war measure. *Ibid.*

5. *Courts — Pleadings — Jurisdiction — Orders — Answers — Discretion of Court—Statutes.*—Under the provision of C. S., 534, 537, the Superior Court judge may, in his sound discretion, allow defendant's motion, after answer filed, to make the complaint more definite and certain as to the grounds upon which the relief is sought, especially when it affects book records and other written data easily accessible to the plaintiff. *Power Co. v. Elizabeth City*, 278.

6. *Same—Jurisdiction—Cause of Action.*—Objection to the jurisdiction of the court, or that the complaint does not allege facts sufficient to constitute a cause of action, is not waived by proceeding with the trial, and may be taken advantage of in the Supreme Court, or this Court may act thereon *ex mero motu* and dismiss the action. *Ibid.*

7. *Courts—Jurisdiction—Equity—Trusts.*—Our courts, in the exercise of their equitable power, have supervisory jurisdiction in the administration of trust estates; and the trustee, in cases of doubt arising in the course of his administration of the trusts imposed by the instrument, may resort to them for instruction. *Bank v. Alexander*, 667.

8. *Same—Widow's Dissent — Contracts — Trusts — Contingent Interest—Minors—Parties—Judgments—Appeal and Error.*—Where a will provides for an income to the widow and, among other things, for contingent interests to ulterior takers, minors, some of whom are not *in esse*, appointing a trustee with power to carry out the provisions of the will, and all those who are to take upon contingency are not only represented by the trustee, but by class representation, and a guardian has been appointed and is acting for all minor interests, both *in esse* and otherwise: *Held*, the courts have jurisdiction to pass upon the question as to whether a contract made between the widow and another principal beneficiary, making her an increased allowance in consideration that she will not dissent from the will, will be in the best interest of all parties, and its action confirming the contract and preserving the *corpus* of the estate for the administration of the trust imposed will not be disturbed on appeal. *Ibid.*

9. *Courts—Discretion of Court—Abuse of Discretion—Homicide—Trials—Appeal and Error.*—The mere fact that the prisoner, indicted for a capital felony, was forced into the trial at a term being held at the time the offense was alleged to have been committed, does not of itself show, on appeal, that he has thereby been injured by an abuse of the discretion of the trial judge vested in him by law, nor will a new trial be granted on the ground that he had been unable to consult

COURTS—*Continued.*

attorneys assigned to him, or prepare his defense, or to ascertain the truth of evidence he had recently discovered, when the circumstances of the case tend to disprove these objections, and when, moving for a continuance to a subsequent term, he was vague and indefinite in these respects. *S. v. Rodman*, 720.

10. *Courts—Jurisdiction—Constitutional Law—Statutes.*—The General Assembly has constitutional authority to distribute among the other courts prescribed in the Constitution that portion of judicial power and jurisdiction which does not pertain to the Supreme Court. Const., Art. IV., sec. 12. *Williams v. Williams*, 728.

11. *Same Justices of the Peace—Superior Courts.*—By C. S., 1436, exclusive original jurisdiction is conferred on courts of a justice of the peace in actions *ex contractu*, where the amount demanded does not exceed the sum of two hundred dollars, and in the Superior Court where the demand exceeds that sum, the jurisdiction of the latter court depending upon whether from the pleadings it may be seen that it was made in good faith, and whether the allegations of the complaint sufficiently allege a good cause of action to sustain the jurisdiction sought. *Ibid.*

12. *Same Pleadings—Good Faith.*—Where it appears from the complaint, in an action brought in the Superior Court, that a good cause of action is alleged in the amount cognizable only in the court of the justice of the peace, and recovery cannot be had for the difference in amount necessary to sustain the jurisdiction of the Superior Court, a demurrer should be sustained. *Ibid.*

13. *Courts—Jurisdiction—Justices of the Peace—Superior Courts—Torts.*—In this case, held, the damages plaintiff alleged to have sustained by her having voluntarily undertaken to take care of deceased during his last illness with a contagious or infectious disease, by causing her, under the advice of his attending physician, to destroy the clothes that were on the bed he had occupied, etc., was not in the nature of a tort that would confer jurisdiction, in the amount claimed, upon the Superior Court. *Ibid.*

14. *Courts—Discretion—Pleadings—Amendments.*—The judge of the Superior Court may, as a matter of his sound discretion, allow amendments to the pleadings before or after verdict, to make them conform to the evidence adduced upon the trial, when the foundation of the cause of action is not thereby changed. *Sams v. Cochran*, 731.

15. *Courts—Discretion—Verdict Rendered Out of Term—Consent—Appeal and Error.*—Where the parties to the action have consented that the judge adjourn the term of the court *sine die*, and that the clerk take the verdict of the jury in his absence, and, after the judge had left the district, and pending the jury's investigation, a juror expressed a desire for further instructions upon a matter not disclosed, a motion to set aside the verdict on that ground is addressed to the sound discretion of the trial judge, and the exercise of this discretion will not be disturbed on appeal. *Beck v. Chair Co.*, 743.

COVENANTS. See Assignments, 2.

CREDITORS. See Banks and Banking, 7.

CRIMINAL LAW. See Courts, 1; Appeal and Error, 12, 25; Evidence, 3, 8; Constitutional Law, 4, 8; Banks and Banking, 5; Schools, 3.

1. *Criminal Law — Evidence — Recent Possession — Nonsuit — Statutes— Trials.*—Evidence that the stolen automobile was in the recent possession of both defendants, with other circumstances tending to show guilt of them both, is sufficient to deny a motion as of nonsuit, under the statute, and declaration of identity of a defendant, made in the presence of both, were held to be competent as to each, under the facts of this case. *S. v. Riley*, 72.

2. *Criminal Law—Larceny—Evidence—Recent Possession—Instructions— Appeal and Error.*—Where the judge has correctly charged the jury on the evidence of recent possession of the stolen article, and has erroneously further charged thereon, a broadside exception is not available to the defendant on appeal, in the absence of a special request, especially if the further instruction is not to his prejudice. *Ibid.*

3. *Criminal Law — Admissions — Evidence — Appeal and Error.*—Where, after the prisoner had been delivered to the sheriff on extradition papers, the sheriff has testified that the prisoner, charged with murder, had made a voluntary admission of a circumstance tending to prove his guilt, without threats or offer of reward, etc., it is not error for the trial judge to exclude a question asked by prisoner's attorney, if the officers at the place of extradition had not previously, before the arrival of the witness, used threats that had induced the prisoner to make the confession. *S. v. Walton*, 437.

4. *Criminal Law—Evidence—Declarations—Fornication and Adultery.*— Where the defendants are being tried for fornication and adultery, testimony of the wife that the *feme* defendant, accompanied by her husband, had entered the store where she was at work, and had left together, after the *feme* defendant, uninterrupted by her husband, had assaulted her and told her of matters inferring the guilt of her husband, etc., while the declarations are primarily the declarations of the *feme* defendant, they are also competent against the male defendant, who stood silent at the time and by his conduct acquiesced therein. C. S., 4343. *S. v. Roberts*, 460.

5. *Same—Nonsuit—Statutes.*—Upon the demurrer by the male defendant to the State's evidence upon a trial for fornication and adultery, the principle that the declarations of one defendant may not be received in evidence of the guilt of the other does not apply when the declarations of the paramour of the male defendant is made in his presence, while the female defendant is assaulting his wife, and he is standing inactively by and encouraging her therein by his conduct, and remains silent when the paramour's declarations are so made. *Ibid.*

6. *Criminal Law—Assault with Deadly Weapon—Evidence—Instructions— Appeal and Error.*—Where there is evidence on behalf of the State to convict the defendant of an assault with a deadly weapon, and to the contrary on defendant's behalf, a reasonable inference that the defendant had only acted in self-defense, it is reversible error for the trial judge to instruct the jury to convict upon all the evidence, if they believe it. *S. v. Horner*, 472.

7. *Criminal Law—Statutes—Courts—Justices of the Peace—Jurisdiction.*—In order for a lawful arrest of one charged with a criminal

CRIMINAL LAW—*Continued.*

offense in a different county from the one in which the warrant was issued by a justice of the peace, it is required by C. S., 4526, that a justice of the peace within the county wherein the arrest was to be made, endorse the warrant upon the proof of the handwriting of the justice issuing it, etc. *Stancill v. Underwood*, 475.

8. *Same—False Arrest—Evidence.*—It is not required to constitute an arrest that the officer making it touch the defendant or take him physically; and it is sufficient if the defendant is aware of the warrant in the hands of the officer and submits under it, and upon evidence thereof in an action for damages for false arrest, an issue is raised for the determination of the jury. *Ibid.*

9. *Same—Malicious Prosecution—Evidence — Questions for Jury.* — The legal definition of malice in an action for damages for malicious prosecution is a wrongful act intentionally done, not necessarily ill-will, anger or revenge, in the prosecution of a criminal action for any purpose other than that of bringing the offender to justice; and where upon the warrant of arrest there is a written statement that upon paying a money demand the warrant is not to be executed, it is sufficient evidence for the determination of the jury in an action for malicious prosecution. *Ibid.*

10. *Criminal Law—Felony—Statutes.*—Where the finder of the property of another of the value of more than $20 takes the same with the intent of misappropriating it to his own use, and deprive the owner thereof, it is a felony under the provisions of our statutes, C. S., 4249. *S. v. Holder*, 561.

11. *Criminal Law—Indictment—Several Counts—Verdict.*—Where a bill of indictment contains two or more valid counts, for offenses of the same grade and permitting like punishment, a general verdict of guilty will be construed as a conviction on each and every count contained in the bill, and an exception thereto will not be allowed for reversible error unless it extends to and vitiates the entire verdict. *S. v. Hammond*, 602.

12. *Criminal Law—Judgments—Motions in Arrest—Motion to Quash—Plea in Abatement—Grand Jury.*—The remedy in a criminal action for a finding of a true bill by the grand jury is either by motion to quash, made before plea, or by plea in abatement, and may not be taken advantage of by motion in arrest of judgment after verdict. *S. v. Mitchem*, 608.

13. *Same—Indictment—Memorandum of Witnesses—Appeal and Error—Record.*—The names of witnesses endorsed on the bill of indictment by the solicitor is for his own convenience and aid of the officers of the court concerned therein, and is not properly a part of the record on appeal to the Supreme Court. *Ibid.*

14. *Criminal Law—Mayhem—Malice — Indictment — Less Degree of the Same Crime—Common Law—Statutes.*—Construing C. S., 4212 in connection with the history of legislation on the subject, it is *held* that thereunder the loss of an eye is not included in the offense of mayhem, and though the infliction thereof without malice may neither be sustained as provided by C. S., 4211, nor under the common law, requiring that the offense should have been committed with malice,

CRIMINAL LAW—*Continued.*

yet upon proper evidence a conviction may be had of an assault with a deadly weapon and an assault with serious damages, as a less degree of the crime charged under the provisions of C. S., 4211. *S. v. Wilson*, 781.

15. *Criminal Law—Homicide—Indictment—Evidence—Verdict—Appeal and Error.*—Under the provisions of C. S., 4640, when the bill of indictment is sufficient with the supporting evidence upon the trial, the defendant may be convicted of the criminal offense charged or of a lesser degree thereof, he is entitled to a charge from the court on all degrees of the crime thus encompassed by the indictment; and an error in failing to charge upon the lesser degrees of the crime is not cured by a verdict of conviction upon one of a greater degree. *S. v. Robinson*, 784.

16. *Same—Self-Defense.*—The killing of a human being with a deadly weapon raises the presumption that it was unlawfully done and with malice, casting upon the person charged the burden of showing to the satisfaction of the jury the legal provocation which will eliminate malice, reducing the offense to manslaughter, or which will excuse it altogether on the grounds of self-defense. *Ibid.*

17. *Same—Excessive Force.*—In order for an acquittal of a homicide under the plea of self-defense, it must be shown that no more force was used at the time of the killing than was reasonably necessary under the circumstances, and if excessive force or unnecessary violence had then been used, under the circumstances the defendant is guilty of manslaughter, though he may have acted in self-defense at the beginning of the occurrence. *Ibid.*

18. *Same—Manslaughter—Questions for Jury—Trials.*—Where there is evidence that the defendant on trial for a homicide shot at the deceased in self-defense, but that he continued to do so unnecessarily, which resulted in the death, and *per contra*, it is for the jury to determine whether he was justified therein under the plea of self-defense; and should they find from the evidence that the killing was done without malice, the offense would not be greater than manslaughter. *Ibid.*

19. *Criminal Law—Defense—Pleas—Former Acquittal—Indictment — Evidence—Variance.*—Where a defendant in a criminal action is acquitted upon a variance between the offense charged in the indictment and the evidence upon the trial, upon another trial for substantially the same offense under a correct indictment, he may not successfully plead a former acquittal. *S. v. Crisp*, 799.

20. *Criminal Law—Burglary—Intent—Statutes.*—Under the provisions of C. S., 4235, the burglarious, etc., intent of breaking into a storehouse, dwelling, etc., is necessary to a conviction. *Ibid.*

21. *Criminal Law—Indictment—Amendments—Statutes—Assault—Deadly Weapon—Serious Injury.—Held*, the amendment to the indictment allowed by the court in this case was sufficient for a conviction of the defendant of violating C. S., 1481, charging an assault with a deadly weapon, inflicting serious injury. *S. v. McLamb*, 803.

22. *Criminal Law—Statutes—Carnal Knowledge of a Female Child.*—Upon the trial of the criminal offense of carnally knowing a female child

CRIMINAL LAW—*Continued.*

over twelve and under sixteen years of age (C. S., 4209, and amendment of 1923), the defendant may not enter a plea of guilty and thereafter withdraw the plea and enter a defense as a matter of right, and the sentence will be sustained in the absence of abuse of the court's discretion. *S. v. Porter*, 804.

23. *Same—Amendments to Statutes.*—When the defendant would not be guilty of the offense prohibited by C. S., 4209, but has since continued to carnally know a female child thereafter, the plea that his continued acts after the passage of the amendment of 1923 would not make him guilty thereunder cannot be sustained. *Ibid.*

CROPS. See Vendor and Purchaser, 1.

CROSSINGS. See Carriers, 7.

CUMULATION. See Principal and Surety, 1.

CUSTOMS. See Carriers, 4.

DAMAGES. See Counties, 4; Actions, 3, 5; Railroads, 2; Carriers, 20; Trespass, 1; Waters, 1; Condemnation, 1; Contracts, 13; Injunctions, 6.

DEADLY WEAPON. See Criminal Law, 21.

DEATH. See Wills, 1; Appeal and Error, 26, 27.

DEBT. See Banks and Banking, 6; Contracts, 1; Statute of Frauds, 1.

DEBTOR AND CREDITOR. See Contracts, 1; Assignments, 1; Corporations, 5; Banks and Banking, 10.

DECEASED PERSONS.

1. *Deceased Persons—Evidence—Statutes—Appeal and Error—Prejudice.*—Where a father is sought to be held liable as an original promissor to pay a debt for the son for goods sold and delivered to the son, in an action against the administrator of the deceased father, testimony of the plaintiff that the deceased father had sent him to the son for collection of a certain amount thereof is concerning a transaction between the plaintiff and a deceased person, prohibited by C. S., 1795, and is reversible error, though conflicting inferences may be drawn therefrom. *White v. Evans*, 212.

DECISIONS. See Courts, 4; Carriers, 18.

DECLARATIONS. See Criminal Law, 4; Homicide, 6.

DEEDS. See Deeds and Conveyances.

1. *Deeds—Rule in Shelley's Case.*—The application of the rule in *Shelley's case* will not be made to a deed for lands where there is no limitation in fee or in tail by way of remainder. *Shephard v. Horton*, 787.

2. *Same—Interpretation—Intent.*—In construing a deed, effect is given to the intent of the grantor as gathered from its language, unless such intention is otherwise controlled by an arbitrary rule of law. *Ibid.*

3. *Same—Filled-in Forms.*—Where a printed form of a deed has been used and the blank spaces filled in by the grantor, any conflict between the written and printed parts will be construed to effectuate the

DEEDS—*Continued.*

intention expressed by the former; and where the form thus used is for a fee-simple deed, and the written interlineations confine the estate to the lifetime of the grantee, leaving the printed relative parts in blank, the estate granted will be construed as for the life of the first taker, and the rule in *Shelley's case* has no application *Ibid.*

DEEDS AND CONVEYANCES. See mortgages, 3, 5, 9, 10; Estates, 2, 7, 11, 14, 15; Trusts, 1; Corporations, 5; Parties, 1; Schools, 4.

1. *Deeds and Conveyances—Husband and Wife—Probate—Statutes—Void Deeds—Color.*—A deed of her own lands from the wife to her husband, not certified to by the probate officer that it was "not unreasonable or injurious to her" (C. S., 2515), is void as a conveyance, though it may be regarded as color of title, and ripen the title in seven years under sufficient adverse possession for that period of time. *Whitten v. Peace*, 298.

2. *Same—Title—Adverse Possession—Husband and Wife—Tenant by the Curtesy.*—Possession, to ripen title to land under color of title, must be adverse, and it is insufficient where a husband has the right of possession as tenant by the curtesy, and has accordingly entered therein, and he and his executor have been in possession for the required period, without claiming under another an adverse right. *Ibid.*

3. *Deeds and Conveyances—Boundaries—Description—Parol Evidence—Void Descriptions.*—While it may be shown by parol that the grantor and grantee of lands had previously gone thereon for the purpose of locating and making definite the lands to be granted, and that the deed made did not state the location within a larger acreage, the principle is not applicable when the deed has been made and the description made definite thereafter; and such may not render operative a deed that is void for indefiniteness of description therein. *Watford v. Pierce*, 430.

4. *Same—Estoppel—Purchaser With Notice.*—Where the original owner of lands conveys a part thereof to two different purchasers, the lands of one contained within the larger boundaries of the conveyance to the other, and the owner had marked off the boundaries of the smaller tract, subsequent to the making of this deed and the grantee thereof has gone into possession and has remained therein, the original owner, and those since his death claiming as his heirs at law, are estopped to deny the boundaries of the smaller tract so as to avoid the deed for indefiniteness of the description therein, and where the purchaser of the larger tract has thereafter received his deed with knowledge of the circumstances, the estoppel applies to him also. *Ibid.*

5. *Deeds and Conveyances—Seals—Void Deeds—Equity.*—While a deed to lands executed without the seals affixed to the signature of the makers is void, equity will compel its proper execution when the writing itself is sufficient for the purpose and the consideration has been paid by the grantee. *Willis v. Anderson*, 479.

6. *Same—Equity—Nonresidence—Attachment—Sermons—Service.*—Where nonresident grantors of a void deed to lands are required in equity to make a valid conveyance of lands situated in this State to resi-

DEEDS AND CONVEYANCES—*Continued.*

dent grantees, the lands are not property owned in this State by the grantors, that are subject under our statutes to bring the nonresident grantors in the courts of this State as defendants in an action brought herein. *Ibid.*

7. *Same—Fraud—Notice.*—One who has acquired by deed lands from the owner of the full equitable title, as under the facts of this case, cannot be affected, without further evidence, of notice of fraud alleged between his vendor and his grantor. *Ibid.*

8. *Deeds and Conveyances—Execution—Evidence—Burden of Proof—Instructions.*—Where the validity of a destroyed deed is attacked upon the ground that it was not executed or the seal affixed, etc., the registration apparently being correct in these particulars introduced in evidence is prima facie taken to be correct, and the burden of the issue is on the party attacking its validity to sustain his contention by the greater weight of the evidence, and an instruction that he is required to do so by clear, strong and convincing proof, is reversible error. *Jones v. Coleman*, 631.

