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VOLUME 189

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NORTH CAROLINA REPORTS
VOL. 189

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1924
SPRING TERM, 1925

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
STATE PRINTERS
1925

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Rule 46 of the Supreme Court is as follows:

Inasmuch as all the Reports prior to the 63d have been reprinted by the State, with the number of the Volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C., as follows:

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1 Dev. & Bat. Eq.	"	21	"	6 " "	"	51	"
2 " "	"	22	"	7 " "	"	52	"
1 Iredell Law	"	23	"	8 " "	"	53	"
2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	1 and 2 Winston	"	60	"
				Phillips Law	"	61	"
				" Eq.	"	62	"

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i. e.*, the original) paging, except 1 N. C. and 20 N. C., which have been repaged throughout without marginal paging.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1925

CHIEF JUSTICE:

WILLIAM A. HOKE.*

W. P. STACY.*

ASSOCIATE JUSTICES:

W. J. ADAMS,

HERIOT CLARKSON,

GEORGE W. CONNOR,

L. R. VARSER.*

ATTORNEY-GENERAL:

DENNIS G. BRUMMITT.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD C. SEAWELL.

MARSHAL AND LIBRARIAN:

MARSHALL DeLANCEY HAYWOOD.

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*Chief Justice Hoke resigned 16 March, 1925, on account of the condition of his health, and was succeeded by Associate Justice Stacy, who in turn was succeeded as Associate Justice by Hon. L. R. Varser.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
W. M. Bond	First	Edenton.
M. V. Barnhill	Second	Rocky Mount.
G. E. Midyette	Third	Jackson.
F. A. Daniels	Fourth	Goldsboro.
Albion Dunn	Fifth	Greenville.
Henry A. Grady	Sixth	Clinton.
T. H. Calvert	Seventh	Raleigh.
E. H. Cranmer	Eighth	Southport.
N. A. Sinclair	Ninth	Fayetteville.
W. A. Devin	Tenth	Oxford.

WESTERN DIVISION

H. P. Lane	Eleventh	Reidsville.
Thomas J. Shaw	Twelfth	Greensboro.
A. M. Stack	Thirteenth	Monroe.
W. F. Harding	Fourteenth	Charlotte.
John M. Oglesby	Fifteenth	Concord.
J. L. Webb	Sixteenth	Shelby.
T. B. Finley	Seventeenth	Wilkesboro.
Michael Schenck	Eighteenth	Hendersonville.
P. A. McElroy	Nineteenth	Marshall.
T. D. Bryson	Twentieth	Bryson City.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. SMALL	First	Elizabeth City.
DONNELL GILLIAM	Second	Tarboro.
R. H. PARKER	Third	Enfield.
CLAWSON L. WILLIAMS	Fourth	Sanford.
JESSE H. DAVIS	Fifth	New Bern.
JAMES A. POWERS	Sixth	Kinston.
W. F. EVANS	Seventh	Raleigh.
WOODUS KELLUM	Eighth	Wilmington.
T. A. MCNEILL	Ninth	Lumberton.
L. P. MCLENDON	Tenth	Durham.

WESTERN DIVISION

S. PORTER GRAVES	Eleventh	Mount Airy.
J. F. SPRUILL	Twelfth	Lexington.
F. D. PHILLIPS	Thirteenth	Rockingham.
JOHN G. CARPENTER	Fourteenth	Gastonia.
ZEB. V. LONG	Fifteenth	Statesville.
R. L. HUFFMAN	Sixteenth	Morganton.
JOHNSON J. HAYES	Seventeenth	N. Wilkesboro.
J. W. PLESS, JR.	Eighteenth	Marion.
J. E. SWAIN	Nineteenth	Asheville.
GROVER C. DAVIS	Twentieth	Waynesville.

LICENSED ATTORNEYS

SPRING TERM, 1925

License to practice law in North Carolina was granted by the Supreme Court, Spring Term, 1925, to the following:

ADAMS, META.....Raleigh.
BARNHARDT, LUTHER ERNEST.....Concord.
BELLAMY, CLAYTON GILES.....Wilmington.
BENFORD, LEE GRIFFITH.....Wake Forest.
BLOUNT, SAMUEL MASTERS.....Washington.
BOWERS, VALENTINE BROADWAY, JR.....Elk Park.
BREARTON, MICHAEL JOSEPH, JR.....Charlotte.
BRYSON, THADDEUS DILLARD, JR.....Bryson City.
BUNDY, CHARLES WARE.....Monroe.
BURNS, THOMAS ALEXANDER.....Asheboro.
BUTLER, MARION.....Winston-Salem.
CARTER, FOSTER PERCY.....West Asheville.
CAUDELL, PAUL JAMES.....St. Pauls.
COGBURN, CHESTER AMBERG.....Canton.
COPELAND, HUGH BLAND.....Edenton.
COWARD, HUBERT EARL.....Kinston.
CRISP, ALFRED REESE.....Collettsville.
FALK, HERBERT SEESHOLTZ.....Newport News, Va.
FLOWERS, ELIJAH DANIEL.....Knightdale.
GALLOWAY, LAMAR QUINTIUS.....Brevard.
GIBSON, JEFFERSON DAVIS.....Hamlet.
HARRILL, MCKINLEY.....Charlotte.
HANNAH, CARRIE DYNE EDMUND.....Lumberton.
HERMAN, BEN.....High Point.
HORNER, FENTRESS THOMPSON.....Gatesville.
HOWIE, CALVIN SCOTT.....St. Pauls.
HUMPHREY, WILLIAM HARRELL, JR.....Lumberton.
JONES, CLAUDE VENICE.....Elizabeth City.
JONES, RICHARD SLOAN.....Franklin.
KING, WILLIAM GREENE.....Clinton.
KITCHIN, CLEMENT SATTERFIELD.....Scotland Neck.
LANCASTER, DAVID BARLOW, JR.....St. Pauls.
LEWIS, JOSEPH FRANCIS.....Henderson.
MACRAE, CHARLES BROADFOOT.....Fayetteville.
MASON, OSCAR FERDINAND, JR.....Gastonia.
MEEKINS, PERCY WILBUR.....Manteo.
MITCHELL, EUGENE CAPERS.....Brevard.
NEAL, THOMAS GILL.....Laurinburg.
OWENS, EDWARD LINDSAY.....Plymouth.
PEARCE, MAURICE CLIFFORD.....Youngsville.
POINDEXTER, CHARLES CRAWFORD.....Franklin.
ROBINSON, GEORGE FLEMING.....Weaverville.
ROOKER, WILLIAM HENRY.....Norlina.
ROOT, JOHN CALVIN.....Raleigh.
SHARP, JOHN DAVIS.....Winston-Salem.

SPRINGLE, GEORGE WASHINGTON.....Raleigh.
STAMEY, MONIE G.....Candler.
STEVENS, HERMAN MAURICE.....Leicester.
STROUD, CHARLES EDWARD.....Greensboro.
SUMMERSILL, RETUS NOBE.....Jacksonville
THIGPEN, RICHARD ELTON.....Durham.
THORPE, RICHARD YOUNG.....Rocky Mount.
TILLETT, BOONE DOWDY.....Raleigh.
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TREXLER, CHARLES OTHO PORTERFIELD.....Rockwell.
WHEDBEE, WILLIAM LIPSCOMB.....Greenville.
WHITAKER, FRANK HARRELL.....Elkin.
WHITMAN, EUGENE MCKINLEY.....Lewisville
WINBERRY, CHARLES BRYANT.....Kellum.
ZOLLICOFFER, JOHN HILLIARD.....Henderson.

Under Comity Act:

BIRKBY, WILLIAM THOMAS.....Illinois.
HOLMAN, ALFRED WANNAMAKER.....South Carolina.
WEST, ROBERT JESSE.....Mississippi.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL TERM 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:

	FALL TERM, 1925
First District	September 1
Second District	September 8
Third and Fourth Districts	September 15
Fifth District	September 22
Sixth District	September 29
Seventh District	October 6
Eighth and Ninth Districts	October 13
Tenth District	October 20
Eleventh District	October 27
Twelfth District	November 3
Thirteenth District	November 10
Fourteenth District	November 17
Fifteenth and Sixteenth Districts	November 24
Seventeenth and Eighteenth Districts	December 1
Nineteenth District	December 8
Twentieth District	December 15

SUPERIOR COURTS, FALL 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

FALL TERM, 1925—*Judge Calvert.*

Camden—Sept. 28.
Beaufort—July 27*; Oct. 5† (2); Nov. 23; Dec 21†.
Gates—Aug. 3; Dec. 14.
Tyrrell—Nov. 30.
Currituck—Sept. 7.
Chowan—Sept. 14; Dec. 7.
Pasquotank—Aug. 24*; Sept. 21†; Nov. 9‡; Nov. 16†.
Hyde—Oct. 19.
Dare—Oct. 26.
Perquimans—Nov. 2.