9. *Same—Seal—Prima Facie Case—Directing Verdict.*—Where the original deed to lands has been lost or destroyed, and the record in the office of the register of deeds has been put in evidence, without the scroll or seal placed after the grantor's name, but the registration reciting that the grantor has affixed his seal, this recital raises the presumption that the seal had been affixed, and an instruction directing a verdict to that effect is correct in the absence of evidence to the contrary. *Ibid.*

DEEDS IN TRUST. See Mortgages, 7; Principal and Agent, 4.

DEFAULT. See Pleadings, 6.

DEFENSES. See Claim and Delivery, 1; Criminal Law, 19; Actions, 1.

DEGREES OF CRIME. See Criminal Law, 14.

DELIVERY. See Express Companies, 1.

DEMURRAGE. See Carriers, 4.

DEMURRER. See Pleadings, 5, 9.

DESCENT AND DISTRIBUTION. See Wills, 8; Estates, 16.

DESCRIPTION. See Deeds and Conveyances, 3; Mortgages, 9.

DEVISES. See Wills, 1, 2, 4, 9; Estates, 2, 12.

DIRECTING VERDICT. See Judgments, 6; Limitation of Actions, 2; Deeds and Conveyances, 9.

DIRECTORS. See Banks and Banking, 2.

DIRECTOR GENERAL. See Courts, 3.

DISABILITIES. See Insurance, 10.

DISCRETION. See Courts, 1, 2, 14, 15; State Highways, 2, 4; Pleadings, 1.

DISCRETION OF COURT. See Verdict, 2; Courts, 5, 9; Certiorari, 1; Judgments, 7.

DISCRIMINATION. See Carriers, 3.

DISMISSAL. See Actions, 8.

DISSOLUTION. See Corporations, 7.

DISTRIBUTION. See Corporations, 5.

DIVERSION. See Municipal Corporations, 1.

DIVISIONS. See Statutes, 4.

DIVORCE. See Marriage, 1.

1. *Divorce—Limitation of Actions—Statutes.*—The common-law rule that there is no statute of limitations barring an action for divorce obtains in this jurisdiction, applying the rule that the proceedings, as a matter for the court, should have been commenced without unreasonable delay, except in so far as it may have been modified by C. S., 445, barring all actions not otherwise provided for in ten years. *Garris v. Garris*, 321.

2. *Same—Alimony—Pendente Lite.*—In proceedings for alimony under the provisions of C. S., 1667, the right of a wife for alimony *pendente lite* arises to her, in the application of the statute of limitations, when the action is commenced, and not from the time of the separation from her husband. *Ibid.*

DOCKETS. See Appeal and Error, 6, 7.

DOMICILE. See Administration, 1.

DOWER. See Estates, 5; Husband and Wife, 5.

1. *Dower—Mortgages.*—Where the widow in the lifetime of her husband has joined in his mortgage of his land she is barred of her right to dower therein. *Brown v. Jennings*, 156.

DRAFT. See Carriers, 1.

DRIVING. See Insurance, 15.

DUE PROCESS OF LAW. See State Highways, 5; Taxation, 8.

DUTIES. See Elections, 2, 3; Express Companies, 2.

EJECTION. See Carriers, 20.

ELECTIONS. See Roads and Highways, 2.

1. *Elections—Primaries—Statutes.*—In primary elections the return for county officers must be certified as the statute requires to the county board of elections, which shall publish the result (C. S., 6032, 6336), the distinction between elections of this character and general elections being that in the former there is no right to an election to public office which may be put in issue and determined by *quo warranto*, and no provision for a board of canvassers with power judicially to determine the precinct return. *Bell v. Board of Elections*, 311.

ELECTIONS—*Continued.*

2. *Same—Ministerial Duties—Mistakes—Corrections.*—In primary elections for county officers the registrar and judges of election are authorized not only to pass upon the qualification of voters therein, but to determine whether a ballot found in the wrong box was placed there by mistake, and, if satisfied of the mistake, to count the ballots for the one for whom they had been cast, in making their returns to the county board. *Ibid.*

3. *Same — County Board of Elections — Continuing Judicial Duties — Functus Officio.*—In a primary for county officers the registrar and judges of election have the sole power, acting in their ministerial capacity, to determine whether votes cast in the wrong ballot box should be counted; and they may correct their tabulation of the results thereof to the county board of elections before the latter has judicially determined the results; the duties of the latter board being continuous, under the provisions of the statute, and such powers not being *functus officio* until they have finally determined the results of the election. C. S., 5924 *et seq.* *Ibid.*

4. *Same—Mandamus.*—Where the powers of the county board of elections are not *functus officio*, they may be compelled by mandamus to act upon the correction of a mistake made by the registrar and judges of election, and its certificate correcting it, in allowing a candidate votes cast for him, but in the wrong ballot box. *Ibid.*

ELECTION OF REMEDIES. See Pleadings, 3; Wills, 4.

ELECTRICITY. See Insurance, 15; Condemnation, 3.

EMPLOYER AND EMPLOYEE. See Railroads, 1, 2; Carriers, 18; Verdict, 1; Statutes, 5; Master and Servant, 1; Evidence, 10; Insurance, 14.

1. *Employer and Employee—Master and Servant—Negligence—Assumption of Risks—Instructions—Appeal and Error—Reversible Error.*—In an action by an employee against his employer to recover damages for a personal injury received in the course of his employment at a power-driven machine, involving the question of assumption of risk, etc., it is reversible error to the defendant's prejudice for the trial judge to instruct the jury as to the employer's liability upon this issue, but leave them uninstructed upon the evidence on the case tending to show that a man of ordinary prudence would not have continued to work in the face of the apparent danger under the circumstances. *Medford v. Spinning Co.*, 125.

2. *Employer and Employee—Master and Servant—Safe Place to Work—Negligence—Fellow Servant—Evidence—Nonsuit—Statutes.* — Where the evidence tends only to show that a contractor for the building of a highway has furnished his employee with a proper machine for mixing the concrete, driven by its own power, and while properly working it was so negligently managed by a fellow servant of the plaintiff's intestate that a part thereof fell upon the latter and caused his death; and there is no evidence tending to show negligence on the part of the employer in the selection of the fellow servant or other fault attributable to him, a judgment as of nonsuit upon defendant's motion under the statute is properly rendered. *Michaux v. Lassiter*, 132.

EMPLOYER AND EMPLOYEE—*Continued.*

3. *Employer and Employee—Master and Servant—Assumption of Risks.*—The defense of a railroad company of assumption of risks rests in the actual or imputed knowledge of the employee of the dangers incident to the employment. *Cobia v. R. R.*, 487.

4. *Same—Independent Negligence.*—An injury independently caused to an employee by the negligent act of another, for which the employer is responsible, does not come within the principle of assumption of risks. *Ibid.*

5. *Same—Burden of Proof.*—The fact of assumption of risks is one which the defendant must plead and prove; and upon evidence of the defendant's negligence the issue is for the jury. *Ibid.*

6. *Same—Contributory Negligence.*—The doctrine of assumption of risks differs from that of contributory negligence, the former resting by contract and the latter consisting of a negligent act of the employee in respect to the cause of the damage, which he should not have committed in the exercise of ordinary care, under the circumstances, for his own safety. *Ibid.*

7. *Same—Defenses — Comparative Negligence — Statutes.* — Contributory negligence is not a complete bar to the recovery of damages by an employee of a railroad company caused by the latter in interstate commerce in an action brought under the Fedreal Employers' Liability Act, the admeasurement being that of comparative negligence by which the jury, under a conflicting evidence, reduces the recovery in accordance with the relative negligence of the employee. Also, see C. S., 3467. *Ibid.*

8. *Same—Measure of Damages—Federal Employers' Liability Act—Statutes.*—Where the plaintiff has brought an action against a railroad company for the negligent killing of her intestate, leaving a widow and children, under the Federal Employers' Liability Act, while engaged in interstate commerce, the measure of damages recoverable is limited to the present cash value, or present worth, or such loss as results to the beneficiaries, occasioned by their being deprived of a reasonable expectation of pecuniary benefit by the wrongful death of the employee; and while the statutory mortuary tables afford evidence of the expectancy of life of the deceased, the jury is not excluded from considering other evidence bearing thereon. The damages recoverable by the injured employee who survives, allowed by the Federal act, discussed by STACY, J. *Ibid.*

9. *Employer and Employee—Master and Servant—Evidence — Nonsuit — Questions for Jury.*—In an action against a cotton mill by its employee to recover damages for an alleged negligent injury, evidence that the defendant's vice-principal, with fellow-servants of the plaintiff, was at work on the tops of boilers 30 feet high, at the foot of which the plaintiff was at work with the knowledge of the vice-principal, to whom he had protested against the danger, is sufficient to take the case to the jury and deny defendant's motion as of nonsuit thereon. *Hairston v. Cotton Mills*, 557.

10. *Same—Fellow Servant.*—An employee may recover damages against his employer for injuries caused by the other employees' negligence, combined with that of the employee's fellow servant. *Ibid.*

EMPLOYER AND EMPLOYEE—*Continued.*

11. *Same—Vice-Principal.*—Where the negligence complained of in an action by the employee to recover damages of his employer for the negligent infliction of an injury, the doctrine of the negligence of fellow servants does not apply when the fellow servants, in the respect complained of, were acting under the direct orders of the defendant's vice-principal who was there present. *Ibid.*

ENTIRETY. See Estates, 1, 7, 11.

EQUITY. See Mortgages, 3, 8; Principal and Agent, 4; Usury, 1; Wills, 8; Injunction, 1, 3; Actions, 5; Deeds and Conveyances, 5, 6; Courts, 7; Parties, 1.

ESTATES. See Mortgages, 3, 8; Wills 2, 9.

1. *Estates—Entireties—Husband and Wife—Marriage.*—The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. *Davis v. Bass*, 200.

2. *Same—Wills—Devises—Deeds and Conveyances.*—In law, the husband and wife are regarded as one legal entity, and when they acquire title to land, after marriage, by devise, deed, or purchase it themselves, the question of whether they derive the title to the land by entireties depends upon the construction of the instrument; and whether or not they are named therein as husband and wife, they take by entireties, the survivor acquiring the sole title, unless the contrary intent appears. *Ibid.*

3. *Same—Rents and Profits—Mortgages.*—Where the husband and wife acquire lands by entirety, the husband is entitled to the rents and profits thereof during the joint lives of himself and wife, and may for that period of time mortgage or dispose of the same, but neither may deal therewith in any manner that will injure or lessen the estate therein of the other without the assent of the other, lawfully given, and no judgment against them, singly, can operate as a lien on the lands subjecting them to levy, but only a judgment against them both can have this effect. The reason for, and the extent of, this principle given by STACY, J. *Ibid.*

4. *Same—Statute—Probate.*—During the continuance of the joint lives of the husband and wife, who have acquired an estate by entireties, the wife's interest in the lands is such as is contemplated by C. S., 2515; and where the estate has been conveyed to one in trust for them both, and the officer in taking the acknowledgment of the wife has failed to make the certificate required by this section, requiring him, as a prerequisite to its validity, to certify that the instrument was not unreasonable or injurious to her, the instrument itself is void, and he may not, by will or otherwise, dispose of her interest thereunder. *Ibid.*

5. *Same—Partition—Dower—Tenant by the Curtesy.*—The estate by entireties existing between husband and wife, from its very nature, without the consent of the other, lawfully given, is not subject to adversary partition, cannot be destroyed by either, and is only severed by divorce absolute; and as the estate ultimately goes to the survivor, the tenancy by the curtesy of the husband and the dower interest of the wife does not attach to it. *Ibid.*

ESTATES—*Continued.*

6. *Same—Rule in Shelley's Case.*—The rule in *Shelley's case* applies to an estate held by entireties by the husband and wife, when the instrument under which it is acquired is so drawn as to fall within its terms. *Ibid.*

7. *Estates—Entireties—Husband and Wife—Deeds and Conveyances—Judgments—Liens.*—An estate by entireties held by husband and wife by virtue of their marriage and the right of survivorship still existing thereunder as to this relation, may be conveyed by them during their joint lives, and a good title given to the grantee against the rights of judgment creditors whose judgments have been obtained against the husband alone since the registration of the deed made by them both to the grantee. *Johnson v. Leavitt*, 682.

8. *Same—Rents and Profits—Leases.*—The husband, during their joint lives is entitled to the possession and the rents and profits of the lands held by himself and wife by entireties, and may lease the same subject to the right of survivorship of his wife at whose prior death the husband's lease becomes inoperative. *Ibid.*

9. *Same—Execution—Statutes—Priorities of Judgment.*—Estates by entireties exist in this State only as an incident to the marriage relationship of husband and wife, and execution may not issue to subject it to the payment of a judgment obtained against only the one or the other of them during their joint lives, but if one of them should die leaving surviving the other against whom judgments have been obtained and the liens thereof are presently existent, the right to issue execution against the estate formerly held by them in entireties attaches as to all at the time the survivor has acquired the full title and distribution of the proceeds must be made pro rata without reference to the time the judgments may have been obtained. C. S., 614, 654. *Ibid.*

10. *Same—Homestead—Purchase Money—Mechanics' Liens—Constitutional Law—Statutory Liens.*—A homestead in lands held by the husband and wife by entireties may not be claimed against a judgment rendered on their joint obligation given for the purchase of the lands so held by them, Const., Art. X, sec. 2, and the same rule applies as to mechanics' or laborers' liens, etc., under constitutional provision, but not as to liens for materials furnished, etc., which rest by statute alone. *Ibid.*

11. *Estates—Entireties—Husband and Wife—Husband's Home Site—Deeds and Conveyances—Statutes.*—The wife's interest in the husband's "home site" exists by statute (ch. 123, Public Laws of 1919), and a different principle applies as to a conveyance without her valid execution. C. S., 4103. *Ibid.*

12. *Estates—Contingent Remainders—Wills—Devise.*—A devise of an estate to the testator's grandchildren, the children of a named child, "and should either of my aforesaid grandchildren die without bodily heirs or before the age of twenty-one, then its or their interest to revert to the surviving ones or their bodily heirs," but should the aforesaid grandchildren all die without bodily heirs, then the property shall revert equally to the testator's children, etc.: *Held*, the devise is affected with two sets of contingencies, the first affecting the interest

ESTATES—*Continued.*

of the grandchildren, the first takers, *inter sese*, and the other, the primary estate as between the grandchildren and the testator's children, the word "or," in this respect, being construed as "and." *Christopher v. Wilson*, 757.

13. *Same.—Held*, under the facts of this case, that when the estate is vested under the terms of the devise in the grandchildren, the first takers, *inter sese*, it is subject to the further contingency, the death of all of the grandchildren without bodily heirs, having reached the age of twenty-one. *Ibid.*

14. *Same—Substitution of Beneficiaries—Deeds and Conveyances.*—Where the grandchildren, or the child of such as may be dead, etc., take an estate from the testator upon contingency that the grandchildren die without leaving bodily heirs, etc., with limitation over to the testator's children: *Held*, the children of the testator's grandchildren who may take thereunder acquire the estate, not as heirs of their parents or as a limitation upon the present estate, but by way of substitution directly under the will; and until the death of all of the grandchildren, or at least one of them leaving issue, it cannot be known or ascertained who are the owners under the ultimate devise, and until then an indefeasible fee-simple title of the entire interest cannot be conveyed. *Hobgood v. Hobgood*, 169 N. C., 485, cited and distinguished. *Ibid.*

15. *Estates—Rule in Shelley's Case—Deeds and Conveyances—Remainders.*—An estate granted by deed with habendum to the grantee for "her own use and benefit during her life and after her death to the lawful heirs of her body who may be living at her death, and to the issue of such child or children who may predecease her, to represent his or her ancestor," etc.: *Held*, though the estate is to the first taker for life with limitation over to the lawful heirs of her body, the words then following show the intent of the grantor not to use the words "heirs of the body" as heirs general in the technical sense of the rule in *Shelley's case*, but to designate her children as the particular ones who shall take in remainder, and this rule having no application, the estate first granted is a life estate only.—*Fillyaw v. Van Lear*, 772.

16. *Estates — Wills — Descent and Distribution — Statutes — Posthumous Child.*—An estate to the wife for life under her husband's will with remainder to the testator's right heirs, vests title in the child alive *in ventre sa mere* at the time of the testator's death, Rules 7 and 12, canons of descent, and upon the subsequent death (intestate) of such child, born alive, the mother inherits the fee from him under Rules 4 and 6; and upon the remarriage of the mother with children resulting therefrom, the children of the second marriage after her death intestate, take the estate as her heirs, and not the collateral relations of the testator. *Semble*, the estate would be cast upon the after-born unprovided-for child, under C. S., 4169, with like result. *Dixon v. Pender*, 692.

ESTOPPEL. See Schools, 1; Waters, 4; Deeds and Conveyances, 4; Carriers, 17.

EVIDENCE. See Contracts, 3, 12, 14; Courts, 2; Criminal Law, 1, 2, 3, 4, 6, 8, 9, 15, 19; Employer and Employee, 2, 9; Insurance, 1, 10, 13; Railroads, 1; State Highways, 4; Telegraphs, 1, 2; Waters, 1; Carriers, 4, 5, 7, 10, 11, 13, 19; Homicide, 1, 3, 5, 6; Mortgages, 2; Statute of Frauds, 1; Appeal and Error, 4, 8, 9, 15, 20; Principal and Agent, 2; Deceased Persons, 1; Master and Servant, 1; Seduction, 1; Insanity, 1; Taxation, 7; Witnesses, 1, 2, 3; Partition, 1; Wills, 5, 6, 11, 12, 16; Bills and Notes, 4, 8, 13, 16; Usury, 3; Contempt, 3; Corporations, 1, 4, 7; Express Companies, 1; Husband and Wife, 2; Intoxicating Liquor, 1, 2; Constitutional Law, 6; Liens, 3; Limitation of Actions, 2; Assault and Battery, 1; Banks and Banking, 5; Indictment, 2; Deeds and Conveyances, 8; Injunction, 5; Judgments, 7; Statutes, 6, 11.

1. *Evidence—Nonsuit—Trials.*—Upon a motion to nonsuit upon the plaintiff's evidence, the evidence must be viewed in the light most favorable to the plaintiff. *Jackson v. Harvester Co.*, 275.

2. *Evidence—Expert Witnesses—Opinion.*—The opinion of a physician, testifying in a personal injury case, as to the effect upon the plaintiff of an injury caused by the negligence of defendant, *is held*, upon the evidence in this case to have been properly received upon the trial. *Riggs v. R. R.*, 366.

3. *Evidence—Gaming—Criminal Law—Prejudice—Statutes—Appeal and Error.*—Where the defendants admit keeping gaming tables for which they were indicted under the provisions of C. S., 4433, they may not sustain their exception to the admission of evidence tending to show they were continuously present at the place, and as a foundation for further evidence tending to show their large share in the receipts of these tables, and other relevant circumstances, on the ground that it prejudiced them with the jury and was immaterial to the issue. *S. v. Galloway*, 416.

4. *Same—Instructions.*—An instruction based upon the evidence on a criminal trial embodying the lower degrees of the crime charged in the indictment, is not erroneous. *Ibid.*

5. *Evidence—Pleadings—Admissions.*—A part of the paragraph of the pleadings is competent as evidence without the introduction of the whole, upon the facts of this case. *Wheless v. Edwards*, 458.

6. *Evidence—Nonsuit.*—A motion as of nonsuit should not be granted if the evidence, viewed in the light most favorable to the plaintiff, may reasonably be inferred by the jury to sustain his action. *Haynes v. Utilities Co.*, 465.

7. *Same—Street Railways—Collisions—Negligence—Questions for Jury.*—Evidence is sufficient to be submitted for the determination of the jury to recover damages for a wrongful death, against a street car company, which tends to show that its car struck an automobile and killed one riding therein as a guest, as the automobile was attempting to pass another, going in the same direction, and the employees of the defendant traveling in the opposite direction failed to give signals or warnings of the approach of the street car; that the car was traveling at a speed forbidden by the ordinance of the city; and that the servants of the defendant might have avoided the injury in the exercise of ordinary care under the circumstances. *Ibid.*

EVIDENCE—*Continued.*

8. *Evidence—Interest—Instructions—Criminal Law.*—The testimony of defendant if accepted as true by the jury, is given the same credibility as that of a disinterested witness, and a charge to that effect, after a proper instruction as to interest, is not error. *S. v. Beavers*, 595.

9. *Evidence—Photographs.*—Where a photograph of the scene of the crime, the subject of the action, has been testified to as being correct, an exception that a witness was permitted to use it in illustration of the facts he was competent to testify to, cannot be sustained on appeal. *S. v. Mitchem*, 609.

10. *Evidence—Nonsuit—Employer and Employee—Master and Servant—Fellow Servant—Safe Place to Work.*—Evidence that the plaintiff in an action to recover damages for a personal injury, was required to adjust, in his line of duty, belts on overhead pulleys by using step-ladders in the narrow, etc., aisle in the defendant's manufacturing plant, where trucks loaded with material were constantly passing, and the floor was uneven so that ladders could not be securely placed, and that the injury occurred near the place where the defendant's superintendent was standing, occasioned by a fellow servant of the plaintiff pushing forward a truck out of the way of the one he was using, which ran down an inclined place of the floor, striking the ladder on which the plaintiff was at work, causing the injury, is sufficient for the determination of the jury upon the question of whether the proximate cause of the consequent injury was the negligent failure of defendant to furnish the plaintiff a safe place to work. *Beck v. Chair Co.*, 743.

11. *Same—Concurring Negligence—Proximate Cause—Nonsuit.*—Where the failure of defendant employer to furnish the plaintiff, its employee, a safe place to work, concurs with the negligence of a fellow servant in proximately causing the injury in suit, the defendant is liable in damages for the consequent injury, and his motion as of nonsuit upon the evidence, C. S., 567, is properly denied. *Ibid.*

EXCEPTIONS. See Insurance, 1; Actions, 7.

EXCESSIVE DAMAGES. See Verdict, 2.

EXECUTION. See Deeds and Conveyances, 8; Estates, 9.

EXECUTORS AND ADMINISTRATORS. See Administration, 1, 2, 3; Wills, 3; Actions, 4.

EXONERATION. See Mortgages, 4.

EXPENSES. See Roads and Highways, 5, 6.

EXPERT TESTIMONY. See Witnesses, 1; Evidence, 2.

EXPLOSIVES. See Husband and Wife, 1.

EXPRESS COMPANIES.

1. *Express Companies—Carriers—Negligence—Failure to Deliver—Evidence.*—Where there is evidence tending to show that an express company has received from consignor a shipment to be made by it as

EXPRESS COMPANIES—*Continued.*

a common carrier, and that it has failed to deliver it to consignee, it is sufficient to take the case to the jury upon the issue of defendant's actionable negligence. *Anthony v. Express Co.*, 407.

2. *Same—C. O. D.—Contracts—Collections—Common-Law—Duties.*—The common law liability of a carrier for damages for its negligence does not extend to the collection for the consignor of the price or value of the shipment, and a C. O. D. shipment received for transportation and delivery rests by special contract in the receipt given the consignor therefor. *Ibid.*

3. *Same—Questions for Jury.*—Where an express receipt has been given to the consignor for a shipment C. O. D. with the provision that it would notify him in the event of nondelivery to or the refusal of the consignee to accept it and pay the money to be collected, evidence that no such notice was given by the carrier or report made concerning the shipment is sufficient for the determination of the jury in the consignor's action to recover the C. O. D. charge for the goods. *Ibid.*

4. *Same—Prima Facie Case—Burden of Proof.*—Where an express company had received a C. O. D. package for transportation and delivery to the consignee, it is peculiarly within its own knowledge as to reasons that would acquit it of its duty therein; and where it has neither made delivery nor accounted for collection, the burden is upon it to show matters in defense. *Ibid.*

FAKE ENTRIES. See Banks and Banking, 5.

FALSE ARREST. See Criminal Law, 8.

FEDERAL BOILER INSPECTION ACT. See Statutes, 5.

FEDERAL COURTS. See Removal of Causes, 1.

FEDERAL EMPLOYERS' LIABILITY ACT. See Employer and Employee, 8; Statutes, 5.

FEDERAL GOVERNMENT. See Courts, 3, 4.

FEDERAL STATUTES. See Railroads, 1, 2; Intoxicating Liquor, 4; Carriers, 18.

FEE SIMPLE. See Wills, 9.

FELONY. See Criminal Law, 10.

FELLOW-SERVANTS. See Employer and Employee, 2, 10; Evidence, 10.

FILLING BLANKS. See Deeds, 3.

FINDINGS. See State Highways, 1; Judgments, 2; Administration, 1; Injunction, 1, 5; Appeal and Error, 11; Contempt, 3; Husband and Wife, 2.

FORCE. See Criminal Law, 17.

FORECLOSE. See Injunctions, 3; Mortgages, 10; Carriers, 17.

FORNICATION AND ADULTERY. See Criminal Law, 4.

FRAUD. See Bills and Notes, 3, 10; Corporations, 4; Deeds and Conveyances, 7; Pleadings, 9.

FREIGHT. See Carriers, 3.

FUNCTUS OFFICIO. See Elections, 3.

GAME. See Principal and Agent, 2.

GAMING. See Evidence, 3.

1. *Gaming—Slot Machines.*—The State license issued for the operation of a slot machine is for one that is lawful, and does not permit the operation of one so devised as to give to the one who happens to strike certain mechanical combinations more of the merchandise than received at other times. *S. v. May*, 470.

GASES. See Witnesses, 2.

GOOD FAITH. See Courts, 12.

GOVERNMENT. See Counties, 1; Sanitation, 2.

GRAND JURY. See Criminal Law, 12.

GRANTS. See Public Lands, 1.

GUARANTOR. See Banks and Banking, 8.

GUARANTY. See Contracts, 1.

HARMLESS ERROR. See Courts, 2; Appeal and Error, 9; Condemnation, 3.

HEIRS. See Wills, 4; Actions, 4.

HIGHWAYS.

1. *Highways—Road Districts—Counties—Statutes—Sinking Fund—Mandamus.*—It is peculiarly within the province of the Legislature, in authorizing a local road district within a county to require that the county commissioners levy a special tax, in conformity with the organic law on the subject, to provide for the interest and principal on the bonds to be issued therefor as they may become due and payable; and where the statute has so provided, whether the appropriation to the payment of the principal be called a sinking fund or not, the effect is the same, and it must be pursued, or otherwise a mandamus against the county commissioners will lie. *Cooper v. Comrs.*, 183 N. C., 231, overruled. *Switzer v. Comrs. of Franklin*, 30.

2. *Same—Stare Decisis—Appeal and Error—Second Appeal—Rehearing—Rules of Court.*—The doctrine of *stare decisis* has no application, especially when no rule of property is involved, when it clearly appears that error has been committed in the decision of the former case by the Supreme Court; and where the exceptions present, on the second appeal, under different and somewhat similar statutes, the question as to whether a mandamus will lie for the failure of the county commissioners to make a special levy for the payment of the principal of the sinking funds for road bonds of a certain district, and the Supreme Court has erroneously decided that it was unnecessary as to another road district within the same county on the

HIGHWAYS—*Continued.*

appeal in the later case the position is untenable, that it was an attempt to obtain a rehearing contrary to the rules on the subject. *Ibid.*

HOLOGRAPH WILLS. See Wills, 5, 12, 14.

HOMESTEAD. See Estates, 10.

HOMICIDE. See Courts, 9; Criminal Law, 15.

1. *Homicide—Murder—Evidence—Trials—Manslaughter.*—Upon the trial of a homicide there was evidence tending to show that the deceased was an employee of the prisoner, and the latter on his premises reproached him for going late to his work, and then followed him therefrom and struck him with a stick, which caused his death; and *per contra* that the deceased had a temper which was easily aroused, and given to violence, and on this occasion attacked the prisoner with his knife, who then struck the fatal blow in self-defense: *Held*, sufficient to sustain a verdict of manslaughter. *S. v. Jones*, 142.

2. *Same—Instructions—Self-Defense.*—Under the evidence in this case: *Held*, an instruction was not erroneous, that if the jury found beyond a reasonable doubt that the defendant voluntarily and intentionally struck the fatal blow, nothing else appearing, he would be guilty of murder in the second degree; and that it would be incumbent upon him to satisfy the jury from all the evidence of facts that would mitigate it to manslaughter or justify the plea of self-defense. *Ibid.*

3. *Homicide—Automobiles—Evidence—Photographs.*—Upon a trial under an indictment for murder where there is evidence tending to show that the deceased was killed by the criminal negligence of the defendant driving an automobile at great speed while intoxicated along a public highway, it is competent for the witnesses to illustrate their testimony by the use of photographs properly testified to be of the place and at the time of the occurrence, and accurately taken. *S. v. Lutterloh*, 412.

4. *Homicide—Murder—Manslaughter—Instructions—Appeal and Error.*—While under the provisions of C. S., 4640, the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being, C. S., 4201. *Ibid.*

5. *Homicide—Murder—Evidence—Questions for Jury—Trials.*—Circumstantial evidence in this case tending to show that the prisoner had a grievance against the deceased, had waited at a cross-road for him, and during that time the deceased had met his death from gunshot wounds, etc., *is held* sufficient to sustain a verdict of murder in the first degree. *S. v. Walton*, 437.

6. *Homicides—Evidence—Declarations.*—Upon the trial for a homicide, evidence of the declarations of the prisoner tending to incriminate him, made separately to several officers of the law entirely voluntary, and not induced by representations of hope or fear, is competent and admissible. *S. v. Rodman*, 720.

HOMICIDE—*Continued.*

7. *Same—Murder—Manslaughter—Instructions.*—Upon a trial for a homicide evidence tending alone to show that the prisoner suddenly killed an officer of the law to escape arrest, with a pistol with which he had previously provided himself while engaged in violation of the prohibition law, and who was temporarily alone with and guarding the prisoner at the time, is under the circumstances of this case held sufficient for an instruction to convict the prisoner of murder either in the first or second degree, or acquit him; and an exception that the court should have further charged upon the offense of manslaughter is untenable. *Ibid.*

HUSBAND AND WIFE. See Estates, 1, 7, 11; Deeds and Conveyances, 1, 2; Trusts, 1; Liens, 2.

1. *Husband and Wife—Statutes—Principal and Agent — Negligence — Explosives.*—A wife may appoint her husband as her agent for doing in her behalf work which may be of such dangerous character as to be a menace to the safety of others, and is liable with him for his negligence that while acting as her agent, he proximately caused an injury to a child, who found explosive caps negligently left by him while causing her lot to be blasted and excavated on a bordering street. C. S., 2507. *Krachanake v. Mfg. Co.*, 175 N. C., 435; *Barnett v. Cotton Mills*, 167 N. C., 580, cited and applied. *Richardson v. Libes*, 112.

2. *Husband and Wife—Alimony — Judgments — Orders—Evidence—Findings.*—Upon a motion to set aside or modify an order for alimony without divorce, the effect of the refusal of the court to grant the motion is an affirmance of the findings previously made; and when these are sufficient, the order presently made will be upheld. *Vickers v. Vickers*, 448.

3. *Same—Affidavit of Wife.*—Where, in an action for alimony without divorce, the evidence is otherwise sufficient to sustain the order granting the alimony or refusing to modify it, the fact that the affidavit of the wife upon the subject-matter forbidden by statute was filed at the hearing will not have the effect of disturbing the order appealed from; the finding of the willful abandonment of the husband being found by the judge upon supporting evidence. *Ibid.*

4. *Same—Issues—Jury.*—Under the amendment to the statute, alimony without divorce may be allowed to the wife, etc., before the determination of the issue by the jury. *Ibid.*

5. *Husband and Wife—Dower—"Home Site"—Statutes—Injunction—Appeal and Error—Prejudice.*—Under the facts of this appeal it appears that a mortgage given by the husband was insufficient to pass the interest of the wife in his lands for insufficiency of her probate, and that the court below, upon her motion in the present case, dissolved a temporary order as to her inchoate right of dower, but continued it with respect to her husband's "home site" (C. S., 4103), which had previously been included in another action to which she was not a party in the dower allotted to her mother-in-law. There was no evidence as to when her husband had acquired the title to the land or when he married the appellant: *Held*, the appellant had no just

HUSBAND AND WIFE—*Continued.*

ground to complain of the action of the court below, and the consideration of C. S., 4103, is not involved on the appeal. *Bank v. Summers*, 687.

6. *Husband and Wife—Negligence—Insurance—Indemnity—Companies—Public Policy—Statutes.*—The Legislature has the power to declare the public policy of the State as to permitting a wife to recover against her husband for an injury received by her from his negligent acts; and where she has recovered in her action against him damages for his negligently driving an automobile while she was a passenger, the husband may maintain his action for the same injury against an indemnity company which had issued to him its policy covering the same negligent act. *Roberts v. Guaranty Co.*, 795.

IMPAIRING OBLIGATION OF CONTRACT. See Banks and Banking, 2.

IMPROVEMENTS. See Municipal Corporations, 5, 6.

INDEMNITY. See Insurance, 14; Husband and Wife, 6.

INDIANS. See Public Lands, 1.

INDICTMENT. See Criminal Law, 11, 13, 14, 15, 19, 21; Schools, 3.

1. *Indictment—Amendment—Courts—Schools — Statutes.*—Where the indictment in the court of a justice of the peace does not sufficiently allege the failure of the parent or guardian to send the child to another than the public school in the district, as required by C. S., 5758, an amendment may be allowed by the judge of the Superior Court to cure the defect and proceed with the trial; but such amendment may not be allowed in the Supreme Court, on appeal, over an error committed in the instructions of the trial judge to the jury, to the defendant's prejudice. C. S., 1500 (12), (13). *S. v. Johnson*, 591.

2. *Same—Evidence—Burden of Proof—Appeal and Error—Instructions.*—Where the indictment is defective in failing to charge that a parent or guardian had also failed to send the child or children to another than the district school, etc., under the provisions of C. S., 5758, and the State offers no evidence in respect to it, it is not required that the parent or guardian offer evidence to show that he had complied with this proviso of the statute; and an instruction of the court to the jury placing the burden upon the defendant to so show is reversible error. *Ibid.*

INFANTS.

Infants—Contracts—Void Contracts.—Excepting necessaries or contracts authorized by statute, an infant may avoid his contracts concerning personalty on account of his infancy, either during his minority or promptly upon coming of age, and recover the consideration he has paid thereon, either in money or property, upon his restoring the consideration he has received, if he then has it, or the value thereof in property in which he has invested it, which is still under his control and ownership. *Hight v. Harris*, 328.

INFERIOR COURTS. See Contempt, 3.

INHERITANCE TAX. See Taxation, 9.

INJUNCTION. See Counties, 5; Husband and Wife, 5; Mortgages, 3; Principal and Agent, 4; Taxation, 7; Usury, 1.

1. *Injunction—Equity—Findings of Fact—Issues—Trial by Jury—Appeal and Error.*—In dismissing a preliminary order restraining the sale of land under a mortgage, wherein the controversy is as to whether an outstanding note it secures has been paid by the plaintiff or another who claims in subrogation of the mortgagee's right, it is reversible error for the Superior Court judge to attempt to deprive the plaintiff of his right to a trial by jury of the issuable matter, unless he has waived his right thereto. *Grantham v. Nunn*, 239.

2. *Same—Mandamus.*—The remedy by mandamus is not the remedy available for the enforcement of equitable rights concerning only the pecuniary interest or the proprietary rights of litigants; and where the equitable right by injunction is sought by the plaintiff in the action to enjoin the foreclosure of a mortgage on his lands, and the temporary order has been issued and dissolved, the trial judge may not, as in mandamus, exclude the rights of the plaintiff from a trial by jury on the issues arising on the pleadings. *Ibid.*

3. *Injunction—Mortgages—Foreclosure—Equity.*—Equity is now administered in the same courts as matters of law, but the distinction between equitable and legal principles have not been abolished. Const., Art. IV, sec. 1. *Waters v. Garris*, 305.

4. *Same—Actions at Law—Usury.*—Where the plaintiff seeks by injunction relief from the foreclosure of a mortgage on his lands on the ground of usury, his remedy being by an action at law (C. S., 2306), he must, under the rules of equity, offer to repay the principal sum due and the legal rate of interest thereon, under the equitable principle that he who asks equity must do equity, and he may not resist the foreclosure of the mortgage on the sole ground that he has been charged a usurious rate of interest, contrary to the provisions of the statute on the subject. *Ibid.*

5. *Injunctions—Contracts—Subcontractor—Appeal and Error—Evidence—Findings of Fact.*—Where a contractor is obligated under his contract to complete a certain work, under certain conditions, by a certain date, and subcontracts it to another, who has failed therein, and the original contractor is threatened with irreparable damages, and the subcontractor, by his acts and conduct in interfering with the possession and progress of the work, prevents its completion by the original contractor: *Held*, upon the hearing as to continuing a temporary order restraining the subcontractor to the final hearing, an order so doing was properly entered, the findings of the court being only conclusive when supported by evidence as to the issuance of such further order. *McFarland v. Quinn*, 645.

6. *Injunction—Pleadings—Allegations—Surface Waters—Damages—Trespass—Insolvency.*—The demand for damages in the complaint for ponding water upon and injuring the lands of the upper proprietor, required by C. S., 2556, is not necessary when the relief sought is to enjoin the maintenance of a dam on the plaintiff's own land by the defendant's trespass thereon, and the abatement of the nuisance thus caused, and, the trespass being continuing, the allegation of defendant's insolvency is not necessary for the continuance of the restraining order to the final hearing before the jury. *Kinsland v. Kinsland*, 810.

IN PARI MATERIA. See Statutes, 1.

INSANITY.

Insanity—Commitment—Statutes—Negligence—Evidence—Questions for Jury.—Omission to perform the material requirements of a statute in application to the clerk of the Superior Court for the commitment of one to the insane asylum, such as the personal examination of the person sought to be committed, etc., is some evidence in her action to recover damages for a wrongful conspiracy against her to deprive her of her liberty, etc., to be considered on the question of the observance by the defendants of a duty required of them; and it constitutes reversible error for the trial judge to instruct the jury that the element of negligence was not to be considered by them in arriving at their verdict upon the issue. C. S., 6191, 6192, 6193. *Getsinger v. Corbell*, 553.

INSOLVENCY. See Injunctions, 6.

INSTRUCTIONS. See Criminal Law, 2, 6; Corporations, 1; Employer and Employee, 1; Railroads, 2; Waters, 2; Appeal and Error, 3, 16; Carriers, 6; Homicide, 2, 4, 7; Mortgages, 2; Seduction, 1; Partition, 1; Wills, 6; Bills and Notes, 5; Evidence, 4, 8; Insurance, 5, 11; Trespass, 3; Intoxicating Liquor, 2; Judgments, 6; Pleadings, 4; Indictment, 2; Deeds and Conveyances, 8; Condemnation, 3.

1. *Instructions—Appeal and Error—New Trials.*—In an action to recover on the defendant's promise to pay the debt of another, when the full amount thereof is uncertain, it is reversible error for the trial judge to instruct the jury in effect to answer the issue in a certain amount for plaintiff, should they find from the greater weight of the evidence that the plaintiff had given the credit upon the assurance of the defendant. *Tarkington v. Criffield*, 140.