SECOND JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Cranmer.*

Washington—July 13; Oct. 26.
Nash—Aug. 24*; Oct. 12†; Nov. 30*; Dec. 7†.
Wilson—Sept. 7; Oct. 5†; Nov. 2† (2); Dec. 21.
Edgecombe—Sept. 14; Oct. 19; Nov. 16† (2).
Martin—Sept. 21 (2); Dec. 14.

THIRD JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Sinclair.*

Northampton—Aug. 3‡; Nov. 2 (2).
Hertford—July 27*; Oct. 19 (2); Dec. 14† (2).
Halifax—Aug. 17 (2); Oct. 5† (A) (2); Nov. 30 (2).
Bertie—Aug. 31 (2); Sept. 14†; Nov. 16 (2).
Warren—Sept. 21 (2).
Vance—Oct. 5*; Oct. 12†.

FOURTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Devin.*

Lee—July 20 (2); Sept. 21†; Nov. 2; Nov. 9†.
Chatham—Aug. 3† (2); Oct. 26*.
Johnston—Aug. 17*; Sept. 28† (2); Dec. 14 (2).
Wayne—Aug. 24 (2); Oct. 12† (2); Nov. 30 (2).
Harnett—Sept. 7; Sept. 14†; Nov. 16† (2).

FIFTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Bond.*

Pitt—Aug. 24†; Aug. 31; Sept. 14†; Sept. 28†; Oct. 26†; Nov. 2.
Craven—Sept. 7*; Oct. 5† (2); Nov. 23† (2).
Carteret—Oct. 19; Dec. 7†.
Pamlico—Nov. 9 (2).
Jones—Sept. 21.
Greene—Dec. 14 (2).

SIXTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Barnhill.*

Onslow—July 20†; Oct. 12; Nov. 23† (2); Dec. 7†.
Duplin—July 13*; Aug. 31† (2); Oct. 5*; Dec. 7; Dec. 14†.
Sampson—Aug. 10 (2); Sept. 14† (2); Oct. 26 (2).
Lenoir—Aug. 24*; Oct. 19; Nov. 9† (2); Dec. 14*.

SEVENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Midyette.*

Wake—July 13*; Sept. 14*; Sept. 21 (2); Oct. 5†; Oct. 12*; Oct. 26† (2); Nov. 9*; Nov. 30† (2); Dec. 14* (2).
Franklin—Aug. 31† (2); Oct. 19*; Nov. 16† (2).

EIGHTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Daniels.*

New Hanover—July 27*; Sept. 14*; Sept. 21†; Oct. 19† (2); Nov. 16*; Dec. 7† (2).
Pender—Sept. 28; Nov. 2† (2).
Columbus—Aug. 24 (2); Nov. 23† (2).
Brunswick—Sept. 7†; Oct. 5.

NINTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Dunn.*

Robeson—July 13* (2); Sept. 7† (2); Oct. 5† (2); Nov. 9*; Dec. 7† (2).
Bladen—Aug. 10*; Oct. 19†.
Hoke—Aug. 17 (2); Nov. 16.
Cumberland—Aug. 31*; Sept. 21† (2); Oct. 26 (2); Nov. 23*.

TENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Grady.*

Alamance—Aug. 17*; Sept. 7† (2); Nov. 30*.
Durham—July 20*; Sept. 21† (2); Oct. 12*; Nov. 2† (2); Dec. 7*.
Granville—July 27; Oct. 26†; Nov. 16 (2).
Orange—Aug. 31; Oct. 5†; Dec. 14.
Person—Aug. 10; Oct. 19.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Finley.*

Ashe—July 13† (2); Oct. 19*.
Forsyth—July 27* (2); Sept. 14† (2); Oct. 5 (2); Nov. 9† (2); Dec. 7† (A); Dec. 14*.
Rockingham—Aug. 10* (2); Nov. 23† (2).
Caswell—Aug. 24; Dec. 7.
Alleghany—Sept. 28.
Surry—Aug. 31 (2); Oct. 26 (2).

TWELFTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Schenck.*

Davidson—July 20† (2); Aug. 24*; Sept. 14†; Nov. 23 (2).
Guilford—Aug. 3*; Aug. 10† (2); Aug. 31† (2); Sept. 21* (2); Oct. 5† (2); Nov. 2† (2); Nov. 16*; Dec. 7† (2); Dec. 21*.
Stokes—July 13†; Oct. 19*; Oct. 26†.

THIRTEENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge McElroy.*

Stanly—July 13; Oct. 12†; Nov. 23.
Richmond—July 20†; July 27*; Sept. 7†; Oct. 5*; Nov. 9†.
Union—Aug. 3*; Aug. 24† (2); Oct. 19; Oct. 26†.
Anson—Sept. 14*; Sept. 28†; Nov. 16†.
Moore—Aug. 17*; Sept. 21†; Dec. 14†.
Scotland—Nov. 2†; Nov. 30 (2).

FOURTEENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Bryson.*

Mecklenburg—July 13* (2); Aug. 31*; Sept. 7† (2); Oct. 5*; Oct. 12† (2); Nov. 2† (2); Nov. 16*; Nov. 23† (2).
Gaston—Aug. 17†; Aug. 24*; Sept. 21† (2); Oct. 26*; Dec. 7† (2).

FIFTEENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Lane.*

Montgomery—July 13; Sept. 28†; Oct. 5.
Randolph—July 20† (2); Sept. 7*; Dec. 7 (2).
Iredell—Aug. 3† (2); Nov. 9 (2).
Cabarrus—Aug. 17 (3); Oct. 19 (2).
Rowan—Sept. 14 (2); Oct. 12†; Nov. 23 (2).

SIXTEENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Shaw.*

Catawba—July 6 (2); Sept. 7† (2); Nov. 16*; Dec. 7†.
Lincoln—July 20; Oct. 11; Oct. 26†.
Cleveland—July 27 (2); Nov. 2 (2).
Burke—Aug. 10 (2); Sept. 28† (3); Dec. 14* (2).
Caldwell—Aug. 24 (2); Nov. 30 (2).

SEVENTEENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Stack.*

Alexander—Sept. 21 (2).
Yadkin—Aug. 24*; Dec. 14† (2).
Wilkes—Aug. 10 (2); Oct. 5† (2).
Davie—Aug. 31; Dec. 7†.
Watauga—Sept. 7 (2).
Mitchell—July 27†; Nov. 16 (2).
Avery—July 6† (3); Oct. 19 (2).

EIGHTEENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Harding.*

Transylvania—July 27† (2); Dec. 7 (2).
Henderson—Oct. 5 (2); Nov. 16† (2).
Rutherford—Aug. 24† (2); Nov. 2 (2).
McDowell—July 13 (2); Sept. 21 (2).
Yancey—Aug. 3†; Oct. 19 (2).
Polk—Sept. 7 (2).

NINETEENTH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Oglesby.*

Buncombe—July 13† (2); July 27; Aug. 3† (2); Aug. 17; Aug. 31; Sept. 7† (2); Sept. 21; Oct. 5† (2); Oct. 19; Nov. 2† (2); Nov. 16; Nov. 30; Dec. 7† (2); Dec. 21.
Madison—Aug. 24; Sept. 28; Oct. 26; Nov. 23.

TWENTIETH JUDICIAL DISTRICT

FALL TERM, 1925—*Judge Webb.*

Haywood—July 13 (2); Sept. 21† (2); Nov. 30 (2).
Cherokee—Aug. 10 (2); Nov. 9 (2).
Jackson—Oct. 12 (2).
Swain—July 27 (2); Oct. 26 (2).
Graham—Sept. 7 (2).
Clay—Oct. 5.
Macon—Aug. 24 (2); Nov. 23.

*For criminal cases only.
†For civil cases only.
‡For jail and civil 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. H. H. FORD, Deputy Clerk, Wilmington.

Fayetteville, 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.

Shelby, fourth Monday in September and third Monday in March. E. S. WILLIAMS, Deputy Clerk, Charlotte.

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.
F. C. PATTON, Assistant United States Attorney, Charlotte.
BROWNLOW JACKSON, United States Marshal, Asheville.
R. L. BLAYLOCK, Clerk United States District Court, Greensboro.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1924.

A. H. HURWITZ AND B. HURWITZ v. CAROLINA SAND AND GRAVEL COMPANY AND JOHN A. ROYALL.

(Filed 24 January, 1925.)

Injunction—Receiver—Accounting—Bond—Alternate Remedies—Courts.

Injunctive relief will be afforded by equity when necessary to preserve the property rights of the party seeking it, but not when other and less drastic remedies will adequately do so; and where it appears that a gravel company, employing labor, and its operations affecting commercial conditions, is sought to be enjoined from exercising a continuous mining right, under its contract with the plaintiff, on the ground that, according to the necessarily incomplete information of the plaintiff, the defendant is not paying for the gravel under its agreement, according to tonnage mined: *Held*, the defendant, being in possession, and with the knowledge of the tonnage mined and being mined, should either give bond and file an accounting with the clerk of the court at stated periods, or a receiver should be appointed (C. S., 860), or, as a last resort, the injunctive relief granted, each of these remedies to be applied by the trial judge according to the necessities of the case, after inquiry into the relevant facts.