2. *Instructions—Appeal and Error—Objections and Exceptions.*—Exceptions to parts of the instructions of the judge to the jury will be considered with reference to the relevant parts as a whole, and when no prejudice thus is found, it is not a ground for reversible error. *S. v. Jones*, 143.

3. *Instructions—Appeal and Error.*—A charge of the court to the jury will be construed contextually as a whole, and it will not be held for error because some of its parts taken disjointedly would appear to be erroneous. *Exum v. Lynch*, 393.

4. *Instructions—Appeal and Error.*—An instruction will not be held for reversible error if, taken in its connection with the whole, it is so connected as not to erroneously mislead the jury as to the principles of law arising from the evidence in the case. *Wheless v. Edwards*, 458.

5. *Instructions—Appeal and Error.*—The charge of the court will not be held for reversible error because of apparent error in its disjointed parts, taken unconnectedly if, construed contextually as a whole, it correctly instructs the jury upon the principles of law arising from the evidence in the case. *Speas v. Bank*, 524.

6. *Instructions—Appeal and Error.*—The charge of the court when as a whole it correctly lays down to the jury, upon the evidence in the case, the correct rule for the admeasurement of damages, will not be held for reversible error when in its disconnected part, taken dis-

INSTRUCTIONS—*Continued.*

jointedly, error may be found; and where the charge thus construed is correct, reversible error will not be held because of faulty illustrations given upon correct principles. *Mangum v. R. R.*, 690.

7. *Instructions—Appeal and Error—Objections and Exceptions.*—Where the charge of the judge to the jury does not appear of record, the presumption is that the instructions given were correctly given upon competent evidence introduced upon the trial. *In re Westfeldt*, 702.

INSTRUMENT. See Bills and Notes, 2.

INSURANCE. See Contracts, 14; Husband and Wife, 6.

1. *Insurance, Fire—Automobiles—Policies—Exceptions—Change of Interest—Larceny—Evidence—Questions for Jury.*—An insurance policy on an automobile of a user thereof, and not a dealer therein, indemnifying against all direct loss and damage by fire, arising from any cause whatever, except, among other things, the change in ownership of interest, title or possession, or directly or indirectly by theft: *Held*, the change of possession by the theft of the car does not fall within the intent and meaning of the exception of the policy unless such change of possession directly or indirectly caused the loss, which presents a question of fact, under the evidence, for the determination of the jury. *Williams v. Ins. Co.*, 184 N. C., 268, cited and applied. *Barringer v. Ins. Co.*, 117.

2. *Insurance, Life—Policies—Contracts—Stipulations.*—A provision in a life insurance policy that in the event of the self-destruction of the insured within two years from the issuance of the policy, only the premiums paid thereon shall be recoverable, is reasonable, and will be enforced. *Parker v. Ins. Co.*, 403.

3. *Same—Actions—Defenses—Suicide—Burden of Proof.*—Where an insurance company defends an action upon a stipulation in the policy limiting recovery upon the death of the insured to premiums paid thereon in the event of self-destruction, the burden is on the defendant to show this defense if it is relied on. *Ibid.*

4. *Same—Ambiguity—Interpretation of Contract.*—Where a policy of life insurance is ambiguously expressed or capable of more than one meaning, its terms are construed to have the meaning that is favorable to the insured. *Ibid.*

5. *Same—Accident—Questions for Jury—Instructions.*—A provision in a policy of life insurance that limits recovery upon the policy to the premiums paid thereon in case of self-destruction, sane or insane, does not preclude a recovery in the event of the insured's having met his death from a pistol shot accidentally at his own hands; and where it is established that the deceased insured met his death from a pistol shot, at his own hands, and the evidence was conflicting as to whether he did so, intending self-destruction or otherwise, it is proper for the court to instruct the jury in effect that the recovery would not be limited to the amount of the premiums paid, should the jury find it was unintentionally or accidentally done. *Ibid.*

6. *Same—Issues—Appeal and Error.*—Under the pleadings and evidence in this case: *Held*, an issue was correctly submitted, "Did the insured die by his own hands, or not, with intent to commit suicide?" *Ibid.*

INSURANCE—*Continued.*

7. *Insurance Policies—Contracts—Interpretation.*—Where the terms of a policy of insurance are therein ambiguously expressed, the interpretation more favorable to the insured will be given them. *Poole v. Ins. Co.*, 468.

8. *Same—Accidents—Stipulations—Unlawful Acts.*—A policy of accident insurance that excepts from the company's full liability diseases contracted before the date of the policy, "nor for sickness due to immorality or the violation of law," does not of itself exclude such liability for an injury caused by the plaintiff's stealing a ride on a railway train, made a misdemeanor by C. S., 3508, unless the plaintiff's act was so reckless as to withdraw it from the class of accidents covered by the policy. *Ibid.*

9. *Same—Questions for Jury.*—Where the evidence is conflicting as to whether the plaintiff in an action to recover for an accidental injury on his policy of insurance, or had forfeited his right under its terms and conditions, the matter of such defense is a question for the jury. *Ibid.*

10. *Insurance, Life—Policy—Contracts—Provisions as to Disability—Evidence—Questions for Jury.*—A provision in a policy of life insurance waiving the payment of premiums in the event of permanent and continuous disability to engage in any occupation of the insured for remuneration or profit, and for the yearly payment of a certain per cent of the face value of the policy, etc., is not confined to the ability of the insured to continue in the occupation he had previously followed, but any other occupation for remuneration or profit; and where the evidence is conflicting thereon, a question is presented for the determination of the jury. *Lee v. Ins. Co.*, 538.

11. *Same—Instructions.*—In this case there was evidence tending to show that the insured was a farmer, and had taken out a policy of life insurance with a provision waiving the payment of premiums and providing for a payment to him of a certain per cent of the face value of the policy in the event he should become permanently and continuously disabled to pursue any occupation for remuneration or profit, and that he had developed tuberculosis that rendered him incapable of attending to his farm or pursuing any business occupation, though his son, to whom he had turned over the complete management of his farm, would occasionally talk to him about it, and that at times he would attend meetings of the board of directors of a bank, of which he was a member, and listen to the discussion of business transactions before it, for which there was a payment made of $2.00 for each meeting so attended, etc.: *Held*, in his action to recover under the disability clause, the question of the defendant's liability was properly submitted to the determination of the jury; and *held*, further, the charge of the court was free from reversible error, under the facts of the case. *Ibid.*

12. *Same.*—A charge of the court to the jury will be presumed to have been understood in its connected or related parts, and will not be held for reversible error if it thus explains correctly the law arising from proper evidence in the case, though taken disconnectedly, it may be subject to criticism. *Ibid.*

INSURANCE—*Continued.*

13. *Same—Evidence.*—Under the facts of this case, tending to show conditions exactly similar. *Held*, evidence that a life insurance company had knowingly waived the collection of premiums for a while under a disability provision of its policy, is competent in the insured's action to recover the premiums he had afterwards been required to pay by a position the company had afterwards taken to the contrary. *Ibid.*

14. *Insurance—Indemnity—Employer and Employee—Contracts—Ambiguity—Provisions.*—While a policy of indemnity against damages to other persons than employees of insured for personal injuries, etc., in case of ambiguity of the language employed is resolved against the company by a reasonable interpretation, the principle does not obtain when the policy by plain language expresses the contract of the parties thereto upon the subject. *Power Co. v. Casualty Co.*, 597.

15. *Same—Electric Companies—Linemen—Drivers of Automobile Trucks.*—Where a policy of indemnity to an employer against damages to other than employees explicitly excepts those caused by the operation of vehicles, trucks, etc., engaged in the employer's business, or the negligence of the drivers thereof, the provision clearly expressed will be given effect in favor of the insurer, though the driver at the time was classified in the policy as an employee, in this case a lineman of an electric power and light company, regularly engaged in the service of his employer at the time such injury was caused to another than an employee, as a part of his employment, and classified as an employee, whose negligent acts the policy of indemnity covered. *Ibid.*

16. *Insurance—Fire Insurance—Contracts—Policies—Mortgages.*—A mortgagee has a direct insurable interest in a policy of fire insurance taken out by the owner, made payable in event of loss to himself and the mortgagee as their respective interests may appear, and, the interest of the mortgagee being separate and distinctive, he is not responsible, under the provisions of the policy, for a subsequent change in ownership or of title made by the owner without his knowledge, and such defense by the insurance company as to the mortgagee's interest is not available to it. *Bank v. Assurance Co.*, 747.

17. *Same—Principal and Agent—Ratification.*—Where the owner of the premises covered by a policy of fire insurance has therein protected the interest of the mortgagee under the standard form of policy, without the knowledge of the mortgagee, the rights of the mortgagee having been acquired under the policy itself and in accordance with its terms, it is not required that he ratify the acts of the owner in order for him to recover upon the policy, his right thereto existing under the contract made for his benefit and in accordance with its terms. As to the rights of the original parties to rescind the contract without the consent of the mortgagee, *quere?*

18. *Same—Waiver.*—Where there is a coinsurance clause in a policy of fire insurance, making the several insurance companies ratably liable in the event of loss by fire, correspondence, after the loss has occurred, by the attorney of the mortgagee, whose rights are covered by the policy, as to releasing one of the companies from liability, in inadvertence to this feature of ratable liability, is *held* not to be a waiver of the mortgagee's right to recover, under the circumstances of this case. *Ibid.*

INSURANCE, FIRE. See Insurance.

INSURANCE, LIFE. See Insurance.

INTENT. See Mortgages, 1; Wills, 5, 6; Carriers, 16; Statutes, 10; Criminal Law, 20.

INTEREST. See Insurance, 1; Evidence, 8; Principal and Surety, 3; Usury, 2; Issues, 3.

INTERSTATE COMMERCE COMMISSION. See Carriers, 3, 9; Railroads, 1; Statutes, 5.

INTOXICATING LIQUOR. See Constitutional Law, 8.

1. *Intoxicating Liquor—Spirituous Liquor—Evidence.*—Circumstantial evidence is sufficient, upon the trial of two consolidated cases, to convict of unlawfully transporting intoxicating liquor and driving an automobile while under its influence. *S. v. Bradsher*, 447.

2. *Intoxicating Liquor—Spirituous Liquor—Testimony of Purchaser—Instructions—Evidence.*—Upon conflicting evidence in this case as to the transportation and unlawful sale of intoxicating liquor, wherein the purchaser of the liquor has testified against the defendant without evidence of any promise or agreement, or of facts from which the same may be inferred, an instruction *held* correct to that effect, and that the jury should take in consideration all the evidence in the case in reaching their verdict. *S. v. Burke*, 516.

3. *Same—Orders—Sale of Vehicle Used in Unlawful Transportation—Appeal and Error.*—In this case an exception to the order of court directing the sale of defendant's automobile, used in the unlawful transportation of liquor, is not sustained, the order not appearing of record in the appealed case, and the verdict upon the evidence sustaining an order of this character. *Ibid.*

4. *Intoxicating Liquor—Spirituous Liquor—Statutes—Federal Law.*—The State has the power, through legislation, to further regulate and control the manufacture, sale, etc., of intoxicating liquor beyond the restrictions contained in a Federal statute upon the subject, the latter prevailing in interstate regulations in case of conflict; and the State statute may consistently give further effect or efficiency to the Federal statute upon the subject as it relates to State regulation. *S. v. Hammond*, 602.

5. *Same—Possession—Prima Facie Case.*—Chapter 1, Laws 1923, generally known as the Turlington Act, with certain reservations as to existing State laws, establishes the rule now prevailing on the subject of prohibition, and it applies to the extent that it is inconsistent with former legislation, and is in conformity with valid Federal statutes on the subject where interstate regulation is concerned. *Ibid.*

6. *Same—Turlington Act.*—Under the provisions of the Turlington Act (sec. 2), it is made unlawful to manufacture, sell, barter, transport or possess intoxicating liquor, except as therein authorized; these provisions to be liberally construed to prevent the use of such liquor as a beverage; and the possession of such liquor is made prima facie evidence of the violation of the law, but allowing the possession thereof for the personal consumption of the owner and bona fide guests, etc.: *Held*, the possession of a large quantity of whiskey in

INTOXICATING LIQUOR—*Continued.*

the home of the defendant raised the prima facie case of her guilt, permitting the inference from the method of its being bottled, etc., that it was for the purpose of an unlawful sale, or that it had been received for unlawful purposes, defendant's motion as of nonsuit thereon was properly denied. *Ibid.*

7. *Intoxicating Liquor — Spirituous Liquor — Statutes—Turlington Act—Possession.*—Evidence tending to show that the defendant had intoxicating liquor in his possession before the efficacy of the Turlington Act is not a defense, under the provisions of this act, for the defendant's possession a year thereafter, upon the trial for violating the prohibition law. *S. v. Knight*, 630.

INVESTMENT. See Mortgages, 8; Banks and Banking, 7.

ISSUES. See Injunction, 1; Usury, 3; Husband and Wife, 4; Insurance, 6; Trespass, 2; Pleadings, 4, 8; Judgments, 8.

1. *Issues—Admissions—Appeal and Error.* — Where an issue has been answered with the consent of the parties to the action, one of them may not urge for error a position that is contradictory to the issue thus answered. *Bank v. Howard*, 544.

2. *Same—Burden of Proof.*—Where there is evidence that a note sued on was affected by an infirmity that would vitiate it, the burden of proof is on one claiming to be a holder in due course without notice, to establish his position before the jury by the greater weight of evidence. C. S., 3040. *Ibid.*

3. *Same — Banks and Banking — Officers—Interest.*—Where the discount committee of a bank accepts and discounts a note at the request of its officer and member thereof, and the officer is interested therein, the principle of imputed knowledge of the officer of the infirmity of the instrument that would vitiate the note does not apply; and upon conflicting evidence, the issue so raised is for the jury to determine, under proper instructions of the judge. *Ibid.*

4. *Issues—Receiving.*—Where a quantity of liquor is found in the possession of defendant, sufficient to raise a prima facie case of her guilt of having unlawfully received it in violation of our statutes, the prima facie case so established may be rebutted by her showing that her possession was lawful under the statutory qualification, the burden remaining with the State to show guilt beyond a reasonable doubt. *S. v. Hammond*, 603.

JUDGES. See Appeal and Error, 11, 26, 27; Pleadings, 6.

JUDGMENTS. See Principal and Surety, 3; New Trials, 1; Verdict, 1; Estates, 7, 9; Waters, 4; Mortgages, 6; Appeal and Error, 14, 15; Certiorari, 2; Husband and Wife, 2; Corporations, 5; Criminal Law, 12; Pleadings, 6; Carriers, 17; Courts, 8.

1. *Judgments — Motion to Set Aside — Courts — Jurisdiction—Consent.*— While ordinarily the judge may not hear a motion to set aside a judgment outside of the county wherein the action was brought, this may be done by him with the consent of the parties. *Gaster v. Thomas*, 346.

JUDGMENTS—*Continued.*

2. *Same—Appeal and Error—Findings of Fact.*—On appeal, the findings of fact by the Superior Court judge on a motion to set aside a judgment by default, the findings of the Superior Court judge upon supporting evidence are conclusive. *Ibid.*

3. *Same—Statutes—Excusable Neglect.*—Where it appears, upon defendant's motion to set aside a judgment by default (C. S., 600), that the same was regularly colendared for trial, the defendant had notice thereof and was afforded full opportunity to file his answer, but that his attorney had failed to do so, and that the judgment was accordingly rendered, he has not shown such excusable neglect as will entitle him to have the judgment set aside on his motion, under the provisions of the statute. *Ibid.*

4. *Judgments—Verdict—Appeal and Error.*—A judgment upon the verdict of the jury upon issues raised by the pleadings, which are not determinative of the controversy between the parties, is erroneously entered. *Bank v. Broom Co.*, 508.

5. *Same—Bills and Notes—Mortgages.*—A bank sued upon a note it had received for borrowed money secured with a chattel mortgage given to the maker by another as collateral, and one of the defendants pleaded and offered evidence tending to show that he was an innocent purchaser of the mortgaged property: *Held*, a verdict in favor of plaintiff bank on the issues of the indebtedness of its borrower, the value of the mortgaged property, and whether the plaintiff was a holder of the chattel mortgage in due course, was insufficient to sustain the judgment in plaintiff's favor. *Ibid*

6. *Same—Instructions—Directing Verdict.*—Where a bank, in its action against the maker of a note, seeks to have the property described in a chattel mortgage made by another and received by it as collateral, sold, and the proceeds applied to the payment of its note, and one of the defendants in possession pleads and offers evidence to show that he is the owner of the property by purchase, it is reversible error for the trial judge to instruct the jury that, upon the evidence, if believed, the bank was the holder of the mortgage in due course, when it is conflicting as to whether the bank acquired the mortgage before it was due. *Ibid.*

7. *Judgments — Evidence — Motions to Set Aside — Discretion of Court—Wills—Caveat.*—A motion to set aside a verdict as being against the weight of the evidence, and the consequent granting of a new trial upon the issue of *devisavit vel non*, is within the sound discretion of the trial judge. *In re Westfeldt*, 702.

8. *Judgments—Issues—Verdict.*—In this case, *held*, an answer to the issue raised by the pleadings, upon the evidence, under proper instructions, making the defendant liable under a special contract as insurer, was not inconsistent with the verdict in defendant's favor upon the issue as to the defendant's negligence as warehouseman or bailee, and defendant's exception that a judgment could not be rendered thereon is untenable. *Sams v. Cochran*, 732.

9. *Judgments—Motions to Set Aside—Irregular Judgments—Pleadings.*—A judgment by default and inquiry entered in plaintiff's favor for the want of an answer after the return day of the summons, without more,

JUDGMENTS—*Continued.*

is an irregular judgment, not rendered in the due course and practice of the courts, and the remedy of defendant is by motion to set it aside, made in the original action. *Duffer v. Brunson*, 789.

10. *Same — Meritorious Defense.*—The movant, to set aside an irregular judgment, must show he has a meritorious defense, as well as that he has acted with reasonable promptness. *Ibid.*

11. *Same—Orders—Appeal and Error.*—The finding by the trial court, on defendant's motion to set aside an irregular judgment, that he had shown a meritorious defense in one involving a question of mixed law and fact, will be overruled on appeal when there is no evidence to support the finding, it being required that the defendant set forth facts showing prima facie a valid defense, to be passed upon by the court. *Ibid.*

JURISDICTION. See Removal of Causes, 1; Judgment, 1; Courts, 3, 5, 6, 7, 10, 13; Administration, 1, 3; Actions, 6; Criminal Law, 7; Pleadings, 6; Wills, 17.

JUROR. See Jury.

JURY. See Courts, 2; Husband and Wife, 4.

1. *Jurors—Challenges.*—The statutory conditions upon which a juror may be challenged and stood aside for cause are cumulative to that of the common-law disqualification as to the juror's interest in the result of the action; and thereunder a juror who is a member of a growers association, a party to the action, may be challenged for cause therein. *Peanut Growers Assn. v. Bobbitt*, 335.

2. *Same—Waiver.*—A party to an action is entitled to set aside a juror for cause shown, and in so doing he cannot be held to have waived this right by having previously refused the offer of the adversary party to agree that he should not act as a juror. *Ibid.*

JUSTICES' COURTS.

Justices' Courts—Appeal—Trial De Novo—Superior Courts—Pendency of Action.—Appeals from a justice's court are tried *de novo* in the Superior Court; and where an appeal has thus been taken and consolidated with another action brought originally in the Superior Court, in both of which infancy is pleaded to avoid a contract for goods sold and delivered, and damages as a counterclaim for the breach of warranty in the sale of a mule, by not submitting an issue as to the damages for the breach of warranty set up before the justice of the peace, the counterclaim in that action is deemed to have been abandoned, and the right of the party plaintiff in the former action and the defendant in the latter is taken as waived when objection has not been aptly taken in time. *Hight v. Harris*, 329.

JUSTICES OF THE PEACE. See Criminal Law, 7; Courts, 11, 13.

KNOWLEDGE. See Statutes, 4.

LACHES. See Appeal and Error, 1, 26, 27; Carriers, 17.

LAND. See Mortgages, 9.

LANDLORD AND TENANT. See Liens, 3.

Landlord and Tenant—Liens—Statutes—Burden of Proof.—The burden of proof is on the landlord to show that he has acquired a statutory landlord's lien on the crop of his tenant, in an action against the tenant to recover for goods sold and delivered. *Adams v. Caudle*, 185.

LAPSE. See Wills, 1.

LARCENY. See Courts, 1; Criminal Law, 2; Insurance, 1.

LAWS. See Courts, 2; Bills and Notes, 15.

LEASES. See Assignments, 2; Estates, 8.

LEGACIES. See Wills, 1, 14.

LETTERS. See Administration, 1, 3.

LIABILITY. See Municipal Corporations, 1; Principal and Surety, 2; Banks and Banking, 3.

LICENSES. See Attorneys at Law, 1.

LIENS. See Taxation, 1; Estates, 7, 10; Assignments, 1; Landlord and Tenant, 1; Vendor and Purchaser, 1.

1. *Liens—Statutes—Subcontractors—Material—Prepayment by Owner to Contractor.*—The liens given the furnisher of material on the building of the owner to the contractor, etc., are strictly statutory, and no lien can be acquired therefor unless notice has been given, as the statute requires, while the owner still owes the contractor a balance upon the contract, to be prorated among those who have a like claim; nor is it contemplated or provided by the statute that this will be altered by reason of the owner paying the contractor by agreement in advance of his work. C. S., 2438. *Rose v. Davis*, 355.

2. *Same—Married Women—Husband and Wife.*—The liens given to those furnishing material to the contractor and used in the construction of houses against the owner are now applicable to married women. *Ibid.*

3. *Liens—Landlord and Tenant—Evidence—Burden of Proof—Payment.*—Evidence in this case that the plaintiff had received certain cotton from the cropper is competent upon the question as to whether he was a purchaser of defendant of the lands, or whether it was intended only as a payment of rent by the one in possession as defendant's tenant. *Wheless v. Edwards*, 457.

LIMITATION OF ACTIONS. See Municipal Corporations, 2; War, 1; Divorce, 1.

1. *Limitations of Actions—Actions—Principal and Agent.*—The burden of proof is on the plaintiff to show that his cause of action is not barred by the statute of limitations when the defendant sets up this plea as a bar thereto; and where a principal has been sued, and after the statute has run against his agent, the plea of the statute is available to the latter. *Jackson v. Harvester Co.*, 275.

2. *Limitation of Actions—Mutual Accounts—Directing Verdict—Evidence.* To bar an action to recover for goods sold and delivered under the provisions of C. S., 421, the two accounts must be mutual or recip-

LIMITATION OF ACTIONS—*Continued.*

rocal, open or continuous, and current, or no time limit fixed by agreement, express or implied, with the balance to be determined by an adjustment of credit and debit; and when there is conflicting evidence as to whether the item sued on was so related to other items upon which the defendant relied, it is reversible error for the judge to direct a verdict thereon if the jury believe the evidence. *McKinnie v. Wester*, 514.

LINEMEN. See Insurance, 15.

LIVESTOCK. See Carriers, 5.

LOCAL LAWS. See Roads and Highways, 1.

MALICE. See Criminal Law, 14.

MALICIOUS PROSECUTION. See Criminal Law, 9.

MANDAMUS. See Highways, 1; Elections, 4; Injunctions, 2; Roads and Highways, 3; Taxation, 8.

MANSLAUGHTER. See Homicide, 1, 4, 7; Criminal Law, 18.

MARRIAGE. See Estates, 1.

Marriage—Divorce—Alimony Without Divorce—Statutes.—In the wife's application for alimony without divorce (C. S., 1667, and amendments thereto), it is not required that the judge hearing the matter shall find the facts as a basis for his judgment, as in proceedings for alimony *pendente lite* (C. S., 1666), though it is necessary that she allege sufficient facts to constitute a good cause of action thereunder. *Semble*, the better practice is for the court to find the facts when the same are in dispute, as was done in this case. *Price v. Price*, 640.

MARRIED WOMEN. See Liens, 2.

MASTER AND SERVANT. See Employer and Employee, 1, 2, 3, 9; Evidence, 10.

Master and Servant — Employer and Employee — Negligence — Res Ipsa Loquitur—Evidence — Nonsuit — Questions for Jury.—Upon a motion as of nonsuit, considering the evidence in the light most favorable to the plaintiff: *Held*, evidence tending to show that the plaintiff, in the course of his employment, had his hand injured by the slipping of the mechanism of a jack, operated by other employees, while raising a donkey engine, which had been derailed, upon the track, requiring under the principle of *res ipsa liquitur* that the cause be submitted to the jury, a motion to nonsuit was properly overruled. *Corbitt v. Royer-Ferguson Co.*, 565.

MATERIAL. See Liens, 1.

MAYHEM. See Criminal Law, 14.

MEASURE OF DAMAGES. See Employer and Employee, 8; Condemnation, 3; Statutes, 9.

MECHANIC'S LIEN. See Estates, 10.

MEMORANDA. See Criminal Law, 13.

MENTAL ANGUISH. See Telegraphs, 1.

MENTAL CAPACITY. See Wills, 13.

MERGER. See Mortgages, 1; Carriers, 15.

MERITORIOUS DEFENSE. See Pleadings, 7; Judgments, 10.

MINORS. See Courts, 8.

MISTAKE. See Elections, 2.

MONEY. See Trusts, 1; Roads and Highways, 5; Estates, 10.

MORTGAGES. See Dower, 1; Judgments, 5; Assignments, 1; Carriers, 17; Estates, 3; Principal and Agent, 4; Injunction, 3; Parties, 1; Insurance, 16.

1. *Mortgages—Title—Merger—Presumptions—Intention of Parties.*—While ordinarily when the mortgagee of lands afterwards acquires the mortgagor's equity of redemption, the lesser interest merges into the greater, and he becomes the owner of the full title, this result will not follow when the merger would be inimical to the interest of the owner, or would prevent his setting up the mortgage to defeat an intermediate title, such as a subsequent lien or a second mortgage, unless the parties otherwise intended, which will not be presented contrary to the apparent interest of the parties. *Furniture Co. v. Potter*, 145.

2. *Same—Instructions—Evidence—Appeal and Error.*—Where the mortgagee of lands has later acquired the mortgagor's equity of redemption, and there is evidence that it was not the intention of the parties to effect a merger to defeat his rights against a junior mortgage it is reversible error for the trial judge to instruct the jury to the contrary. *Ibid.*

3. *Mortgages—Wills—Estates—Remainders—Equity—Deeds and Conveyances—Registration—Injunction.*—A wife joined in a mortgage of her husband on two tracts of his land, and thereafter conveyed to a purchaser in fee simple with the usual warranty of title, tract No. 2, both duly registered, and subsequently died devising tract No. 2, to his wife for life and a portion thereof to his nephew, and the other portion to his son, the will having been probated after the deed to the purchaser of tract No. 2 had been duly registered, and thereafter the mortgagee proceeded to foreclose under the power of sale in his mortgage. In proceedings by the administratrix to enjoin the sale: *Held*, the equity of the mortgagee in tract No. 2 was superior to that of the life estate of the widow and of the remaindermen, with the right of the latter three to redeem the land by paying the mortgage debt. *Brown v. Jennings*, 155.

4. *Same—Exonoration.—Held*, under the facts in this case, the equities of the widow and remaindermen under the will were equal, neither being entitled to exoneration against the others. *Ibid.*

5. *Same—Deeds and Conveyances—Purchasers.*—Where lands devised by the husband to his widow for life with remainder over have been mortgaged with the joinder of the wife during his lifetime, and also conveyed thereafter to a purchaser in fee simple by deed duly

MORTGAGES—*Continued.*

recorded before the probate of his will has been made: *Held*, the purchaser had a superior equity to that of the life tenant and remaindermen under the will. *Ibid.*

6. *Same—Parties—Judgments.*—In a suit to enjoin the foreclosure of a mortgage made by the deceased during his life brought by his administratrix after his death involving certain equities of his widow as a life tenant and the remaindermen claiming under his will: *Held*, it was necessary to make those claiming under the will parties to the action in order to bind them by the decree of the court. *Ibid.*

7. *Mortgages—Deeds in Trust—Power of Sale.*—The power of sale contained in a mortgage is the contract of the parties, and must be strictly followed by the mortgagee to be a valid execution of the power. *Ibid.*

8. *Mortgages—Sales—Equities—Estates — Contingent Interests — Investments—Payment Into Court.*—Where the owner of lands has mortgaged the same during his life as tracts numbered 1 and 2, and has later conveyed tract No. 2 to a purchaser in fee simple, and has devised tract No. 1 for life with remainder over: *Held*, the mortgagee should hold the proceeds of the sale after the satisfaction of his mortgage for the life tenant and remaindermen, who may determine whether the surplus be invested in accordance with their equities, or the interest of the life tenant be paid in cash under the provisions of the statute. C. S., 1791, or the mortgagee may relieve himself of liability by paying the fund into court. C. S., 2592. *Ibid.*

9. *Mortgages—Sales—Description of Land—Notice—Statutes—Deeds and Conveyances.*—Advertisements for the sale of land under foreclosure of mortgage or deed of trust are required by our statute (C. S., 2588) to describe the lands "substantially" as in the conveyance thereof; and while it may be more advisable to give the exact description, the deed made in pursuance thereof is not necessarily void for lack of such description, as where the land is designated as a well-known and certain tract, or place of business, or manufacturing plant, with reference to the book in the office of the register of deeds where the description is given, with number of page, etc., for a more particular description, it is a sufficient description of the land and will convey the title if the notice of such has been published in accordance with the terms of mortgage or deed in trust. *Douglas v. Rhodes*, 580.

10. *Mortgages—Foreclosure—Sale—Posting of Notice—Presumption—Purchaser—Deeds and Conveyances.*—Where the mortgagee or trustee in a deed of trust has posted notice of foreclosure sale in conformity with the power contained in the instrument, and according to law, and has sold the lands therein described at the courthouse door of the county in conformity with the provisions thereof, in the absence of notice or knowledge to the contrary, he has a right to assume that the notices remained posted continuously during the required period, and nothing else appearing, the sale and the deed accordingly made will not be declared invalid against the rights of the purchaser at the foreclosure sale. *Carson v. Fleming*, 600.

MOTIONS. See Appeal and Error, 7, 10; Judgments, 1, 7, 9; New Trials, 2; Actions, 9; Criminal Law, 12.

MUNICIPAL CORPORATIONS. See Counties, 1; Trespass, 1; Contracts, 6; Taxation, 6, 8.

1. *Municipal Corporations—Cities and Towns—Diversion of Funds—Railroads—Individual Liability.*—The action of the governing body of an incorporated town in taking money from its treasury for the payment of lands for a right of way of a proposed railroad as an inducement for it to make the town one of its *termini*, without legislative sanction or a vote of its citizens, is an unlawful appropriation of the town's funds, in the nature of a trespass, for which the individual members may be held personally liable in a proper action. *Brown v. Walker*, 52.

2. *Same—Limitations of Actions—Appeal and Error.*—And where, in such instances, the railroad company, through its agents, have participated in this manner in the unlawful appropriation of the town's funds, and the railroad accordingly has thereafter been built and is operating over the right of way thus acquired, the mere fact that the trial court has dismissed the action as to the members of the municipal board participating in the commission of the wrongful act, under the plea of the statute of limitations, C. S., 443 (1), the correctness of this ruling not being appealed from, will not likewise or necessarily bar the action against the railroad company, under the same plea, under an alleged privity between them. *Ibid.*

3. *Same—Torts*—Where, in violation of duty, the municipal authorities of a town have wrongfully diverted its funds, without consideration moving to the town, by aiding in the building of a railroad, such breach of duty by the municipal authorities is a tort, for which any and all the participants, both the municipal authorities and the railroad participating therein receiving the benefits therefrom, may be held jointly and severally liable. *Ibid.*

4. *Same—Trespass.*—The statute of limitations, C. S., 443 (1), is properly restricted to unlawful acts done by a public officer, under color of his office, to the person and property of another, by violence of force, direct or imputed, and does not apply to a breach of official duty in reference to the officials of a town as employees thereof, in wrongfully diverting the funds of the town to a railroad company in acquiring a right of way for it. *Ibid.*

5. *Municipal Corporation—Cities and Towns—Street Improvements—Statutes—Assessments—Notice.*—Where a city has been enjoined in an action from enforcing an assessment against abutting property of the owner for street improvements, under a statute providing for notice and right of appeal from the commissioners to the Superior Court, any further proceedings as to the assessments without giving the owner the statutory notice deprives him of his statutory right, and is void; and the fact that the notice given was rendered ineffectual by the injunction does not relieve the city of its statutory obligation to give the notice after the injunction has been made inoperative in the due course and practice of the courts. *R. R. v. Sanford*, 218.

6. *Municipal Corporations—Streets—Improvements—Assessments—Intersecting Streets—Statutes.*—Where railroad property in a city lies along an unimproved street, but abuts upon an improved street that runs through the unimproved one, the owner is ordinarily liable to

MUNICIPAL CORPORATIONS—*Continued.*

an assessment of one-half of the cost of the improvement on the abutting and improved street, and the exception in the statute as to street intersections is inapplicable. C. S., 2710 (1), 2703. *Mount Olive v. R. R.*, 332.

MUNICIPALITIES. See Taxation, 2.

MURDER. See Homicide, 1, 4, 5, 7.

NAVIGABLE WATERS. See Contracts, 7.

NECESSARIES. See Sanitation, 1; Roads and Highways, 2, 5, 6.

NECESSARY PARTIES. See Removal of Causes, 1.

NEGLIGENCE. See Employer and Employee, 1, 2, 4; Insanity, 1; Husband and Wife, 1, 6; Statutes, 6; Railroads, 1; Express Companies, 1; Telegraphs, 1, 2; Master and Servant, 1; Verdict, 1; Carriers, 5, 7, 8, 10, 11, 12, 18, 19; Witnesses, 2; Judgments, 3; Evidence, 7.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 1, 6, 7, 8, 9, 10, 13, 16, 17, 19; Statutes, 11; Banks and Banking, 8.

NEWLY DISCOVERED EVIDENCE. See Appeal and Error, 10; New Trials, 2.

NEW TRIALS. See Instructions, 1; Appeal and Error, 10, 26, 27.

1. *New Trials—Appeal and Error—Judgments — Presumptions — Burden to Show Error.*—The judgment of the Superior Court having jurisdiction of the parties and subject-matter of the action is presumed to be correct on appeal, and will not be reversed and a new trial ordered unless it is made reasonably to appear that the granting thereof would probably result in the appelant's favor, the burden of showing error being upon him. *Garner v. Quakenbush*, 181.

2. *New Trials—Newly Discovered Evidence—Motions.—Held*, in this case, affidavits filed on motion for a new trial in the Supreme Court for newly discovered evidence, are insufficient. *Manuel v. R. R.*, 559.

NONRESIDENTS. See Wills, 3; Deeds and Conveyances, 6.

NONSUIT. See Contracts, 3; Criminal Law, 1, 5; Carriers, 7, 11, 14, 19; Employer and Employee, 2, 9; Telegraphs, 1; Evidence, 1, 6, 10, 11; Witnesses, 5; Master and Servant, 1; Wills, 11; Appeal and Error, 15.

NOTICE. See Municipal Corporations, 5; Taxation, 5, 8; Bills and Notes, 2, 9, 10, 17; Deeds and Conveyances, 4, 7; Mortgages, 9, 10; Carriers, 13; Banks and Banking, 11.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 3, 8, 13, 17, 18, 20, 22, 23, 24; Instructions, 2, 7; Contracts, 11.

OFFICERS. See Constitutional Law, 7; Issues, 3; Banks and Banking, 5.

OFFICIAL BONDS. See Principal and Surety, 1.

OFFSETS. See Condemnation, 2.

OPINION EVIDENCE. See Statutes, 7.

OPINIONS. See Appeal and Error, 5; Evidence, 2.

ORDERS. See Courts, 5; Husband and Wife, 2; Intoxicating Liquor, 3; Judgments, 11.

ORDER NOTIFY. See Carriers, 1.

ORDINANCES. See Sunday, 1.

PAROL EVIDENCE. See Contracts, 9; Deeds and Conveyances, 3.

PARTIES. See Mortgages, 1, 6; Appeal and Error, 7; Banks and Banking, 2; Actions, 3, 9; Wills, 11, 17.

1. *Parties—Equity—Statutes — Actions — Cloud on Title — Mortgages — Deeds and Conveyances—Warranty.*—Where the owner of lands in possession thereof or entitled thereto brings his action claiming as such owner to remove as a cloud upon his title the lien of one claiming under his mortgage, and *pendente lite* has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest, C. S., 446, without claim of the right to the possession under the provisions of the statute of 1893, C. S., 1743: and where issue has been joined, he may, if successful, recover his costs. *Plotkin v. Bank*, 711.

PARTITION. See Estates, 5.

1. *Partition—Title—Chain of Title—Evidence—Statutes—Instructions — Appeal and Error.*—Where proceedings for partition of lands covered by a nonnavigable stream of water have been made under the provisions of ch., 85, Revised Statutes of 1837, before amended, and applicable at the time, it was by the terms of the statute binding upon the parties, and where a party litigant has shown the land to have been embraced under the partition proceedings, it is error for the trial court to hold or instruct the jury that the partition proceedings could not be considered as a link in the chain of claimant's title unless the court had confirmed the report of the commissioners, or the parties to these proceedings had confirmed them by their subsequent conduct that would amount to their ratification. *Power Co. v. Taylor*, 351.

PARTNERSHIP. See Banks and Banking, 6, 7; Corporations, 6.

PASSENGER. See Carriers, 20.

PAYMENT. See Mortgages, 8; Liens, 3; Banks and Banking, 8.

PEDDLERS. See Taxation, 8.

PENALTY. See Principal and Surety, 2.

PENDENCY OF ACTION. See Actions, 2; Justices' Courts, 1.

PENDENTE LITE. See Divorce, 2.

PERCOLATING WATERS. See Waters, 1.

PETITION. See Appeal and Error, 2.

PHOTOGRAPHS. See Homicide, 3; Evidence, 9.

PLACE. See Employer and Employee, 2; Carriers, 20; Evidence, 10.

PLEADINGS. See Telegraphs, 2; Courts, 5, 12, 14; Taxation, 7; Evidence, 5; Injunctions, 6; Judgments, 9.

1. *Pleadings—Amendments—Courts—Discretion—Vendor and Purchaser—Warranty—Statutes.*—Where the plaintiff seeks to recover damages upon the allegations that defendant falsely and knowingly induced him to purchase an automobile upon false representations, it is within the sound discretion of the trial judge to permit an amendment alleging a warranty, in addition to the allegations in the original complaint; and where the statute of limitations has not run as to the latter, the amendment cannot be construed to have a different result. C. S., 547. *Wiggins v. Motor Co.*, 316.