APPEAL by plaintiffs from *Lane, J.*, order, at chambers, 3 September, 1924, denying the motion of the plaintiffs for an injunction until the hearing.

The defendant, Royall, was not served with summons.

The contentions of the parties are as follows:

The plaintiffs allege that they sold and conveyed to John A. Royall, who sold to the defendant, Carolina Sand and Gravel Company, the sand, gravel and stone upon certain land in Moore County, to be quar-

ried, washed and removed, as appears by copy of the contract attached to the complaint; that the consideration for said sand, etc., as set forth in the contract, is as follows:

"The grantee, for himself, his heirs, administrators, executors and assigns, hereby contracts and agrees to pay to the said grantors, their heirs and assigns, a royalty of one cent per ton for every ton of said gravel, sand and stone removed from said two tracts of land, and guarantees that the royalties shall not be less than $600 per year for the period of five years from 15 June, 1919, payable quarterly; and it is hereby acknowledged, understood and agreed that the said grantee has this day paid to the said grantors $1,000 in cash, to be applied on the payment of said royalties at the rate of $200 per year for five years from 15 June, 1919, and if said royalties do not amount to $600 per year, then the said grantee, his heirs, administrators, executors, successors and assigns agree to pay to said grantors, their heirs, administrators, executors, successors and assigns such sum of money which, when added to said $200 part of said $1,000 paid as above stated, said royalties will equal the said amount of $600 per year, but if said royalties amount to more than $600 per year, said grantee, his heirs, administrators, executors, successors and assigns, shall pay said grantors, and their heirs, administrators, executors, successors and assigns, the amount of money which with the $200 before mentioned will amount to one cent per ton for all gravel, sand and stone removed from said two tracts of land for a period of five years from 15 June, 1919, and after the expiration of five years the said grantee, for himself, his heirs, administrators, executors, and successors and assigns, agree to pay said grantors, and their heirs, administrators, executors, successors and assigns, a royalty of one cent per ton for all gravel, stone and sand removed from said two tracts of land.

"And it is understood and agreed that if the grantee, his heirs, successors, administrators, executors and assigns shall default in the payment of the sums of money or royalties hereinbefore mentioned for the period of six months from the time they become due, then that all the rights and privileges, title and interest herein conveyed shall revert to the grantors, their heirs, administrators, executors, successors and assigns, and thereupon the grantors, their heirs, administrators, executors, successors and assigns, and the grantee, his heirs, administrators, executors, successors and assigns, shall be relieved from all obligations hereunder, except that under no circumstances shall the grantee, his heirs, administrators, executors, successors and assigns, be relieved from paying at least $600 per year, as above specified, during a period of five years, to the said grantors, their heirs, administrators, executors, successors and assigns.

"It is further agreed that when at any time before the expiration of five years from 15 June, 1919, as much as two thousand dollars royalties have been paid, exclusive of the one thousand dollars already paid, then and in that event the guarantee of $600 per year above provided shall cease, and from then on the grantee, his heirs and assigns, shall pay the grantors, their heirs and assigns, quarterly, one cent per ton for all gravel, sand and stone removed as aforesaid."

The contract further provides that the obligations imposed on John A. Royall and his heirs and assigns shall in like manner be imposed on his assigns, etc., in the present case the defendant Carolina Sand and Gravel Co. The contract further provides that Royall or his assigns "hereby agrees to keep a true and strict account of all gravel, sand and stone removed from said two tracts of land, and to furnish to the said grantors, and their heirs, administrators and assigns, an itemized statement of the same quarterly from the 15th day of June, 1919."

The complaint alleges:

"That owing to the geographical and physical shape, form, curvature, topography and condition of the surface of the land above described before entry thereon by the defendants for their mining operations in the removal of the sand, gravel and stone under the contract with plaintiffs as above set out, which sand, gravel and stone has been removed by the defendants in their mining operations in the manner and to the extent above set out, it is impossible for the plaintiffs to allege with certainty the tonnage of sand, gravel and stone removed from said lands by the defendants and for which the defendants are liable to plaintiffs, but from the best information obtainable with regard thereto, plaintiffs allege that defendants have removed from said lands more than 3,673,269 tons of sand, gravel and stone, and there is now due and owing plaintiffs in royalties by defendants therefor the sum of more than $33,732.69 for said land, gravel and stone.

"That the Carolina Sand and Gravel Company are now trespassing on said lands by continuing to remove therefrom the sand, gravel and stone of plaintiffs in large quantities, appropriating the same to its own use and refusing to account to plaintiffs therefor or to pay for same, to the untold hurt and irreparable damages of the plaintiffs."

The defendant, Carolina Sand and Gravel Co., answered the complaint and admitted the execution of the contract set out in the complaint from the plaintiffs to John A. Royall and from Royall to the answering defendant, but denied all other material allegations of the complaint. The contracts were duly recorded.

Upon hearing the motion for restraining order at chambers, the same was denied and the plaintiffs excepted, assigned error and appealed to the Supreme Court.

W. R. Clegg for plaintiff.
H. F. Seawell for defendant.

CLARKSON, J. Jeremy defines an injunction to be "a writ framed according to the circumstances of the case, commanding an act which this Court regards essential to justice, or restraining an act which it esteems contrary to equity and good conscience." Jeremy's Eq., p. 307.

"Injunction has been styled the 'strong arm' of equity to be used only to prevent irreparable injury to him who seeks its aid. . . . As a remedy for preventing wrongs and preserving rights the injunction has been regarded as more flexible and adjustable to circumstances than any other process known to law. The correctness of this estimate is seen in the readiness with which injunctions yield to the convenience of parties; the ease with which damages are substituted in their place when justice and the public interest so require; the facility with which a preventative and a mandatory injunction are made to coöperate so that by a single exercise of equitable power an injury is both restrained and repaired; and the facility with which injunctive relief can be applied to new conditions and adjusted to the changing emergencies of modern enterprise." Joyce on Injunctions, Vol. 1, part of sec. 2, pp. 4, 5.

In 14 R. C. L., part of sec. 43, it is said: "Inadequacy of the remedy at law is the basis on which a court of equity founds the exercise of its power to afford relief by injunction. If it appears to the satisfaction of the court that a person has a property right and that he has no means of protecting it from injury at the hands of another, the court may then exercise its extraordinary power."

C. S., 843, in part, is as follows:

"A temporary injunction may be issued by order in accordance with the provisions of this article. The order may be made by any judge of the Superior Court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

"1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or

"2. When during the litigation, it appears by affidavit that a party thereto is doing, or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual."

C. S., 860, in part, is as follows:

"A receiver may be appointed—

"1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court."

It will be noted that these statutes give broad and liberal powers.

In *Lumber Co. v. Wallace,* 93 N. C., p. 27, *Merrimon, J.,* in construing the above sections of The Code, says: "The provisions of The Code, secs. 338 and 379 (C. S., 843 and 860, *supra*), in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration, or the continuance, of wrong in respect to the subject-matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of these remedial agencies, and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified, or to grant perpetual injunctions in proper cases and the like relief." . . . (p. 30). "It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done, unless in extreme cases, and this is not such an one. The court made its order granting an injunction until the hearing. This order must be so modified as to require the plaintiffs to execute a bond with approved security in such sum as the court may deem proper, payable to the defendants claiming the property, conditioned that the plaintiffs will pay to them all such damages and sums of money as the court may adjudge against them and in favor of the defendants upon the final determination of this action; and so, also, to appoint a receiver, who shall take, state and keep an accurate account of the timber that the plaintiffs shall now have on hand, and such as they shall cut henceforth until the final hearing of the action upon its merits, and make report to the court of his action as such receiver; and, further, so as to restrain the plaintiffs from removing such timber, or any part thereof, until the receiver shall take the account thereof as required by the order of the court appointing him. But if the plaintiffs cannot or will not give such bond, the court shall make such further order as to it may seem meet and just." *Lewis v. Lumber Co.,* 99 N. C., p. 11.

Walker, J., in *Stewart v. Munger,* 174 N. C., p. 402, going into this matter thoroughly, citing and approving the cases, *supra,* and reason-

ing of *Merrimon, J.*, says, at p. 407: "While we are of the opinion that plaintiff is entitled to relief, we do not deem it necessary in this case, upon a review of the pleadings and affidavits, that resort should be had to so drastic a remedy as that of injunction, because we believe that the plaintiff's rights may be fully secured to him without seriously interfering with the operation of the defendant's extensive plant, which it has constructed at great expense to carry on the business of cutting and removing the timber for commercial purposes. Several of our cases justify a milder process for dealing with the matter, and we think it should be adopted, especially as plaintiff has been somewhat slow, if not remiss, in prosecuting his right, and looking on while defendant, if his evidence be true, was investing large sums of money in his plant and business."

In the present case, it appears that the defendant is a going concern. The plaintiffs had a contract with one Royall to quarry certain sand, gravel and stone on plaintiffs' land in Moore County, and defendant, Carolina Sand and Gravel Co., is assignee holding under this contract. This is not disputed by the record. The contract made provision for stipulated rent and royalties to be paid to plaintiff. From the undisputed facts here, the defendant is in possession of the land and taking out the sand, gravel and stone. Plaintiffs contend the rent and royalties are in arrearage and the contract forfeited. The defendant being in charge and control of the quarry operations and getting out the sand, gravel and stone, it is impossible for the plaintiffs to ascertain to what extent these operations are being carried on and what tonnage of sand, gravel and stone is being quarried and removed. Thus, it is impossible for plaintiffs to know what royalty they are entitled to under their contract. At the same time, it is important that defendant's operations should not be stopped by injunction, as it would, perhaps, seriously impair the credit of the defendant company, and, perhaps, as far as can be ascertained from the record, throw numerous persons out of employment and effect their livelihood. This sand, gravel and stone, by common knowledge, is useful in commerce and is of considerable value in building operations, roads, and for other purposes.

A court of equity looks always towards doing justice to the parties, and in good conscience protecting their rights until the final adjudication of the controversy through the courts. No protection given plaintiffs before the hearing would do them justice in this case. The courts of equity are gradually adjusting themselves to modern conditions and look to what in good conscience is for the best interest of the litigants, without resorting to any hard or fast rule.

We think by analogy to the cases cited and the statutes referred to, plaintiffs' rights under their contract should be safeguarded; at the

same time the defendant's commercial enterprise should not be seriously hampered. The injury, under the facts and circumstances of this case, is not such irreparable injury that plaintiffs' rights cannot be protected by defendant giving bond or a receiver being appointed—a less harsh method than a temporary injunction.

There was error in the ruling of the court below in denying the plaintiffs all relief. Under the authorities, above cited, and on the facts of this record, it would seem that the plaintiffs are entitled to have the defendant execute a bond for their protection and file weekly or monthly statements with the clerk of the Superior Court showing the amount of sand, gravel and stone quarried; or, if such will not meet the exigencies of the case, a receiver might be appointed, or, as a final resort, an injunction issued. But, we leave the exact order to the sound discretion of the chancellor or judge of the Superior Court, who will inquire into all the relevant facts of the case.

The object of the court should be to so mold its orders and decrees as to afford relief to plaintiffs as indicated in this opinion, and also to permit the defendant to prosecute its industry under just restraint for the benefit of plaintiff in case of their recovery. *Lumber Co. v. Wallace, supra,* p. 31.

It is so ordered.

Error.

ROMA SAWYER v. GILMERS, INC., ET ALS.

(Filed 24 January, 1925.)

1. Slander—Principal and Agent—Employer and Employee—Evidence—Questions for Jury.

Where there is evidence that an employee of an incorporated retail store acting within the scope of his employment as store detective, in a threatening manner questions a customer, a girl fourteen years of age, accompanied by her mother, about a comb, after looking over a counter of them in the store, stops the exit of the girl and her mother from the store in the meanwhile, and then permits them to depart, it is competent for the jury to consider the facts and circumstances and determine whether the employee intended to charge the customer with theft; and when there is evidence that the customer and her mother so understood and indicated the same in their language to the employee at the time, which he did not deny, it is sufficient to take the case to the jury in an action for slander.

2. Corporations — Slander — Principal and Agent—Employer and Employee.

A corporation may be held in damages in a civil action for the torts or slander of its employees when committed or uttered in pursuance of their employment.

3. Slander—Special Damages—Evidence.

Where, within the scope of his employment as store detective, an employee of a corporation has openly and wrongfully accused the plaintiff, a customer in the store at the time, of theft in the presence of other employees and customers, in an abrupt and threatening manner, the false accusation is actionable *per se* and it is competent for the plaintiff to introduce evidence of her special damages, tending to show that she had been humiliated by the comments of her friends and others upon the occurrence, such results being natural to the occasion and likely to follow under the circumstances of the accusation.

APPEAL by defendants from *Sinclair, J.*, at March Term, 1924, of DURHAM.

Defendant, Gilmers, Inc., is a corporation engaged in the business of operating a system of retail stores, one of which is located on Main Street in the city of Durham, N. C. Defendant, J. W. Beavers, on 13 May, 1922, was an employee of his codefendant, his duties, among others, being to investigate and report to the manager of the store, the loss of property, or the taking from the store of merchandise, which had not been paid for. He had formerly been a police officer of the city of Durham.

Plaintiff, then about 14 years of age, between 6 and 7 o'clock p. m. on Saturday, 13 May, 1922, was in said store with her mother. While the mother was making purchases in said store, plaintiff was standing near the jewelry counter, manifesting an interest in the articles displayed thereon. This counter was near the door, opening from the store into the street. Defendant, Beavers, was standing a short distance from her, on duty in the store. Plaintiff's attention was directed particularly to the combs or barrettes displayed on the jewelry counter. The clerk in charge said to plaintiff, "Do you want to buy one of these (meaning the barrettes)?" Plaintiff replied, "No, I do not find the kind I want." Plaintiff had broken one of a pair that she owned and wanted a new one to match the unbroken one. At this moment her mother joined her and, together, they started for the door, intending to leave the store. Defendant, Beavers, rushed in between them and the door, and addressing plaintiff, in a loud and rough voice and with a brusque manner, said to her, "How about the one you have got in your hand?" Beavers threw his hand between plaintiff and the door, preventing plaintiff and her mother from going out of the store, as they intended to do. Beavers is a large, portly man, of unusual physical strength and of a commanding presence. Plaintiff was frightened by the words and conduct of Beavers, and begun to cry. She made no reply to his question. Her mother at once took her by the hand, and showing Beavers that she had only a pocket-book in one hand and noth-

ing in the other, said to him, "She has a pocket-book, she is my daughter; she does not steal." Plaintiff, then realizing what Beavers had said to her, said, "You stuffy old fool, you had better look out who you are accusing of stealing in your old store."

Beavers made no reply to plaintiff or her mother, but withdrew his hand, and permitted them to leave the store. After returning home, upon the suggestion of the father of plaintiff, she and her mother returned to the store, and saw Mr. Tilley, the manager. The mother, in the presence of plaintiff, related to Mr. Tilley the occurrence, Mr. Tilley replied, "Yes, I understand he did not accuse your daughter of stealing. Mr. Beavers says he stopped your daughter at the door and offered her a pocket-book." Mr. Beavers was standing near by during this conversation.

Plaintiff was badly frightened and greatly humiliated by the words and conduct of Beavers. Many people were present in the store at the time. They both saw and heard the incident. It was discussed by her school-mates when she returned to school the next week. Her friends and acquaintances spoke of it, in her presence. She told her parents that she wished to stop school. The incident was referred to in her presence by school-mates and others from time to time during the remainder of that school term. The repeated references to the occurrence caused her continued humiliation.

Plaintiff, testifying as a witness in her own behalf, was asked the following question:

"What, if anything, do you remember now was said to you about this matter by any of your friends or acquaintances after it occurred?"

She replied: "One boy said, 'Roma, if I had known you wanted a comb that bad, I would have bought you one.' A girl said to me, 'Roma, honey, did you really steal the comb.' Such remarks were made to me by different class-mates in the high school."

To this question and answer, defendants, in apt time, objected; objection overruled; defendants excepted. This was defendants' first exception.

Plaintiff was asked the further question: "State whether or not, there was any difference in the actions of your friends before and after this occurrence." She replied: "Some of my friends acted cooler to me after this happened than they did before. I had been living in Durham about two years before this time."

To this question and answer defendants, in apt time, objected. Objection overruled. Defendants excepted. This was defendants' second exception.

Abner Pope, witness for plaintiff, testified that during May, 1922, he was running a grocery store in Durham; Mr. Sawyer and his family

lived across the street, opposite his store. He was asked to state whether or not there was any discussion in his store, on Saturday night, 13 May, 1922, in reference to Miss Roma Sawyer. He replied: "Some time on Saturday night, about 7 o'clock, somebody came into the store. I do not recall who it was. He said something about Miss Roma being stopped down at Gilmers and accused of stealing something."

To this question and answer, defendants, in apt time, objected. Objection overruled. Defendants excepted. This was defendants' third exception.

The witness continued: "We were all so very much surprised that I did not know what to think about it. I had known her a long time, and had found her one of the most honest girls I had ever known. There were fifteen or twenty people in my store. I do not know what they said, but everybody seemed to be surprised. I heard them say that it was Mr. Beavers who had accused her of stealing."

Defendants objected to this testimony and moved the court to strike it out. Objection overruled. Defendants excepted. This is defendants' fourth exception.

Defendants denied that Beavers had spoken the words to plaintiff, as alleged, and denied that he had prevented plaintiff and her mother from leaving the store and offered evidence tending to contradict the evidence of plaintiff.

After the charge of the court, the jury returned verdict as follows:

1. Did defendant, Beavers, speak to, of and concerning the plaintiff in the presence and hearing of another or others, the words, as alleged in the complaint? Answer: "Yes."

2. If so, did said language, in view of the attendant circumstances, amount to a charge of larceny, as alleged in the complaint? Answer: "Yes."

3. If defendant, J. W. Beavers, used said language, as alleged in the complaint, was he at the time acting within the scope of his employment, and in the line of his duty? Answer: "Yes."