2. *Same—Contracts—Warranty—Immaterial Allegations.*—Where the original complaint has alleged facts sufficient to constitute a warranty by defendant of an automobile which the latter had sold and delivered to him, the specific allegation of warranty becomes immaterial, and it is within the sound discretion of the trial judge to allow the complaint to be amended so as to allege a warranty. C. S., 537, 547. *Ibid.*

3. *Same—Election of Remedies.*—Where the complaint sufficiently alleges that the plaintiff was induced to purchase an automobile by the false representation of the owner as to its condition, he may recover upon a warranty without the use of the particular word, and objection that he had been put to an election of remedies cannot be sustained. *Ibid.*

4. *Pleadings—Issues—Instructions—Appeal and Error.*—Issues not raised by the pleadings should not be submitted to the jury, but if the issue is submitted, reversible error in the instructions thereon will warrant a new trial. *Bank v. Broom Co.*, 508.

5. *Pleadings—Demurrer.*—Where a complaint liberally construed alleges facts sufficient to constitute a cause of action in any phase or aspect, it is good against a demurrer thereto. *Foy v. Foy*, 518.

6. *Pleadings—Judgment by Default—Clerks of Court—Judge—Default and Inquiry—Jurisdiction.*—Chapter 304, Public Laws of 1919 and ch., 92, Public Laws, Extra Session, 1921, in regard to pleadings, etc., before the clerk of the Superior Court do not in all instances deprive the Superior Court judge of his jurisdiction to enter judgment by default final, or default and inquiry in proper instances, and where the clerk has failed to enter a judgment by default and inquiry by default of an answer when the statute so provides, but transfers the cause to the civil issue docket, it is not error for the trial judge, after the lapse of several terms, and the answer having long since been due, to proceed with the inquiry before the jury on the issue of damages, and when accordingly the jury has assessed the damages, his action in refusing to sign judgment thereon on defendant's motion as a matter of law as not being in accordance with the due course and practice of the courts, is reversible error. *Hill v. Hotel Co.*, 586.

7. *Same—Meritorious Defense.*—Upon defendant's motion to set aside a judgment for excusable neglect, it is necessary for him to also show a meritorious defense. *Ibid.*

8. *Pleadings—Issues—Appeal and Error.*—Where the purchaser of a carload of potatoes only alleges damages against the seller, due to the

PLEADINGS—*Continued.*

bad condition of the potatoes, it may not be successfully contended by the plaintiff that he had been deprived, on the trial, of his position as to grade, etc., by the submission of the issue alone raised by the pleadings. *Produce Co. v. Wilkinson*, 642.

9. *Pleadings—Demurrer—Fraud.*—Where the complaint generally alleges a fraudulent intent on the part of railroad corporations in acquiring and absorbing their connecting lines under statutory authority, and from its other allegations it appears that the consolidation was lawfully effected, a demurrer thereto does not admit the fraud vaguely alleged, it being required that the particularities of the fraud relied upon be sufficiently stated in the complaint. *Manning v. R. R.*, 648.

PLEAS. See Trial by Jury, 2; Criminal Law, 12, 19.

POISON. See Witnesses, 2.

POLICIES. See Insurance, 1, 2, 10, 16; Contracts, 14.

POSSESSION. See Courts, 2; Criminal Law, 1, 2; Intoxicating Liquor, 5, 7.

POSTHUMOUS CHILD. See Estates, 16.

POWERS. See Counties, 1, 2, 3; State Highways, 2; Mortgages, 7.

PRACTICE. See Attorneys at Law, 1.

PREJUDICE. See Appeal and Error, 4; Deceased Persons, 1; Evidence, 3; Husband and Wife, 5.

PRESCRIPTIVE RIGHTS. See Contracts, 7.

PRESUMPTIONS. See Mortgages, 1, 10; New Trials, 1; Carriers, 5, 15; Statutes, 4.

PRIMA FACIE CASE. See Telegraphs, 1; Bills and Notes, 3, 8; Express Companies, 4; Intoxicating Liquors, 5; Deeds and Conveyances, 9; Statutes, 11.

PRIMARY ELECTIONS. See Elections, 1.

PRINCIPAL AND AGENT. See Constitutional Law, 2; Corporations, 4; Husband and Wife, 1; Insurance, 17; Limitation of Actions, 1; Bills and Notes, 6, 16; Usury, 4.

1. *Principal and Agent—Torts—Scope of Agency—Respondeat Superior.*—The principal is liable in damages for a tort committed within the scope of his agent's employment, whether the tortious act resulting in the injury was expressly authorized by him or not. *Gallop v. Clark*, 186.

2. *Same—Game—Evidence—Questions for Jury—Trials.*—Where the one employed to guard the game preserves of those associated together into a hunting club shoots and fatally injures one who has gone there for the purpose of shooting the game that he was employed to guard, he is acting within the apparent scope of his employment, and the principals are responsible in damages for his wrongful act. The evidence in this case *held* sufficient to take the case to the jury. *Ibid.*

PRINCIPAL AND AGENT—*Continued.*

3. *Principal and Agent—Banks and Banking—Cashier—Misappropriation of Funds.*—Where a customer of a bank has his note for borrowed money accepted by a bank, and delivers it to its cashier for discount, the cashier is the agent for the bank to pay the proceeds over to the customer, or to place it to his credit at the bank; and where the cashier instead misappropriates it to his own use, he is acting within the scope of his agency as cashier of the bank, and applying the general principle relating to principal and agent, the bank is liable to its customer for the money thus misapplied. *Grady v. Bank*, 184 N. C., 158, cited and distinguished. *Williams v. Bank*, 197.

4. *Same Mortgages—Deeds in Trust—Equity — Injunction.* — Where the cashier of a bank acting within the scope of his authority has misappropriated the funds paid to him, to take up the borrower's note given to the bank secured by a mortgage, the foreclosure of the mortgage will be enjoined in the suit for that purpose brought against the bank by the maker of the note. *Ibid.*

5. *Principal and Agent — Vendor and Vendee — Contracts — Respondeat Superior.*—Where the defendants have sent their agents to see the plaintiff, following the latter's inquiry, in regard to a sale of merchandise, and the agents have made the sale, accepted by defendant, and the goods delivered thereunder, the defendant is liable to plaintiff for the breach of the written contract of sale, though the contract itself did not accompany the agents' order and the defendants were not made aware of its terms. *Birdwell v. Moale*, 801.

PRINCIPAL AND SURETY. See Claim and Delivery, 1.

1. *Principal and Surety—Official Bonds—Clerks of Court—Cumulative Suretyship.*—The surety on the official bond given for one term of office is not liable on the distinct bond of the same incumbent given upon his succeeding himself to the same office; but where, during either of these terms, a new bond is taken with the same surety for that period the security is considered cumulative, and upon defalcation before or after its taking, the surety is liable to the extent of the total amount of them both. *S. v. Martin*, 119.

2. *Same—Penalty—Liability—Surety.*—Where a defaulting clerk of the Superior Court succeeds himself in office, and has given the required bond separately for each term, with the same surety, and continues his defalcation, recovery cannot be had against the surety except to the amount of the bond given for each term. *Ibid.*

3. *Same—Statutes—Judgments—Interest.*—The surety bond of a clerk of the Superior Court is fixed as to amount in the sum of five thousand dollars, and to that extent a surety is responsible for the defalcation of his principal, including 6 per cent interest from the time of notice given it, except from judgment thereon, when a different principal applies and the surety is liable for 6 per cent interest on the judgment until it is paid. C. S., 2309. *Ibid.*

4. *Same.*—While, as against the principal on the bond of a clerk of the Superior Court, interest under our statute at the rate of 12 per cent is collectible from the time of defalcation, the amount of the penalty on his bond determines the liability of the surety thereon. C. S., 357. *Ibid.*

PRIORITIES. See Waters, 4; Administration, 2; Estates, 9.

PRIVILEGE TAX. See Constitutional Law, 1.

PROBATE. See Estates, 4; Deeds and Conveyances, 1; Wills, 16.

PROFITS. See Estates, 3, 8.

PROMISE. See Statute of Frauds, 1; Contracts, 10.

PROTEST. See Attorneys at Law, 1.

PROVISO. See Insurance, 10, 14.

PROXIMATE CAUSE. See Statutes, 8, Carriers, 20; Evidence, 11.

PUBLIC LANDS.

1. *Public Lands—Indian Reservations—Cherokee Indians—State Grants—Void Grants.*—Under the provisions of statute in 1783, certain described lands was reserved to the Cherokee Indian tribe, with express provision that no person should enter and survey the same within the bounds thus reserved, and that all entries of State lands and grants thereof from the State should be void; and *held*, those claiming title to these lands under a grantee from the State during the life of the statute, and before its repeal, acquired no title as against those claiming under a valid grant from the State after its repeal. The history of the rights of entry upon the Indian land from pre-Revolutionary times, together with the various statutes affecting them, applied by ADAMS, J. *Brown v. Smathers*, 166.

2. *Same—Statutes—Interpretation.*—In construing the statute of 1783 as to lands reserved to the Cherokee Indians, as to whether certain lands granted by the State came within the boundaries of lands prohibited to be entered: *Held*, the State had the right for itself, and those claiming under it, to say and settle where the true boundary line was; and that portion which is west of the Meigs and Freeman line and north and west of the Blue Ridge range of mountains, and within the Indian boundary, was not subject to entry since the statute of 1783 and prior to its repeal. *Ibid.*

3. *Same—Boundaries.*—In construing whether certain grants from the State fall within the description of the lands reserved to the Cherokee Indians, and therefore void under the statute: *Held*, the last call in the statutory description must be taken to the State's line in the shortest available direction which conforms to the description; and *held* further, that the grantee from the State during the life of the statute, or before its repeal, could acquire no title to lands falling within the boundaries of the lands reserved to the Cherokee Indians, thus construed, notwithstanding the mistake at the time that a certain parallel of latitude marked the boundary. *Ibid.*

PUBLIC POLICY. See Husband and Wife, 6.

PUNISHMENT. See Constitutional Law, 8.

PUNITIVE DAMAGES. See Assault and Battery, 1.

PURCHASE. See Counties, 3; Banks and Banking, 6; Estates, 10.

PURCHASERS. See Mortgages, 5, 10; Deeds and Conveyances, 4; Intoxicating Liquor, 2; Carriers, 17; Banks and Banking, 9.

QUASHING. See Criminal Law, 12.

QUESTIONS FOR JURY. See Insurance, 1, 5, 9, 10; Carriers, 10, 14; Principal and Agent, 2; Statutes, 7; Seduction, 2; Witnesses, 3; Bills and Notes, 16; Corporations, 1, 7; Express Companies, 3; Homicide, 5; Constitutional Law, 6; Criminal Law, 9, 18; Evidence, 7; Employer and Employee, 9; Insanity, 1; Master and Servant, 1; Banks and Banking, 5.

QUESTIONS OF LAW. See State Highways, 3; Witnesses, 1.

RAILROADS. See Carriers, 1, 4, 5, 7, 8, 10, 11, 12, 15, 17, 18, 19, 20; statutes, 4, 5; Municipal Corporations, 1; Courts, 3; Actions, 3.

1. *Railroads—Employer and Employee—Negligence—Commerce—Federal Statutes—Evidence—Interstate Commerce Commission.*—While the Federal statute applicable excludes from evidence the reports made by the inspector of boilers in the employ of the Interstate Commerce Commission, it does not prohibit the testimony of the inspector upon the trial of an action to recover of the railroad damages for the wrongful death of its employee in interstate commerce, when he is properly qualified and testifies to facts that have come within his personal observation, and which are otherwise competent. *Geroic v. R. R.*, 76.

2. *Railroads—Employer and Employee—Damages—Commerce—Federal Statutes—Appeal and Error—Instructions.*—The damages recoverable for the wrongful death of a railroad company's employee engaged in interstate commerce is confined to the loss of the pecuniary benefits to the persons designated by the Federal statute reasonably to be expected from the continued life of the deceased; and it is reversible error for the trial judge to instruct the jury thereon in accordance with the measure of damages otherwise allowable in the State court, that it was the pecuniary net worth of the deceased to his family, based upon his earnings and expectancy of life, etc. *Ibid.*

RATES. See Carriers, 8.

RATIFICATION. See Insurance, 17.

REBUTTAL. See Carriers, 5.

RECEIVERS. See Corporations, 3.

RECEIVING STOLEN GOODS. See Issues, 4.

RECORDS. See Taxation, 2; Appeal and Error, 6, 7, 20, 25; Criminal Law, 13; Corporations, 8.

REFERENCE. See Trial by Jury, 2.

REGISTRATION. See Mortgages, 3.

REHEARING. See Appeal and Error, 1, 2; Highways, 2.

REMAINDERS. See Mortgages, 3; Estates, 15.

REMEDIES. See Condemnation, 2.

REMOVAL OF CAUSES.

1. *Removal of Causes—Federal Courts—Jurisdiction—Severable Controversies—Necessary Parties.*—Where a local bank has loaned money

REMOVAL OF CAUSES—*Continued.*

to a contractor for the erection of a local school building under an agreement entered into by which the local school committee should reserve for the plaintiff bank, as collateral, certain moneys to be retained by them from the specified amounts to be retained as the building progressed, a nonresident defendant surety of the contractor for the completion of the building may not remove the cause from the State to the Federal court upon the ground that the resident defendants were not necessary parties to the determination of the controversy. C. S., 455, 456. *Morganton v. Hutton*, 187 N. C., 740, cited and applied. *Bank v. Hester*, 68.

RENEWAL. See Bills and Notes, 1, 6, 18.

RENTS. See Estates, 3, 8.

REPEAL. See Constitutional Law, 3; Roads and Highways, 7.

REPLEVIN BOND. See Claim and Delivery, 1.

RESERVATIONS. See Public Lands, 1.

RESIDUARY CLAUSES. See Wills, 10.

RES IPSA LOQUITUR. See Master and Servant, 1.

RESPONDEAT SUPERIOR. See Principal and Agent, 1, 5.

RESTRICTIONS. See State Highways, 2.

RESULTING TRUSTS. See Trusts, 1.

REVIEW. See State Highways, 1; Appeal and Error, 15, 19, 21; Contempt, 3.

REVOCATION. See Administration, 1; Wills, 15.

RIGHTS. See Administration, 2.

ROAD DISTRICTS. See Highways, 1.

ROADS AND HIGHWAYS. See Carriers, 14.

1. *Roads and Highways — Public Roads — Taxation — Statutes — Local Laws.*—It was the intent and purpose of C. S., 3718, 3719, 3720 and 3721, that the public roads of a township formed under the provisions of a special statute, with a road commission having charge of its public roads (ch. 84, Public-Local Laws 1919), to provide for the continued maintenance of the roads, and for the payment of interest on bonds issued for their construction and *held* under the statute applicable in this case, the county commissioners levy a special tax sufficient for such purposes, the local and the general act on the subject being consistent and their terms not repugnant to each other. *Township Road Commission v. Comrs. of Franklin*, 362.

2. *Same—Elections—Necessaries—Constitutional Law.*—The maintenance of township roads under a board of commissioners duly constituted, and the provision for the payment of interest on bonds issued for the purpose with provision for their retirement at maturity, are necessary expenses not requiring, when permitted by statute, and in the absence of statutory requirement to the contrary, an authorization by the approving vote of the electors of the district. *Ibid.*

ROADS AND HIGHWAYS—*Continued.*

3. *Same—Mandamus.*—Where the county commissioners have wrongfully refused to levy a road tax, authorized by statute upon the request of township road commissioners, it is a refusal to perform a ministerial duty, and the remedy by mandamus will lie. *Ibid.*

4. *Roads and Highways—State Highway Commission—County Commissioners—Contracts.*—The State Highway Commission and the county boards of commissioners are alike agencies of the State for the building and maintenance of public roads, with statutory differences as to national and county highways, etc., and may contract with each other relative thereto in accordance with provisions stated by the statutes on the subject. *Lassiter v. Comrs. of Wake*, 379.

5. *Same—Necessary Expenses—Contribution of Moneys by Counties.*—Where there are two routes by which the State Highway Commission may construct and maintain a national highway from a county seat, and by one of them largely traveled it would relieve the county of great cost in maintenance, and in the straightness of curves relieve the road in certain places of dangerous conditions, and also large expenditure for a bridge, etc., if such route were accepted and constructed and maintained by the State Highway Commission, it is within the discretionary powers conferred by the statute for the county to pay from its general fund, as a necessary county expense, the larger cost of this route over the other upon an agreement made to that effect. *Ibid.*

6. *Same—Constitutional Law—Statutes—Necessary Expenses.*—The building and maintenance of public roads of a county is a necessary county expense, and being authorized by statute the question is not required by the Constitution to be submitted to the voters for approval. Const., Art. VII, sec. 2; C. S., 1297 (18), (19); C. S., 1325. *Ibid.*

7. *Same—Repealing Acts.*—Chapter 189, Laws of 1919, brought forward in C. S., 3580-3593, is repealed by the laws of 1921 in so far as the former conflict with the latter act, and under the latter power is conferred on the State Highway Commission to take over county highways as a part of the national highway system of roads upon such terms and agreements with the county commissioners as may be made by them as authorized by the act of 1921. *Ibid.*

ROUTES. See State Highways, 3.

RULES OF COURT. See Appeal and Error, 1, 6, 7; Highways, 2; Attorneys at Law, 3.

RULE IN SHELLEY'S CASE. See Estates, 6, 15; Deeds, 1.

SALES. See Constitutional Law, 1; Mortgages, 7, 8, 9, 10; Intoxicating Liquor, 3; Sunday, 1; Corporations, 7.

SANITATION.

1. *Sanitation—Sewerage — Constitutional Law — Necessaries — Bonds — Taxation.*—Where, under the provisions of a statute to establish a county-wide system of sewerage according to districts, a district has been established and its lines defined: *Held*, sewerage as contemplated by the act is a necessary county expense, and bonds may be issued

SANITATION—*Continued.*

for the purposes of the district without submitting the question of their issuance to the voters of the district. Constitution, Art. VII, sec. 7. *Reed v. Engineering Co.*, 39.

2. *Same—Government—Boundaries—State Agencies — Statutes — Special Acts—Counties.*—The courts may not declare a statute unconstitutional unless clearly and manifestly so: *and held*, where a statute authorizes the formation of sanitary sewerage districts within county-wide limits, the boundaries of these to be fixed by certain designated local authorities in a specified manner, and done without previous notice to the voters, the statute will not be construed as unconstitutional on that account, or as a "local, private or special act relating to health, sanitation," etc. Recent amendment to Constitution, Art. II, sec. 29. *Ibid.*

SCHOOLS. See Statutes, 1; Indictment, 1.

1. *Schools—Taxation—Bonds—Statutes—Constitutional Law—Estoppel.*—The Private Laws of 1903 created a school district coterminous with a city's limits or those which may thereafter be extended, giving the school authorities the power to permit children to go to the public schools who may reside outside of the corporate limits upon such terms as they may deem just and fair, and complied with the faith or credit clause of our Constitution, Art. VII, sec. 7, under the provisions of the statute, by submitting to the voters of the district, at an election duly and regularly held, the question of a special school tax, which was approved by them. Under later statutes the limits were extended beyond those of the town without authorization for the vote of the special tax and no election was held; and for nineteen years a special tax was also levied and collected for the additional or outlying territory, without protest or legal action taken by the taxpayers: *Held*, the voters' approval under the statute of 1903 was a sufficient compliance with the constitutional requirement; and the plaintiffs, in their action in behalf of themselves and other taxpayers, are estopped after nineteen years to question the constitutionality of the special tax levied and collected. *Carr v. Little*, 100.