4. Did defendants wrongfully assault the plaintiff, as alleged in the complaint? Answer: "Yes."

5. What damages, if any, is the plaintiff, Roma Sawyer, entitled to recover of defendants? Answer: "$2,500."

Upon this verdict, judgment was rendered in favor of plaintiff and against defendants. Defendants appealed therefrom. Assignments of error are based upon exceptions taken in apt time to evidence and to instructions given the jury in the charge of the court.

McLendon & Hedrick for plaintiff.

Brogden, Reade & Bryant for defendants.

CONNOR, J. J. W. Beavers, while on duty in the store of his co-defendant, his employer, Gilmers, Inc., observed plaintiff standing near the jewelry counter looking at some combs or barrettes displayed thereon for sale. He heard the clerk in charge ask plaintiff if she wished to buy one of the barrettes and heard plaintiff, after examining them, reply that she did not, giving as her reason that she had not found the kind she wanted. Beavers, thereupon, at once, in a brusque manner, approached plaintiff and in a loud and rough voice said to her, in the presence of her mother and a number of people then in the store, "How about the one you have in your hand." Plaintiff, a school girl about 14 years of age, was frightened by the manner and words of Beavers and began to cry. Her mother, by her reply to Beavers, indicated clearly to him that she understood that Beavers had charged plaintiff with larceny. Plaintiff was reassured by her mother's prompt defense. By her spirited remark to Beavers she made it equally clear that she also understood that he had accused her of stealing a comb. Beavers, without a word of apology or explanation, turned and walked away. They then left the store. When they returned later and complained to the manager, Mr. Tilley, of Beavers' manner and words, although he heard the conversation, Beavers was again silent. He had previously reported the incident to the manager, denying however that he had made an accusation of larceny against plaintiff.

These are the facts as found by the jury. There was sufficient evidence to sustain this finding. Under the instructions of the court, the jury found that Beavers, acting within the scope of his authority and in the line of his duty as an employee of his codefendant, used the language as alleged in the complaint and meant thereby to charge and did charge plaintiff with larceny, in the presence of her mother and many other persons then in the store. There was no justification or attempt to justify the charge. The defense was that Beavers did not use the language alleged and as testified by plaintiff and her mother.

In *Cotton v. Fisheries Products Co.*, 177 N. C., 57, this Court held that in an action for slander it is not required that the charge be made in express terms, but the significance of the utterance may be determined by the words themselves, and in view of the attendant circumstances, and in this connection, the tone and gestures and accompanying acts of the parties may at times be properly considered; and if, when so interpreted, the words by fair intendment and to the reasonable apprehension of the listeners, amount to such charge they may be so construed and dealt with. Authorities are cited to sustain this holding. It is also there held that "it is the accepted principle here and elsewhere that corporations may be held liable for both the wilful and negligent torts of their agents and that the principle extends to actions

for slander when the defamatory words are uttered by express authority of the company or within the course and scope of the agent's employment."

As plaintiff and her mother, who had purchased articles of merchandise in the store, were about to leave, defendant, Beavers, in a brusque manner, rushed between them and the door opening into the street and placed himself in the door, with his hand thrown out, preventing them from passing through the door into the street as they intended. He is a large, portly man, of great physical strength and of commanding appearance. Plaintiff is a girl, then about 14 years of age, and was accompanied only by her mother. There were many persons present at the time who saw and heard the incident and who were strangers to plaintiff. She was so frightened by the conduct of Beavers that she began to cry. Both she and her mother were deterred by the violence of Beavers from going out the door. His manner was threatening and plaintiff was put under reasonable apprenhension, under all the circumstances, that if she persisted in going through the door as she intended, he would prevent her by force.

These are the facts as found by the jury. There was evidence sufficient to sustain the finding. Under the instructions of the court the jury found that Beavers, acting within the scope of his authority, and in the line of his duty as an employee of his codefendant, Gilmers, Inc., wrongfully assaulted plaintiff. *S. v. Williams,* 186 N. C., 627; *Gallop v. Clark,* 188 N. C., 186.

Plaintiff seeks to recover of defendants damages for the slander and for the assault which she alleges and which the jury has found, were committed by Beavers, employee of Gilmers, Inc., acting within the scope of his employment. The jury, upon the evidence submitted and under the instructions of the court, has assessed her damages. Defendants move for a new trial, assigning errors, based upon exceptions duly noted, both in the admission of evidence and in the instructions given to the jury in the charge of the court.

Defendants contend that it was error to admit as evidence the testimony of repetitions of the slanderous words alleged to have been uttered by defendant, Beavers, such repetitions being voluntary by third persons and unauthorized by the defendants. This contention is presented by exceptions to questions addressed to and to answers made by plaintiff and witness, Abner Pope. His Honor expressly instructed the jury that this "testimony was not evidence on the question as to whether or not the defendant, Beavers, actually accused plaintiff of stealing, but was to be considered by the jury as evidence only upon the question as to whether or not plaintiff's general reputation had been damaged as a result of such words."

The evidence was competent for the purpose to which his Honor thus limited it and the assignments of error based on these exceptions are not sustained.

It is conceded by attorneys for both plaintiff and defendant that this question has not heretofore been presented to and therefore has not been passed upon by this Court. It has, however, received consideration in other jurisdictions. The conclusion reached by courts in these jurisdictions are by no means uniform. There is such a diversity of opinion that it cannot be said that the weight of authority either sustains or rejects the proposition that such evidence is admissible on the issue of damages.

Maytag v. Cummins, 260 Fed., 74, filed 8 July, 1919, U. S. Circuit Court of Appeals, 8th Circuit, is cited as a leading case on this proposition. It is reported with full and exhaustive annotations in 16 A. L. R., 712. *Sanborn, C. J.,* writing the opinion for the Court, states the question presented as follows: "Is it, then, the law that evidence of the voluntary and unauthorized repetition of a slander and of rumors and reports thereof by third persons and not under the control of and without the request of the originator is admissible in an action against him for damages caused by his utterances of it to others?" The Court held that such evidence is not admissible. The opinions of judges and text-writers, both for and against the proposition are reviewed and discussed. The conclusion is reached that the evidence is inadmissible, notwithstanding the circumstances under which the original slander was uttered. *Stone, C. J.,* concurs in the result but dissents from the rule that one who originates a slander cannot be held for damages arising from repetitions which are the natural and probable consequences of the original utterance. He holds that there is such conflict in the decisions of the courts of various jurisdictions that it cannot be said that the weight of authority is either way. He says that the cases excluding such evidence are based upon the theory that damage flowing from such repetitions, rumors or reports is not the proximate result of the original slander unless authorized or intended by defendant. "This is an application to the law of defamation of the general rule that the intervention of an independent, illegal act breaks the causal chain, since the defendant cannot be held to have anticipated and (without evidence thereof) intended the unlawful act of another as the consequence of his wrong." He says further, "With the decisions of respectable jurisdictions conflicting, I see no reason for deciding that the matter has been authoritively settled. As no decision controlling in this Circuit exists and as decisions outside the Circuit conflict, this seems to me an instance where the justice of the contending views should be examined and a decision reached on that basis alone."

The slanderous words for which plaintiff seeks to recover were uttered in the presence of a large number of persons. They were uttered in a public place, in a loud and rough voice. The time was Saturday afternoon, between 6 and 7 o'clock. The person accused of stealing was a young girl, the daughter of respectable parents and a student in the city high school. These words were, under the law, actionable *per se*. Plaintiff alleged and offered to show that she was entitled to recover special damages in addition to the damages which the law presumed from the wrong done her. For this purpose she offered evidence that the news that she had been stopped in defendants' store and accused by one of its employees of stealing, spread rapidly among her friends and acquaintances who discussed the incident and that her reputation was injured and her feelings wounded and hurt as a consequence. The injury done her by the wrongful act of defendants was in some measure proportionate to the extent of the circulation. This wide circulation was the natural and probable result, not only of the slander, but also of the circumstances under which the slander was uttered. It was a result which defendants could and should have anticipated. They are and should be held answerable for the result, which, considering the circumstances under which the wrong was done, might reasonably have been anticipated. Whether the repetition of the slanderous words and the discussion of the incident with the resulting humiliation which plaintiff sustained was the direct and proximate result of the original slander was for the jury to determine. There was no error in overruling the objection to this evidence and the exception is not sustained. 36 C. J., 1230.

We hold it to be the law in this State that the author of a defamation, whether it be libel or slander, is liable for damages caused by or resulting directly and proximately from any secondary publication or repetition which is the natural and probable consequence of this act. He is not liable for such damages where the secondary publication or repetition is without authority from him, express or implied. If the defamation is uttered under such circumstances as to time, place or conditions as that a repetition or secondary publication is the natural and probable consequence of the original defamation and damage resulting therefrom, he is liable for such damages and evidence of such repetition or secondary publication and of damages resulting therefrom, is admissible. It is for the jury to determine under instructions of the court, whether in view of the circumstances under which the original defamation was uttered, a secondary publication or repetition was the natural and probable consequence of such defamation which could and should have been foreseen or anticipated by the defendant in an action for damages for the original defamation.

We have examined with care the other assignments of error directed to the instructions of his Honor to the jury. They are not sustained. We do not deem it necessary to discuss them. We find no errors of law or legal inference affecting the validity of the judgment from which defendants appeal. There is

No error.

STATE v. JIM COLLINS.

(Filed 24 January, 1925.)

1. **Homicide—Murder—Evidence—Fleeing Arrest.**

Upon the question of whether the accused for murder intended to give himself up to the officers of the law but fled from arrest owing to the intimidation of a crowd assembled who were hostile to him, declarations thereof by another, who has not testified, are incompetent as mere hearsay.

2. **Appeal and Error — Objections and Exceptions — Unanswered Questions—Record.**

Exceptions to the exclusion of answers to questions taken by the prisoner upon the trial for a homicide, will not be sustained on appeal when it is not indicated of record what the answers would have been and the materiality and competence of the proposed evidence may not be seen.

3. **Homicide—Murder—Evidence—Threats—Fleeing Arrest.**

Threats against the prisoner that he claims caused him to conceal himself and avoid giving himself up to the authorities of the law, to be competent as evidence in his behalf must be shown to have been known by him at the time he had avoided arrest.

4. **Homicide — Murder — Deliberation and Premeditation — Evidence—Fleeing Arrest.**

Where the prisoner has been convicted of murder in the first degree the exclusion of evidence tending to show the reason of his flight after committing the crime is not error, and has no bearing upon the question of his premeditation and deliberation necessary for a conviction of this degree of the crime.

5. **Homicide—Murder—Evidence—Dying Declarations.**

Upon a trial for murder, the declarations of the deceased are competent for conviction when there is evidence that they were made by the deceased when he knew he was soon to die, from the effect of the wound inflicted on him by defendant, when he had sufficient mental clearness to understand the purport and effect of his statement, and in fact died within a short time thereafter; and an exception to their admissibility may not be sustained on the ground that they were not complete judging from the other evidence in the case, their credibility being for the jury to determine.

6. Homicide—Murder—Witnesses Recalled—Discretion of Court—Appeal and Error.

It is within the sound discretion of the trial judge to permit the State on a murder trial, to recall and examine a witness after it had closed its evidence, and not reviewable on appeal in the absence of an abuse of this discretion.

7. Homicide—Murder—Cooling Time—Evidence—Questions for Jury.

While ordinarily the question of whether the prisoner had sufficient cooling time from the time his passions had been aroused by the deceased and the time of the killing, is one of law, it is proper for the court to submit the question to the jury when the evidence upon the subject varies by fixing this length of time from "a short while" to three-quarters of an hour.

8. Homicide—Murder — Instructions—Evidence—Cooling Time—Appeal and Error.

When the dying declarations of the deceased are competent evidence, it is not reversible error for the trial judge to omit to charge the jury that they should receive them with due caution in the absence of a special request to that effect.

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

Exceptions to the statement of the contentions of the parties must be made at the time.

10. Instructions—Appeal and Error.

An exception to the charge of the court on a trial for murder that the court had not given the law on the principle of cooling time arising under the evidence in the case, will not be sustained on appeal when the charge construed as a whole sufficiently covers the matter.

11. Instructions—Evidence—Appeal and Error—Homicide—Murder.

Under the evidence upon the trial for a homicide in this case: *Held,* not error for the court to refuse a requested instruction to the effect that the defendant was entitled to the most favorable inference from the evidence. *S. v. Brinkley,* 183 N. C., 720.

CRIMINAL ACTION, tried before *Lane, J.,* and a jury, at September Term, 1924, of ANSON.

The prisoner was charged with the murder of A. C. Sedberry on 19 July, 1924, and he appealed from the judgment pronounced on conviction for murder in the first degree. At the trial he did not testify or introduce any evidence. The salient features of the State's evidence are substantially as follows:

On the day of the homicide the deceased was engaged in scraping the public road leading from White Store to Peachland. He and Baxter McRae were running a road grader which was pulled by a truck, McRae operating the truck and the deceased the grader. They met a car driven by Frank Gulledge, in which were Jack Polk, Henry Watts and Jack

Crowder. The prisoner was on the running board. During a part of 1924 the prisoner had worked for the deceased, but had left him and was employed by William Gulledge when the homicide occurred. The deceased had the car to stop when it approached the truck and this conversation followed: Sedberry: "Jim, why did you do like you did this morning?" Collins: "Did what?" Sedberry: "Send Oscar Gulledge for the money." Collins: "I just sent him." Sedberry: "Ain't you a man of your own?" Collins: "I am." Sedberry: "Why did you not come and get it?" Collins: "I just didn't come." Sedberry: "I owe you $2.37 and carried you one night to see the doctor, didn't I?" Collins: "You did." Sedberry: "I didn't intend to charge you for that if you had stayed your time out that you hired to work, but as you did not, I am going to charge you $2.50 for that trip; that leaves you owing me thirteen cents, and I'm going to strike off even with you." Collins: "I don't give a d—n what you do with it." Sedberry (after stepping down from the road machine): "Don't you cuss me." Collins: "I didn't cuss you." Sedberry: "You cussed at me." The subsequent conduct of the two is described by Baxter McRae: "Sedberry then got hold of Jim, pulled him off the fender of the car, hit at him and slapped him a time or two after he stepped on the ground. He hit him across the head, and while being hit, Jim was holding up his hands. Sedberry then turned Jim loose and Jim stepped back and opened his knife and started to him, and Sedberry picked up a rock and said, 'Don't you come on me with that knife.' Jim then backed off and closed the knife. Sedberry then got back on the road machine and said, 'Let's go,' and we started down the road. This happened just beyond Jack Polk's house. Jim started following us up the road, and Jack's wife called to him from the window and said, 'Don't you come up here; go back the other way.' When we got about fifty yards beyond Jack Polk's house, Jim Collins came on down there again and hollered to me to stop the truck. He spent the nights at Jack Polk's, but worked for and boarded with Mr. Gulledge. When we had gone about fifty yards on the opposite side of Jack's house, Jim came down near where we were and hollered to me to stop the truck. Sedberry said, 'Go on.' Then Jim aimed the gun at Sedberry and looked up. Just at that time Jack Polk ran up, jerked the gun down and it fired in the ground about three feet behind the scraper. The gun looked like it was aimed at Sedberry's head. Jim and Jack went back towards the house tussling over the shotgun. Jack was trying to take the gun away from him and finally did get it. They tussled for about fifty yards over the gun going toward Jack's house. We went on down the road across the swamp with the truck and scraper, and when we had gotten about 290 yards from where the gun was fired I saw Jim Collins coming, and said, 'Here

comes that negro.' Sedberry looked around, and Collins shot while he was running. He didn't say a word and shot one time, turned around and went back. He shot with a thirty-two Colt's automatic pistol. He was running when he shot. It is three hundred and thirty-five yards from where he overtook us to Jack Polk's house. He got within about twenty-five feet of Sedberry before he shot. I saw that he was shot just above the hip. I helped him get on the truck and carried him to White Store. It was about three hundred and eighty-five yards from where we first met Collins to where he shot Sedberry. It was from a half to three-quarters of an hour from the time of the quarrel in the road until Collins shot Sedberry."

Jack Polk testified as to the shooting: "I rode off on the running board and after getting up the road a little way I saw Jim coming out of my house with my gun going down the road towards Sedberry. I told Mr. Gulledge to look yonder Jim's got my gun, stop and let me get off, he slowed up, I jumped off and went running back towards where Jim was. I met my wife and she said 'Jack where are you going?' I said 'don't you see Jim with my gun, I am going to get it from him.' I overtook him and he had the gun cocked and aimed at Mr. Sedberry. I grabbed the gun and said, 'What you mean? Give me my gun. What you mean by taking my gun out of the house? Give me my gun and let that man alone.' It fired just as I knocked it down. Then me and Jim tussled over it. While we were tussling I told him to give me my gun and asked him didn't he have good sense, and let the man alone, and after a while I got it loose from him, we were near the house when I got it. I ran in the house with the gun and went in the back part of the house and saw him near me when I went in the dining room and he come in behind me when I was putting up the gun, and when I looked around he was going around the house on the left side. He was going back toward Sedberry. I went out the back door, I didn't see any pistol, didn't know he had one and had never seen him with one. My wife was going up the road calling me to come on. I was not going toward the truck. The last I saw of Jim he was going around the house in the direction of the truck. He was running. The next time I saw him he was up the road toward Mr. William Gulledge's, he didn't say anything about shooting Sedberry. I knew he had been shot and didn't say anything to him. He told me to get his money from Mr. Gulledge and give it to him."

The foregoing testimony was corroborated by other witnesses, but under cross-examination they modified or varied their statement as to some of the circumstances. There was also evidence tending to show that the deceased beat the prisoner on the head and caused him to become highly excited; that soon after the fatal shot was fired the prisoner

said that he had shot a man and wanted to give himself up to the sheriff; that he told William Gulledge that he had shot the deceased and wanted his money at once; that Gulledge told him to go to Ben White's and stay there until he could go to the store and get some change, but a large crowd soon gathered near by; that the deceased was a white man, six feet in height, weighing about 215 pounds and the prisoner a colored boy about 19 or 20 years of age.