2. *Same.*—The Public-Local Laws of 1915, ch. 253, relating to the submission to the voters of the school districts in Pitt County the question of a special tax, is an enabling act, and has no application where the public schools were under a board of trustees and not a school committee. *Ibid.*

3. *Schools—Criminal Law—Statutes—Indictment — Compulsory Attendance.*—For a conviction under the provisions of C. S., 5758, it is necessary for the indictment to allege, and the State offer evidence tending to show not only that the parent or guardian of the children within the described age had failed or refused to send them to the public school within the district, but also that such child or children had not been sent to attend school periodically for a period equal to the time which the public school in the district in which they reside shall be in session. *S. v. Johnson*, 591.

4. *Schools—Deeds and Conveyances — Statutes — Constitutional Law.*—Where a deed to lands to a city for school purposes, conveying a fee-simple title thereto for such purposes, has been executed and delivered, and thereafter statutes have been enacted making certain

SCHOOLS—*Continued.*

provisions whereby the original owners and their heirs may acquire the lands in the event of the cessation of such use, and the lands have been held for such use for a long term of years, and then sold under authorization of a statute, reserving the proceeds of the sale for the use of the public school funds of the city: *Held*, the statute so specially passed was constitutional and valid, and a deed to the purchaser in accordance therewith passed an absolute fee-simple title. *Greensboro v. Simpson*, 737.

SEALS. See Deeds and Conveyances, 5, 9.

SEDUCTION.

1. *Seduction—Statutes—Instructions—Supporting Evidence.*—Where there is supporting testimony of the woman in her statutory action for seduction, to wit, the carnal intercourse with an innocent and virtuous woman, induced by promise of marriage, an instruction which eliminates the necessary supporting evidence of the woman to only the element of the promise of marriage is reversible error. C. S., 4339. *S. v. Doss*, 214.

2. *Same—Questions for Jury—Statutes.*—The weight and credibility of the evidence supporting that of the woman, upon the trial of seduction, under C. S., 4339, is for the jury, if it comes within the requirement of being legal evidence, however slight it may be. *Ibid.*

SELF-DEFENSE. See Homicide, 2; Criminal Law, 16.

SERVICE. See Deeds and Conveyances, 6.

SERVICE MESSAGES. See Telegraphs, 1, 2.

SEWERAGE. See Sanitation, 1.

SHIPMENT. See Carriers, 2, 4.

SIGNATURE. See Wills, 7.

SINKING FUND. See Highways, 1.

SLOT MACHINE. See Gaming, 1.

SOFT DRINKS. See Sunday, 1.

SPECIAL LAWS. See Sanitation, 2.

SPIRITUOUS LIQUOR. See Intoxicating Liquor, 1, 2, 4, 7.

STARE DECISIS. See Highways, 2.

STATE AGENCIES. See Sanitation, 2.

STATE COURTS. See Courts, 4.

STATE HIGHWAYS.

1. *State Highways—Roads and Highways—Appeal and Error—Review of Findings.*—The findings of fact, as well as the conclusions of law, are reviewable by the Supreme Court, on appeal, in passing upon the judgment of the Superior Court judge in a suit involving the validity of the order of the State Highway Commission in determining a

STATE HIGHWAYS—*Continued.*

proper route for the State Highway between two county seats, etc.; and exception that the facts were not sufficiently found is untenable. *Cameron v. Highway Commission*, 84.

2. *State Highways—Roads and Highways—Commission — Discretionary and Restricted Powers—Statutes.*—Construing the Public Laws of 1921, ch. 2, creating a State Highway Commission to take over for the State, as therein provided, the highways or public roads, change, alter or construct them so as to form a Statewide system, connected with such systems of other State: *Held*, section 10, giving the commission broad and comprehensive discretionary powers in the adoption of routes, should be construed *in pari materia* with section 7 thereof, the latter limiting the discretion conferred in the former, among other things, in respect to routes between county-seats, "principal towns," according to a map referred to and attached to the act; and as to those matters particularly mentioned in section 7, the discretion was taken away from the commission by express statutory provision.—*Ibid.*

3. *Same — Routes of Highways—Principal Towns—Courts—Questions of Law and Fact.*—*Held*, the map referred to in the act as a "proposed" route of the State Highway system, by placing certain towns along its proposed route, does not affect the discretionary authority of the Highway Commission in locating the highway between county-seats, or prevent the commission from changing the route from them, but its determination is reviewable by the courts as a mixed question of law and fact, whether the change decided upon goes by the principal towns as required by the statute. *Ibid.*

4. *Same—Absence of Discretion—Evidence.*—*Held*, in this case there was no evidence of abuse of discretion by the State Highway Commission in changing the route of the State Highway between two county-seats and leaving out a certain small town appearing on the map and shown as on the "proposed" route. *Ibid.*

5. *Same—Constitutional Law—Due Process.*—Those who have acquired property along the "proposed" route, as shown in connection with the consideration by the Legislature of the bill which became enacted into the Public Laws of 1921, ch. 2, establishing under the State Highway Commission a method for building a State system of highways, acted with implied notice of the powers conferred upon the commission in changing the route, and cannot maintain the position that they have been deprived of the due-process-of-law provision in the Constitution, whether of a vested right or otherwise. *Ibid.*

STATE HIGHWAY COMMISSION. See Roads and Highways, 4.

STATUS QUO. See Counties, 3.

STATUTES. See Constitutional Law, 1, 3, 5; Evidence, 3; Contracts, 1, 5, 8; Actions, 8, 9; Counties, 1; Criminal Law, 1, 5, 7, 10, 14, 20, 21, 22, 23; Employer and Employee, 2, 7, 8; Highways, 1; Husband and Wife, 1, 5, 6; Principal and Surety, 3; Sanitation, 2; Schools, 1, 3, 4; State Highways, 2; Taxation, 1, 3, 4, 7, 9; Trespass, 1; Verdict, 1; Attorneys at Law, 3; Public Lands, 2; Wills, 1, 2, 3, 13, 14, 16, 17; Assignments, 1; Claim and Delivery, 1; Estates, 4, 9, 10, 11, 16; Landlord and Tenant, 1; Appeal and Error, 7; Condemnation, 1, 2; Courts, 5, 10;

STATUTES—*Continued.*

Deceased Persons, 1; Divorce, 1; Elections, 1; Municipal Corporations, 5, 6; Pleadings, 1; Insanity, 1; Seduction, 1, 2; Judgments, 3; Liens, 1; Partition, 1; Bills and Notes, 9, 14, 17, 19; Roads and Highways, 1, 6; Usury, 1; Certiorari, 1; Corporations, 1, 6; Banks and Banking, 5, 6; Trial by Jury, 1; Indictment, 1; Intoxicating Liquor, 4, 7; Mortgages, 9; War, 1; Marriage, 1; Carriers, 15.

1. *Statutes—In Pari Materia—Schools—Constitutional Law—Taxation—Bonds.*—A later statute, apparently in conflict with a former local one will not be construed to repeal the local act for repugnancy when the two may be sustained by a reasonable interpretation to give effect to the legislative intent as gathered from the language employed; and where the school trustees, under the provisions of a later general act purporting to make uniform all general or local acts on the subject, have submitted the question of a special school tax or bond issue to the voters of a school district, and approved by them under the provisions of our Constitution, Art. VII, sec. 7, and the former local statute has also authorized the submission of this question to the voters: *Held*, construing the statutes *in pari materia*, a variance between them, with reference to the referendum and the body that issue the bonds, is immaterial and is a substantial compliance with the organic law. *Carr v. Little*, 101.

2. *Same—Trustees.*—Construing *in pari materia* the Private Laws of 1903 and the Private Laws of 1911, relating to the issuance of special school tax bonds for the district of Greenville, Pitt County: *Held*, the effect of the later act was to reduce the number of trustees for the district, and the constitutionality of the bonds issued under the facts of this case may not be successfully questioned. *Ibid.*

3. *Statutes—Codification—Interpretation.*—Where statutes are codified, as in the Consolidated Statutes, the language used in the codification will be construed to effectuate the intent and meaning of the statutes so codified, when this may be done by a reasonable construction. *Phosphate Co. v. Johnson*, 419.

4. *Statutes—Knowledge—Presumptions—Carriers—Railroads—Geographical Divisions.*—In the passage of an act permitting a railroad corporation operating in this State to purchase or acquire connecting lines of railroads, it will be presumed that the Legislature had knowledge of the direct physical connection of the buying and the selling corporations. *Manning v. R. R.*, 648.

5. *Statutes—Carriers—Railroads—Commerce—Employer and Employee—Federal Employers' Liability Act—Federal Boiler Inspection Act—Interstate Commerce Commission.*—Where a violation of the duty imposed by the Federal Employers' Liability Act and the Boiler Inspection Act and the rules of the Interstate Commerce Commission in relation thereto causes a personal injury to an employee engaged in the course of his employment by a railroad company in interstate commerce, it is unnecessary for the plaintiff to plead or prove the provisions of these acts and rules in his action in the State courts to recover damages for the injury, etc., for the courts will take judicial notice thereof. *Mangum v. R. R.*, 689.

6. *Same—Negligence—Evidence.*—The Federal Employers' Liability and Boiler Inspection acts and the rules of the Interstate Commerce

STATUTES—*Continued.*

Commission in pursuance thereof require, among other things, that the locomotives be equipped with a proper pilot, or cow-catcher; and where a locomotive was not so equipped, but with a rotten pilot, came into collision with an automobile at a crossing, and the evidence in plaintiff's action to recover damages tends to show that by reason of the defect the automobile went under the locomotive, and caused a derailment, proximately producing the injury complained of to a fireman thereon while engaged in interstate duties, the failure of defendant to comply with the requirements of the Federal law is in itself evidence of actionable negligence, for which a recovery may be had. *Ibid.*

7. *Same—Collisions—Witnesses—Experts' Opinion—Questions for Jury.*—In an action to recover damages for a personal injury under the Federal Employers' Liability Act and the Boiler Inspection Act, and the rules of the Interstate Commerce Commission in pursuance thereof, expert opinion evidence in proper instances is competent to show that a rotten pilot to the locomotive in a collision with an automobile would result in the automobile's breaking through to beneath the locomotive, resulting in a derailment, when relevant to the inquiry, in an action by an employee on the locomotive of a railroad company engaged in interstate commerce, who was injured in the derailment, and an exception by the carrier, under the facts of this case, that it invaded the province of the jury upon the issue of negligence was *held* untenable. *Ibid.*

8. *Same—Proximate Cause.*—Where a railroad locomotive was derailed in a collision with an automobile at a public crossing, and there is evidence of negligence on the carrier's part in proximately causing an injury to its employee, in his action for damages the mere fact that the driver of the automobile may have likewise been negligent does not bar the plaintiff's right to recover in his action against his employer, alone, under the principle that another negligent act may concur in proximately causing an injury, without excluding liability of the defendant, when its negligent act was one of the proximate causes of the injury in suit, and the doctrine of intervening negligence is inapplicable. *Ibid.*

9. *Same—Measure of Damages.*—In an action to recover damages for a personal injury to an employee of defendant railroad company under the provisions of the Federal Employers' Liability and Boiler Inspection acts, the measure of damages are those caused by the negligence of the defendant for physical suffering and the plaintiff's pecuniary loss by reason of permanent disability, when permanently disabled, present, and prospective, upon evidence in the case, reduced to the present worth of such aggregate sum as the jury may find the plaintiff to have been endamaged under the proper rule of expectancy of life, and the evidence as to plaintiff's earning capacity, etc. *Ibid.*

10. *Statutes—Interpretation—Intent.*—The preliminary and vital object to be obtained in the interpretation of the language of a statute is the intention of the Legislature, with further consideration of the existing law, the evils intended to be avoided, and the remedy to be applied. *Hunt v. Eure*, 716.

STATUTES—*Continued.*

11. *Same—Bills and Notes—Negotiable Instruments — Nonnegotiable Instruments—Value—Evidence—Prima Facie Case—Burden of Proof.*—The principle that when a note sued on reciting a valuable consideration, has been shown to have been executed and delivered, makes a prima facie case in plaintiff's favor that he has paid value (C. S., 3004), requiring the defendant to disprove it by the preponderance of the evidence, applies only to negotiable instruments under the provisions of our statutes, and not to those which are nonnegotiable, and an instruction that places this burden on the defendant in the latter instance, is reversible error. *Ibid.*

STATUTE OF FRAUDS. See Contracts, 1, 12.

1. *Statute of Frauds—Promise to Answer for Debt of Another—Evidence—Trials.*—A promise to become personally responsible for the debt of another, does not fall within the intent and meaning of the Statute of Frauds, and is not required to be in writing, etc. *Tarkington v. Criffield*, 140.

STIPULATIONS. See Insurance, 2, 8.

STOCK. See Banks and Banking, 2; Bills and Notes, 7.

STOCKHOLDERS. See Banks and Banking, 2, 3.

STREETS. See Municipal Corporations, 5, 6.

STREET RAILROADS. See Evidence, 7.

SUBCONTRACTOR. See Liens, 1; Injunctions, 5.

SUBMISSION OF CONTROVERSY. See Actions, 8.

SUBROGATION. See Banks and Banking, 4.

SUBSTITUTION. See Estates, 14.

SUBTERRANEAN WATERS. See Waters, 1.

SUICIDE. See Insurance, 3.

SUITS. See Taxation, 4.

SUNDAY.

1. *Sunday—Sale of Merchandise—Soft Drinks—Ordinances—Cities and Towns.*—An ordinance regulating the sale of merchandise, drinks, etc., on Sunday is a valid exercise of the police powers of an incorporated city or town; and while the service of meals within the town at restaurants, etc., is a necessity, permitting the sale of coffee, tea, etc., the sale of coca-cola as a part of the meals is not included, and a sale thereof as a part of the meal may be prohibited by ordinance. C. S., 2787 (6), (10), (27). *S. v. Weddington*, 643.

SUPERIOR COURTS. See Justices' Courts, 1; Courts, 11, 13.

SUPPLEMENTARY PROCEEDINGS. See Contempt, 1.

SUPREME COURT. See Appeal and Error, 21.

SURFACE WATERS. See Injunction, 6.

TAXATION. See Constitutional Law, 1; Sanitation, 1; Schools, 1; Statutes, 1; Roads and Highways, 1.

1. *Taxation—Statutes—Liens—Vendor and Purchaser.*—Where a manufacturer of automobiles or a receiver appointed for him has failed to pay the license or privilege tax imposed by the Revenue and Machinery acts, C. S., 7987, construed *in pari materia* expressly provides that a lien therefor shall attach to all real estate of the taxpayer situated within the county, etc., and continue until such taxes, with any penalty and cost which shall accrue thereon shall have been paid, and the lien may be enforced by the State, etc., for each tax year accordingly, and a subsequent purchaser of the manufacturing plant is subject to the lien for the nonpayment of the taxes, and it is enforcible against the realty. *Vaughan v. Lacy*, 123.

2. *Taxation—Counties—Municipalities—Correction of Records.*—Where the record of the board of county commissioners, through a clerical error, states that a tax levy for general county purposes is 20 cents on the $100 valuation of property, this error may subsequently be corrected by the board, at its own instance, to correctly show that in fact the levy was actually made for 15 cents for general county purposes, 5 cents thereof being for the improvement of the courthouse and county home, and thus within the constitutional requirement. *R. R. v. Forbes*, 151.

3. *Taxation—Assessments—Actions—Suits—Statutes.*—Under the provisions of C. S., 7979, a taxpayer may pay the tax assessed by the proper county agents under protest, and bring an action at law to recover the amount so paid upon the ground of its illegality, having observed the statutory provisions as to time, notice, etc., or he may apply for injunctive relief upon the ground of the illegality or invalidity of the assessment so made, or that it was for an unauthorized purpose. C. S., 858. *R. R. v. Comrs. of Carteret*, 265.

4. *Same—Unlawful Assessments—Statutes—Notice.*—Where the county list taker has changed the report made by the proper clerk of a railroad company in increasing the amount of taxable personalty given in for taxes, which has been adopted by the county commissioners at its proper meeting, and notice thereof given to the said agent of the railroad, and the notice of this change has been turned over to the company's legal department, but not acted upon until the list has been placed in the sheriff's hand for the collection of the tax thus increased: *Held*, in the suit of the railroad company to restrain the collection of the tax by the sheriff, the plaintiff may not resist the dissolution of the temporary restraining order upon the ground that it had not received the legal notice of the increase after appropriate action had been taken thereon by the county commissioners. C. S., 7897. *Ibid.*

5. *Same—Municipal Corporations—Cities and Towns.*—The valuations properly fixed under the statute by the proper county authorities for purposes of taxation, C. S., 7897, are binding upon cities and towns within the same county. *Ibid.*

6. *Same—Injunctions—Pleadings—Allegations—Evidence.*—Where a tax payer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation. *Ibid.*

TAXATION—*Continued.*

7. *Taxation—Peddler's Tax—Statutes.*—One who travels with an auto-truck loaded with merchandise and delivers goods purchased by retail dealers therefrom, though in the manufacturers' original packages, is a peddler within the terms and intent of our statute requiring the payment of a peddler's tax. *S. v. O'Briant*, 452.

8. *Taxation—Boards of Equalization — Notice to Taxpayers — Constitutional Law—Due Process—Mandamus — Municipal Corporations.*— Where, in pursuance of the provisions of statute, the local authorities for the assessment of personal property of corporations, etc., have approved the reports of the owners of the value thereof for taxation, reported the same to the State board designated for the purpose and no appeal taken from the local board, the State Tax Commission who were the Corporation Commission, without notice or hearing given the owner, may not informally increase the assessment and order the increased taxes to be collected by the local authorities, the same being contrary to the due-process clause of our Constitution, though the increased value has been included in the report by the State Board to the Legislature and the report adopted by statute; and mandamus will not lie to compel the collection thereof by the local county or municipal authorities. *Markham v. Carver*, 615.

9. *Taxation—Inheritance Tax—Statutes—Trusts.*—Where the nonresident owner of shares of stock in a North Carolina corporation incorporates them in a trust terminable by him at his own will at any time, and retains the control and enjoyment of the profits thereof with right to vote the same by proxy whenever he may so elect, and dies without revocation thereof, the same is subject to the inheritance or transfer tax provided by chapter 34, Public Laws 1921, under the provisions of a valid statute. *Bank v. Doughton*, 762.

TELEGRAPHS.

1. *Telegraphs—Negligence—Prima Facie Case—Burden of Proof—Service Messages — Evidence — Nonsuit — Questions for Jury — Mental Anguish.*—When the evidence tending to show that a telegraph company has received a telegram for transmission and has failed to deliver it within a reasonable time, a *prima facie* case of negligence is shown entitling the plaintiff to have the issue passed upon by the jury, with the burden of disproving its negligence on the defendant, and the failure of the defendant to send a service message notifying the sender of its nondelivery is also evidence of its actionable negligence. *Willis v. Tel. Co.*, 114.

2. *Telegraphs—Negligence—Service Messages—Pleadings—Evidence.* — It is not required that the complaint, in an action to recover damages for mental anguish against a telegraph company for negligently failing to deliver a death message within a reasonable time, allege negligence in respect to its failure to send a service message back to the sender informing him of the fact of nondelivery, in order to admit evidence thereof on the trial. *Ibid.*

TENANCY BY THE CURTESY. See Estates, 5; Deeds and Conveyances, 2.

TENDER. See Usury, 2.

TESTIMONY. See Intoxicating Liquor, 2.

TITLE. See Carriers, 1; Partition, 1; Mortgages, 1; Wills, 2; Deeds and Conveyances, 2; Actions, 3.

TORTS. See Municipal Corporations, 3; Principal and Agent, 1; Courts, 13.

TOWNS. See State Highways, 3.

TRADES. See Constitutional Law, 1.

TRANSPORTATION. See Intoxicating Liquor, 3.

TRESPASS. See Municipal Corporations, 4; Injunction, 6.