Dr. Hart testified as follows: "I was called to see A. C. Sedberry on the 19th of July, 1924; found him lying on the porch of Mr. E. E. McRae's house at White Store with a pistol shot wound in his back. The bullet entered the body about three inches to the left of the spinal cord and just above the hip bone, passing upward and to the right—penetrating the intestines ten times, cutting the liver, severed the nerve and arteries, and lodged just under the last rib on the right side. He was brought to the hospital here and the bullet removed and intestines sewed up. He suffered intensely and bled profusely. His chance was mighty small, but we operated to give him the benefit of the doubt, and he died Sunday morning, 20 July, 1924, about 5:00 o'clock. His death was caused by the pistol shot wound."

Other testimony is referred to in the opinion.

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

H. H. McLendon and H. P. Taylor for defendant.

ADAMS, J. On his cross-examination the sheriff testified that he learned of the homicide about noon and went immediately to White Store and thence to the home of Henry Collins, the prisoner's brother. He was then asked this question: "Did you receive information from the defendant's brother Henry that he was close by and ready to surrender?" The State's objection was sustained and the prisoner excepted.

There are two grounds upon which the ruling may be upheld: (1) Neither the form of the question nor the record indicates what the answer would have been. *S. v. Ashburn,* 187 N. C., 717, 722; *Barbee v. Davis, ibid.,* 79, 85; *Hosiery Co. v. Express Co.,* 186 N. C., 556; *S. v. Jestes,* 185 N. C., 735; *Snyder v. Asheboro,* 182 N. C., 708. (2) The proposed evidence was inadmissible as hearsay. Evidence is termed hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness from whom the information is sought; and such evidence, with certain recognized exceptions not applicable here, is uniformly held to be objectionable, the declarant not having spoken under the sanction of an oath and not having submitted to cross-examination. *Chandler v. Jones,* 173 N. C., 427; *S. v. Springs,* 184 N. C., 768.

The witness testified further that soon after he arrived at the scene of the homicide he saw probably seventy-five armed men between White Store and Gulledge's house, and that on Sunday the number increased possibly to a thousand men, many of whom were armed. The prisoner sought to show that on the day of the homicide and again on Sunday threats had been made against him by some of these men; and to the exclusion of the evidence he duly excepted.

As suggested above there is nothing in the record from which we may ascertain whether the witness would have given an affirmative or negative answer to the questions propounded. But apart from this, there is no evidence that the prisoner had heard of such threats or that his flight was influenced by them; and if it be granted that the sheriff was followed by four armed men when he went the second time to Henry Collins's house and that he got possession of a pistol while in the woods near by, we find no evidence that the prisoner was there or knew of the presence either of the officer or the men who followed him. Moreover, he was convicted of murder in the first degree; and as flight is not evidence of premeditation and deliberation the motive impelling flight may not be shown for the purpose of repelling the inference of such premeditation and deliberation. *S. v. Foster,* 130 N. C., 666, 675; *S. v. Westmoreland,* 181 N. C., 590, 595. Exceptions 1, 2, and 6 cannot be sustained; and on the same principle exception 5 must be overruled.

Concerning the dying declaration of the deceased, J. C. Sedberry, his brother said: "On Sunday morning, 20 July, just before he died, he told me he was going to die, that he could not last much longer, and he wanted to tell me how this thing occurred, and I told him to go ahead and tell me, but make it brief as he could because of his weakened condition. I was with him from the time I reached Wadesboro until his death. He had been operated on before I got there. I don't know how long he was under the effects of ether or chloroform and don't know how much medicine had been given hypodermically. I understood they had to give him injections of some drug, I didn't know what. I did not see any administered. The nurses were passing back and forth all during the night doing something. He died about fifteen minutes or twenty minutes after his conversation with me. He was conscious up to the last. His mind seemed to be clear, of course he was suffering. He said he was on the grader, and Baxter McRae was driving the truck in front of him, and Jim Collins slipped up behind, and Baxter McRae hollered to him or called his attention to say, 'There comes that negro,' and that he had just started to look around as the negro fired, and as soon as he fired the pistol he turned and ran back the other way and did not say a word, neither one spoke to the other."

Miss Miller, superintendent of the sanatorium, testified: "I was present when he made the statement to his brother between four and five o'clock Sunday morning. His mental condition was very clear. He said he knew he was not going to live and he wanted to make the statement. And he said he wanted to tell his brother exactly how it happened, and he said he was on the grader and Mr. McRae told him to look out this man was behind him and he started to turn and was shot."

The prisoner's exception to these declarations is based on the theory that they are in conflict with the testimony of all the eye-witnesses and that the deceased at the time was either unconscious or inadvertent to the circumstances, manifested by his silence as to his assault on the prisoner.

The rule for the admission of dying declarations is thus stated: (1) At the time they were made the declarant should have been in actual danger of death; (2) he should have had full apprehension of his danger; (3) death should have ensued. *S. v. Mills,* 91 N. C., 581, 594. The evidence excepted to disclosed all these conditions. In *S. v. Williams,* 168 N. C., 191, it is said that dying declarations are frequently made under conditions which render it impossible for the declarant to state in detail the circumstances connected with the killing; and in *S. v. Brinkley,* 183 N. C., 720, evidence of a dying declaration was admitted, although the deceased became too weak to recite all the circumstances relating to the homicide. In the absence of a cross-examination such declarations are often incomplete; but after all they are only evidence to be considered, weighed, and passed upon by the jury, the final arbiter of all issues of fact. The admission of this evidence conformed to the rules pointed out in several of our decisions.

After the examination of G. F. Hunsucker, the State rested its case and the prisoner in pursuance of a previous request was permitted to recall the sheriff for further cross-examination. At the conclusion of his testimony the prosecution asked permission to examine J. F. Tice, who testified as to the circumstances under which the prisoner was shot and arrested several days afterwards near the line between Stanly and Cabarrus. The request was granted and the prisoner excepted to the examination of Tice on the ground that the State had previously closed its case. Whether the evidence objected to should be introduced was a matter to be determined in the sound discretion of the court and in the absence of abuse the exercise of which discretion is not reviewable. *S. v. Davidson,* 172 N. C., 944; *S. v. King,* 84 N. C., 737; *S. v. Haynes,* 71 N. C., 79; *S. v. Rash,* 34 N. C., 382.

On cross-examination the prisoner asked Tice the questions, "When you did get up there (where the homicide occurred) the sheriff told you

to stay at White Store and keep the crowd back for him, didn't he? Didn't he deputize you for that purpose Saturday afternoon?" It was proposed to show that the sheriff had deputized the witness to prevent the crowd from going to Henry Collins's because he had information that the prisoner was ready to give himself up, and that the witness disobeyed the sheriff's instructions and went in a car with four armed men while the sheriff was there and caused the prisoner to flee.

Upon the principle already stated this evidence was not competent on the question of flight; and if intended as an impeaching question it is not ground for a new trial. Tice was himself a public officer, having occupied the position of constable for eight years. It is evident from his testimony that he was acting in the discharge of official duties and that when he went to Henry Collins's house he did not know the sheriff was there.

Exceptions 10, 15, and 16 are addressed to the court's refusal to sustain the prisoner's motion for nonsuit as to the charge of murder in the first degree and in declining the instruction that there was no evidence of murder in the first degree and that a verdict therefor should not be returned.

The basis of these exceptions is the contention that at the time he shot the deceased the prisoner was urged on by passion aroused by the unprovoked assault of the deceased and that sufficient time had not elapsed for the "passion to subside and reason to reassume her dominion—that is, for premeditation and deliberation." Under our decisions the question of cooling time is ordinarily one of law and only the existence or nonexistence of the facts controlling its application in a given case is for the jury. *S. v. Sizemore,* 52 N. C., 206; *S. v. Moore,* 69 N. C., 267; *S. v. Merrick,* 171 N. C., 788. The question frequently depends upon the nature of the prosecution and the facts disclosed by the evidence. It has been held, for instance, that an interval of two or three minutes, or the prisoner's absence of "no time" is not sufficient; but that an hour is more than sufficient, and a half-hour or even fifteen minutes may be sufficient for passion to subside and reason to resume its sway. *S. v. Norris,* 2 N. C., 430; *S. v. Moore, supra; S. v. Savage,* 78 N. C., 520; *S. v. Williams,* 141 N. C., 827. In *S. v. Merrick, supra,* the question of cooling time fixed by the witnesses was too indefinite and uncertain for a direct ruling as to manslaughter, and it was referred to the jury for final determination.