1. *Trespass—Damages—Condemnation — Municipal Corporations — Cities and Towns—Statutes—Waiver.*—Where a city is sued for damages for running its water-supply pipe on the plaintiff's lands, and it is made to appear that the pipe land is upon the State's highway over the plaintiff's land, the plaintiff, as the dominant owner, may maintain his action, and the denial of this title or right by defendant is a waiver of its right that the plaintiff should have proceeded before the clerk under the statute (C. S., ch. 33) entitled Eminent Domain, sec. 1706; and the plaintiff may maintain his action of trespass in the Superior Court. *Rouse v. Kinston*, 1.

2. *Trespass—Issues.*—The refusal of the trial judge to submit an issue tendered by the party will not be held for error when the one submitted by the court arises upon the pleadings, is supported by the evidence, and is determinative of the question, no particular form therefor being required. *McLauchorn v. Coppage*, 455.

3. *Same—Instructions.*—Where an action of trespass involving title to lands depends upon an issue as to the true dividing line between adjoining owners only, an instruction which confines the verdict to their findings upon the conflicting evidence thereon of the parties is not erroneous. *Ibid.*

TRIALS. See Courts, 1, 9; Criminal Law, 1, 18; Homicide, 1, 5; Statute of Frauds, 1; Appeal and Error, 4; Principal and Agent, 2; Evidence, 1; Carriers, 10, 18; Contracts, 14.

TRIAL BY JURY. See Injunctions, 1.

1. *Trial by Jury—Constitutional Law—Waiver—Statutes.*—The constitutional right to a trial by jury, in civil actions, (Art. IV, sec. 13), may be waived by the parties as provided by our statutes, C. S., 568, 572. *Lumber Co. v. Pemberton*, 532.

2. *Same—Reference—Pleas in Bar—Accounts.*—By excepting to an order of court referring the taking and stating a long account between the parties involved in the controversy as determinative, a party may preserve his right to a trial by jury upon the evidence thus taken, unless he waives his right during the progress of the reference; and while an issue determinative of the action should first be tried before a reference is ordered, a party excepting to the order may not successfully insist thereon when the issue is to be determined solely by the reference provided for by C. S., 573. *Ibid.*

TRIAL DE NOVO. See Justices' Court, 1.

TRUSTS. See Constitutional Law, 2; Courts, 7, 8; Taxation, 9.

1. *Trusts — Husband and Wife — Deeds and Conveyances — Purchase Money—Resulting Trusts.*—A resulting trust in favor of the wife is not created in the husband's favor solely by his paying the purchase price for lands with his own money and taking the deed to his wife, the presumption of a gift arising from the relationship. *Whitten v. Peace*, 298.

TRUST COMPANIES. See Corporations, 7.

TRUSTEES. See Statutes, 2.

TURLINGTON ACT. See Constitutional Law, 5; Intoxicating Liquor, 6, 7.

ULTRA VIRES ACT. See Banks and Banking, 6; Corporations, 6.

USE. See Waters, 3.

USURY. See Injunctions, 4.

1. *Usury—Equity—Injunction—Statutes.*—Where the plaintiffs in two separate actions seek the same equitable relief against the same defendant to enjoin the foreclosure sale of land under mortgage, the one as the original owner of the land and the other his subsequent grantee thereof, they are both proper parties to a consolidation thereof; and an order of court consolidating the cause is proper. *Miller v. Dunn and Abdallah v. Dunn*, 397.

2. *Same—Tender—Legal Interest.*—Upon the principle that he who seeks equity must do equity, the plaintiff in his suit to enjoin the foreclosure of a mortgage upon the ground of usury, must tender the correct amount of the mortgage debt with the legal rate of interest thereon, the remedy to recover under the usury statute being an independent action at law. C. S., 2306. *Ibid.*

3. *Same—Evidence—Issues—Appeal and Error.*—Where the plea of usury (C. S., 2306) is made by the plaintiff in the action to enjoin defendant from the sale of land securing a mortgage note, and there is a dispute as to whether the charge made was usurious, and as to the amount due under the mortgage, it is reversible error for the trial judge to assume the correctness of plaintiff's contentions as a fact, and take the case from the jury accordingly. *Ibid.*

4. *Usury—Banks and Banking—Principal and Agent.*—Our statute on the subject of usury permits only one recovery, and that against the party receiving it; and where one bank acting as agent for another collects such charges only as such agent, receiving no benefits, to the knowledge of the plaintiff, the collecting bank is not liable for such charges, but only the bank for which it was thus acting. *Speas v. Bank*, 524.

5. *Same — Burden of Proof.*—Upon the trial of an action to recover for usury the burden of proof is on the plaintiff throughout the trial to establish his cause of action, and while the defendant may not be required to sustain its defense to introduce evidence in its own behalf, it thereby takes the chances of an unfavorable verdict and its evidence is not required to convince the jury by its preponderance. This principle upon which the doctrine of the burden of proof rests in both civil and criminal cases, discussed by STACY, J. *Ibid.*

VALUE. See Statutes, 11; Banks and Banking, 9.

VARIANCE. See Criminal Law, 19.

VEHICLE. See Intoxicating Liquor, 3.

VENDOR AND PURCHASER. See Carriers, 2; Constitutional Law, 2; Taxation, 1; Contracts, 4; Pleadings, 1.

1. *Vendor and Purchaser—Crops—Liens—Contracts—Waiver.*—Where one having a lien on a crop for advancements is informed by his lien debtor that he has sold a part of the crops to another, and the conditions of the sale, and the lien creditor accepts a part of the money thus obtained by his debtor, it is a ratification of the transaction, and he cannot recover the balance from the purchaser or assert his lien on the crops against him. *Parker v. Harrell*, 337.

VENDOR AND VENDEE. See Principal and Agent, 5.

VERDICT. See Appeal and Error, 3; Judgments, 4, 8; Criminal Law, 11, 15; Courts, 15.

1. *Verdict — Judgment — Commerce — Employer and Employee — Negligence—Statutes.*—In an action to recover damages from a railroad company for the negligent killing of its employee in interstate commerce by reason of defective engine, appliances, etc., the finding by the jury for the plaintiff, interpreted with reference to the pleadings, evidence and instructions in this case, that the defendant's negligence proximately caused the death, is broader than the verdict upon the finding for the defendant, that it was not caused by a violation of the Federal statute enacted for the safety of such employees, and it was not error for the trial judge to render the judgment for damages for the plaintiff. *Gerow v. R. R.*, 76.

2. *Verdicts—Excessive Damages—Court's Discretion—Appeal and Error.*—The action of the trial court in refusing to set aside a verdict for excessive damages is a discretionary matter, and it will not be disturbed on appeal unless it is made to appear that the verdict must have been the result of passion or prejudice. *Willis v. Tel. Co.*, 114.

VESTED INTERESTS. See Wills, 2.

VESTED RIGHTS. See Contracts, 5, 7.

VICE PRINCIPAL. See Employer and Employee, 11.

WAIVER. See Trespass, 1; Insurance, 18; Actions, 2, 6; Carriers, 9; Jury, 2; Appeal and Error, 13; Vendor and Purchaser, 1; Certiorari, 2; Trial by Jury, 1.

WAR. See Courts, 3; Carriers, 12.

1. *War—Limitation of Actions—Statutes.*—The Federal Transportation Act, placing railroads, etc., under Government control as a war measure during the war with Germany, and the later act releasing them therefrom, did not interfere with the commencement of the prosecution of action in the State courts between citizens of the same or different States to recover damages for a breach of contract for the sale of goods; the later act expressly limiting the time to two years thereafter; and an action of this character arising during war

WAR—*Continued.*

control is barred by our State statute of limitations after three years (C. S., 404, 405) from the time of their accrual. *Vanderbilt v. R. R.*, 568.

WARRANTS. See Constitutional Law, 4.

WARRANTY. See Pleadings, 1, 2; Parties, 1.

WATERS.

1. *Waters—Subterranean and Percolating Waters—Damages—Evidence.*—Where a city has dug artesian wells to supply its inhabitants with water, for pay, adjoining or adjacent to the plaintiff's land, causing the water from his artesian wells thereon to be so greatly diminished in volume or flow that it rendered the lands unproductive and deprived him or his tenants of wholesome drinking water, etc., to the impairment of their health, and greatly depreciated the value of the lands, the measure of damages is not confined to the present use of the lands, and the jury may consider any and all the purposes to which the property was reasonably adapted and might with reasonable probability be applied, and award to plaintiff the difference between the fair market price of the lands before and after the defendant's unlawful act. *Rouse v. Kinston*, 1.

2. *Same—Instructions—Appeal and Error.*—Where a city has unlawfully taken the pure water supply for its inhabitants, from an adjacent or adjoining owner of lands, to the injury to his property, by the boring of artesian wells: *Held,* evidence of previous negotiations between the parties looking towards a financial adjustment of the plaintiff's damages, which had never been consummated, is not reversible error, when the trial judge has instructed the jury they could only consider it as fixing the defendant city with notice that damages would follow to the plaintiff from the boring of the defendant's artesian wells. *Ibid.*

3. *Same—Reasonable Use.*—The owner of lands is only entitled to the reasonable use of percolating waters collected in subterranean channels on his own lands; and where a city has dug artesian wells for the water supply of its inhabitants, so as to practically exhaust the supply to the artesian wells of an adjoining owner, to the injury of the productiveness of his lands and the health of his tenants, it is responsible in damages to the plaintiff for the injury to his lands thereby caused; and the English common-law doctrine to the contrary is inapplicable under our statute, C. S., 970. *Ibid.*

4. *Waters—Power Plants—Condemnation — Prior Rights — Judgment — Estoppel.*—After a water-power company having the statutory authority has staked off upon the lands and mapped its location, in condemnation, and has commenced and is proceeding without unreasonable delay, in good faith, to develop the water-power thereon, another such company may not acquire by condemnation subsequently any portion of the land for such purposes thus designated: and where a portion thereof has been unlawfully sought to be thus condemned, and the court has so determined, the case is conclusive as to another portion thereof thus situated, under the principle that it either was or should have been litigated in the former action. *Power Co. v. Power Co.*, 128.

WATERS—*Continued.*

5. *Same—Constitutional Law.*—The superior right to a water-power prior acquired, under condemnation, to that attempted to have been later acquired under such proceedings, is not a special privilege prohibited by the Fourteenth Amendment to the Federal Constitution. *Ibid.*

WATER COMPANIES. See Contracts, 6.

WIDOWS. See Courts, 8.

WILLS. See Mortgages, 3; Estates, 2, 12, 16; Judgments, 7.

1. *Wills—Devises—Lapsed Legacies—Statutes—Death of Beneficiary in Lifetime of Testator.*—A devise to the son of a portion of the testator's lands, who died during the life of the testator, leaving children who survive the testator, does not lapse, but goes to his children, the grandchildren of the testator, at the latter's death, under the provisions of C. S., 4168, no contrary intent of the testator appearing by a construction of his will. *Askew v. Dildy*, 147.

2. *Wills—Devise—Estates—Contingent Remainders—Title—Vested Interests—Statutes.*—Where the testatrix devises absolutely her undivided land to her two sons, and by codicil devises to each a certain part thereof, that portion designated as lot No. 1 to one of them, and lot No. 2 to the other, with further provision, should either of them die leaving a child or children, said child or children shall be entitled to his or her parent's part: *Held*, the title to the lands vested in the son living at the time of the death of the testatrix, and was not postponed to await the uncertain event of the death of the son without leaving child or issue. *Dupree v. Daughtridge*, 193.

3. *Wills — Executors and Administrators — Nonresidents — Witnesses — Statutes.*—Where a nonresident testator has left a will disposing of certain lands in this State, including his wife as a beneficiary, with two witnesses required by C. S., 4131, an affidavit he has attached thereto as a part thereof, stating that none of his wife's money had been used in his acquisition of the lands disposed of, signed without witnesses, cannot alone be construed as showing an *animo testandi*, or as having the effect of passing thereunder any of the testator's lands here situated under the will to which it was attached: *Semble*, a will properly attested and otherwise sufficient under the laws of another State would operate to pass title to lands situated here. C. S., 4152. *Whitten v. Peace*, 298.

4. *Wills—Devise—Election of Remedies—Heirs at Law.*—Where a testator has devised his lands, excluding those his wife attempted to convey to him under a void deed, the acceptance of benefits under the will does not put her heirs at law to their election to take the lands described in her void deed as her heirs at law. *Ibid.*

5. *Wills—Holograph Wills—Evidence—Ambiguity—Intent — Appeal and Error.*—Upon the trial of a caveat to a holograph will, when an inquiry in the issue is to the intent of the testatrix to make the will, or the *animus testandi* wherein the caveator's interest as an heir at law was practically omitted, evidence as to the relationship or regard the testatrix had for the caveator is admissible upon the question of the intent of the testatrix to make a will, though it be of such a character that might influence the sympathy of the jury in the caveator's favor. *In re Southerland*, 325.

WILLS—*Continued.*

6. *Wills—Evidence—Intent—Burden of Proof—Instructions.*—Where the *animus testandi* does not appear by construction of the instrument itself offered as a last will and testament, but is left uncertain, it is competent to show it or disprove it by parol or extrinsic evidence for the jury to decide; and an instruction on this phase of the case does not affect the burden of proof to the propounder's prejudice after the execution of the paper-writing has been prima facie proven by him. *Ibid.*

7. *Wills—Signature—"Mother."*—The signature of the word "Mother" to a paper-writing offered as a holograph will is sufficient if it is shown that the maker adopted it as her own for the purpose of executing the instrument. *Ibid.*

8. *Wills—Equity—Conversion—Descent and Distribution.*—Whether lands directed by the testator to be sold shall be regarded as personalty in whole or in part, under the doctrine of equitable conversion, depends upon his intent as gathered from his will; and a direction that his executor sell certain of his lands to pay his debts, and should a surplus remain to pay it in certain amounts to designated beneficiaries, evidences his intent that the full proceeds of the sale should be regarded as personalty, and after satisfying the bequests, the remainder, as personalty, is subject to the appropriate canon of distribution. *Woodward v. Bell*, 505.

9. *Wills—Devise—Estates—Defeasible Fee Simple.*—A devise of lands to testator's wife in fee simple, with limitation over should she die intestate, vests in her, surviving her husband, a fee-simple estate defeasible upon the happening of the contingency of her dying intestate. *Foy v. Foy*, 518.

10. *Same—Residuary Clauses.*—A wife took under the will of her husband his entire estate, including lands, with certain specific exceptions, defeasible upon her dying intestate and left a will specifically disposing of the same among numerous beneficiaries, and by Item VIII, gave all that she had not mentioned to R., the nephew of her husband and his wife, which included the land in dispute. *Held*, by a proper interpretation of the entire will, she died testate as to this land, and it did not go under a different item of the will to the heirs of both. *Ibid.*

11. *Wills—Caveat—Evidence—Nonsuit—Actions—Parties.*—Proceedings to caveat a will are *in rem* involving the rights of the beneficiaries as named in the will, and those of the opposing heirs at law or next of kin depending upon the answer to the issues of *devisavit vel non*, and there being no parties, strictly speaking, upon whom a judgment as of nonsuit may be taken, the issue should be tried in the due course and practice of the court, and a motion as of nonsuit should be denied. *In re Westfeldt*, 702.

12. *Wills—Evidence—Holograph Wills.*—Evidence that a paper-writing purporting to be the last will and testament of the deceased, wholly written and signed by her, was found among her valuable papers after her death, in a desk where she kept her business papers, and those she desired to keep for their sentimental value to herself, and transferred

WILLS—*Continued.*

after her death to her trunk where they were found is *held* sufficient, under the circumstances of this case to sustain the verdict of the jury and deny the caveator's motion as of nonsuit. *Ibid.*

13. *Same—Mental Capacity—Statutes.*—There being evidence upon the trial of the issue of *devisavit vel non* that the deceased had sufficient mental capacity to execute the paper-writings being propounded as her will, that she was aware of the nature, extent and value of the property, and those whom she wished to have it, etc., the issue was properly submitted to the jury. C. S., 4144. *Ibid.*

14. *Wills—Holograph Wills—Witnesses—Beneficiaries—Void Legacies—Statutes.*—One who is a beneficiary under a holograph will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. C. S., 1792, 1793. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witnesses thereto. C. S., 4138. *Ibid.*

15. *Wills—Interpretation—Several Writings—Repugnancy—Implied Revocation.*—Where there are several papers purporting to be a valid holograph will, reconcilable in their terms, the fact that none of them were dated or the time of their execution offered in evidence is not material, and the principle that a later will inconsistent with a former one repeals the latter to the extent of the repugnancy, has no application. *Ibid.*

16. *Wills—Probate—Evidence—Statutes.*—The record and probate of a will according to law is conclusive as to its validity, when not vacated on appeal nor declared void by a competent tribunal, and the executor named has duly qualified and is engaged in the performance of his duties as such without any legal objection having been interposed. C. S., 4145, 4161. *Bank v. Dustowe*, 777.

17. *Same—Parties—Statutes—Agreements—Courts—Jurisdiction.*—Persons who are interested neither as heirs at law of the deceased nor as beneficiaries under the writing propounded as the will, are neither necessary nor proper parties to a case agreed to interpret its provisions, nor to set it aside, nor to assert that an order made by the court be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. C. S., 446. It is otherwise as to one who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon. *Ibid.*

18. *Same—Consent.*—Necessary parties to an action concerning the interpretation of a will are barred by their own consent to submit an agreed case, etc., and their acquiescence in a motion made by others, not necessary or proper parties, cannot affect the judgment accordingly rendered by the court. *Ibid.*

WITNESSES. See Wills, 3, 14; Criminal Law, 13; Statutes, 7.

1. *Witnesses—Expert—Questions of Law—Evidence—Appeal and Error.*—It is a question of law for the court, and not of fact for the jury, whether a witness, who is introduced as such, is an expert; and if

WITNESSES—*Continued.*

there is any evidence tending to establish this as a fact, the affirmative holding of the trial judge is not reviewable on appeal. *Shaw v. Handle Co.*, 222.

2. *Same—Negligence—Poison—Gases—Evidence.*—Where there is other evidence tending to show that the death of defendant's employee was caused by the negligence of the defendant, in an action to recover damages therefor, a physician, who has qualified as an expert, and who may testify from his personal observation and investigation thereof, is also competent to testify to his opinion that the intestate's death was caused, as in this case, by poisonous gases from an improperly constructed or worn-out parts of a gas engine operating a motor boat in which the intestate was riding in an enclosed cabin, when relevant to the inquiry. *Ibid.*

3. *Same—Evidence—Questions for Jury—Trials.*—The testimony of an expert is not admissible upon matters of judgment within the knowledge or experience of ordinary jurymen. *Ibid.*

4. *Same.*—Where there is evidence tending to show that the plaintiff's intestate met his death by poisonous gases from an improperly constructed gas engine in a boat wherein he was riding, and furnished by the defendant, his employer, to be used within the scope of his duties, testimony of an expert in such matters that he had examined the engine after the injury, and its imperfect condition was such as to give out the poisonous gases, is competent, when there is also evidence tending to show that the conditions testified to by him had existed at the time of the intestate's death. *Ibid.*

5. *Same—Nonsuit.*—Where there is evidence tending to show that the defendant, in an action to recover damages for the wrongful death of plaintiff's intestate alleged to have been caused by the defendant's negligence, had hired, through its vice-principal, a gas motor boat for the use of the intestate in the scope of his employment, on which the gas engine, owing to its wornout or imperfect condition, gave off poisonous gases under circumstances that caused the death of the intestate: *Held*, sufficient to take the case to the jury and to deny defendant's motion as of nonsuit. *Ibid.*

WORK AND LABOR. See Employer and Employee, 2; Evidence, 10.

WRITTEN INSTRUMENTS. See Wills, 15.