In the case before us there was evidence that the time intervening between the first combat and the fatal shot was three-quarters of an hour, a half-hour, and "a little while." Under these circumstances the question was submitted to the jury who rejected the prisoner's contention and found that between the two periods there had been sufficient

time for the prisoner's exercise of reason and judgment. If, therefore, there was evidence of murder in the first degree the exceptions should be overruled. That there was such evidence is hardly subject to debate. The testimony tended to show ample time for deliberation and premeditation and the statements said to have been made by the prisoner justified the inference of a fixed design to take the life of the deceased. Mary Polk testified that when the prisoner came towards the house from which he took the gun she warned him to go back and he replied, "Mary, I ain't going to let no man beat me over the head like that and get off"; and William Gulledge said that after the shooting had occurred the prisoner went to his house and told him, "No d—d man could jerk him around and get off with it." These and several other circumstances, such as the prisoner's return to the house for the pistol after the ineffectual discharge of the gun, were admissible on the question of a preconceived purpose; and in applying the evidence the presiding judge was careful and minute in impressing the principle that sufficient cooling time must have passed for rational deliberation and premeditation. As to these exceptions we think the prisoner has no just ground of complaint.

The eleventh exception, which relates to the instruction pertaining to the alleged dying declarations of the deceased, is not tenable. We have held that the evidence as to these declarations was competent; and while the court might properly have told the jury to consider this evidence with due caution, the failure to do so in the absence of a special request will not be held for reversible error. We have repeatedly said that as to subordinate features or particular phases of the evidence proper request should be made for appropriate instructions. *S. v. O'Neal,* 187 N. C., 22.

Exception twelve refers to the statement of certain contentions to which no objection was made during the trial. *Bailey v. Hassell,* 184 N. C., 450; *S. v. Ashburn, supra.*

The thirteenth exception is as to an instruction on the question of premeditation and deliberation, the prisoner insisting that no reference is therein made to cooling time or reasonable doubt. In other parts of the charge, however, the jury was particularly and fully instructed upon each of these questions, and the principle is established that the entire charge of the judge and not isolated and detached paragraphs should be considered in determining whether there is error prejudicial to the appellant. *S. v. Wentz,* 176 N. C., 745; *S. v. Wilson, ibid.,* 751.

Refusal to give the following instruction is assigned as ground for the seventeenth exception: "If the acts of the defendant are capable of two inferences, one criminal and the other not, the law requires you to place an innocent construction upon his conduct." In relation to

the circumstances shown at the trial the legal proposition introduced in the prayer is incorrect. An instruction similar in its essential features was disapproved and the reasons therefor assigned in *S. v. Brinkley, supra.* Exception fourteen obviously requires no discussion and the others are formal.

We have endeavored to give this appeal our careful and deliberate consideration. The evidence reveals circumstances which may reasonably be construed as the basis of the defense set up and relied on by the learned and diligent counsel who were appointed to represent the prisoner; but there was also abundant evidence to support the contentions of the State, and under comprehensive instructions the testimony was sumitted to and determined by the jury. We find no error. Let this be certified as provided by law.

No error.

B. R. LACY v. THE GLOBE INDEMNITY COMPANY.

(Filed 24 January, 1925.)

1. Warehousemen—State System — Statutes—Warehouse Receipts—Negotiable Instruments.

It was the intent and purpose of C. S., 4925 (Laws 1921), entitled "An act to provide improved marketing facilities for cotton," in regard to the establishment of a system of warehouses in which this staple may be stored, and warehouse receipts issued to those thus using the same, making the warehouse receipts negotiable and acceptable as collateral security, to afford, in addition to the bonds required of those who have the management thereof, further security by levying a certain tax on the cotton when ginned, and placing these funds in the hands of the State Treasurer, to be used by him, in his sound discretion, for the purpose stated.

2. Same—Local Managers—Fraud—Principal and Surety.

Where a storage warehouse has been formed under the provisions of C. S., 4925, and has become a part of the cotton warehouse storage system of the State, and the local manager has given his bond in conformity with the provisions of the statute, to guarantee the faithful performance of his duties under the law, the surety on his bond is liable in damages, among other things, for his failure to cancel the warehouse receipts in accordance with the statute that he has issued to those storing cotton therein, when the cotton has been legally withdrawn therefrom, and when he has instead fraudulently used these receipts, endorsed by the owner in blank, as collateral to his own personal note to a bank discounting the same without notice of the fraud.

3. State Treasurer—Actions.

Where the local manager of a cotton warehouse, formed and existent under the provisions of our statute (C. S., 4925), has failed in his duty to cancel warehouse certificates the warehouse has delivered to its customers,

but, instead, has used these certificates, properly endorsed in blank by the owner, with guarantee of their integrity, as provided by the statute, as collateral to a note given to a bank for borrowed money which the bank has taken without notice of the fraud thus practiced, and the maker has failed to pay his note at maturity, the receipt being thus negotiable by the terms of the statute, it is within the sound discretion of the State Treasurer to pay the bank the loss it has thus sustained, and the State Treasurer may maintain his action against the surety on the manager's bond, given in accordance with the terms of the statute, as being primarily liable.

4. Same—Banks and Banking—Notice.

While it is provided in the statute that where a receipt is given for cotton belonging to a local manager of a cotton storage warehouse existent thereunder, it shall specify that fact on its face, this provision does not apply to cotton placed therein by others, nor when the local manager in breach of his duty has unlawfully and fraudulently withheld these receipts and used them as collateral to a note of his own he has had discounted at a bank, and the bank, without knowledge of the fraud, has been deprived of this collateral and has suffered loss.

5. Same—Holder in Due Course.

Where a warehouse, existent under the statute (C. S., 4925), issues its warehouse receipts to the owners storing their cotton therein, by the terms of the statute, these receipts are made negotiable; and by delivery when endorsed in blank (C. S., 3010), and when taken as collateral security by a bank for a note, for value, without notice of this fraud or infirmity therein, they confer upon the bank the position of holder for value in due course, to the extent of the bank's liens. C. S., 3005, 3007.

6. Same.

Where the local manager of a cotton storage warehouse, existent under the statutory State system of warehouses, has fraudulently used the warehouse receipts given to the owners as collateral to his own note given to and discounted by a bank, in order to vitiate the receipts thus hypothecated, it is necessary for the bank, under the provisions of C. S., 4087, to have had notice of this fraud going to the integrity of the receipts, or that the bank itself acted in bad faith with respect thereto.

CLARKSON, J., not sitting.

CONTROVERSY without action, submitted upon case agreed and determined before *Grady, J.*, at May Term, 1924, of WAKE.

The facts as stated in the case are as follows:

1. The Legislature of North Carolina, at its session in 1921, ratified on 7 March, 1921, chapter 137 of the Public Laws of said State, entitled "An act to provide improved marketing facilities for cotton," and the said Legislature of North Carolina had, prior thereto, at its session in 1919, enacted chapter 168 of the Public Laws of said State, but chapter 137 of the Public Laws of 1921, by section 21 thereof, declared: "Chapter one hundred and sixty-eight of the Public Laws of one thousand nine hundred and nineteen, and all other laws and clauses of laws, in so far

only as they conflict with the provisions of this act, are hereby repealed." And said chapter 137 of the Public Laws of 1921, and chapter 168 of the Public Laws of 1919, in so far as the provisions of said last-named act do not conflict with the first-named act, are herein referred to and made a part of this agreement.

2. That pursuant to the stipulation of said chapter 137 of the Public Laws of 1921, there was established and recognized at LaGrange, in the county of Lenoir and the State of North Carolina, a cotton warehouse as a part of the North Carolina State Warehouse System, known as the LaGrange Storage Warehouse, and one Milton L. Walters was the manager of the said LaGrange Storage Warehouse, and was such manager on 10 November, 1921, the said warehouse having been duly licensed under the acts aforesaid, and the said Milton L. Walters, as local manager, pursuant to the provisions of said act, gave bond in the penal sum of $5,000, with the Globe Indemnity Company as surety, which said bond was executed on 10 November, 1921, a copy of which is hereto attached, marked "Exhibit A"; and thereafter, to wit, on 10 November, 1922, the said Milton L. Walters, pursuant to the requirements of said act, executed his manager's bond in the penal sum of $6,000, with the Globe Indemnity Company as his surety, a copy of which said bond is hereto attached, marked "Exhibit B"; both of said bonds being given to the State of North Carolina.

3. That the said Milton L. Walters was duly employed as manager of said warehouse, in accordance with the provisions of said act, and, as such manager, gave the bonds hereinbefore referred to.

4. That the said Milton L. Walters, as local manager of said warehouse, issued cotton receipts on the dates and to the persons and for the number of bales and the grade of said cotton hereinbefore stated, copies of which warehouse receipts are hereto attached, marked "Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9": 16 January, 1922, H. M. Hardy, LaGrange, 10 bales; 16 January, 1922, H. M. Hardy, LaGrange, 2 bales; 20 February, 1922, Hugh E. Hardy, LaGrange, 3 bales; 4 March, 1922, F. Barwick & Bro., LaGrange, 7 bales; 17 March, 1922, F. Barwick & Bro., LaGrange, 6 bales; 17 March, 1922, P. R. Kinsey, LaGrange, 10 bales; 17 March, 1922, P. R. Kinsey, LaGrange, 10 bales; 17 March, 1922, P. R. Kinsey, LaGrange, 10 bales; 17 March, 1922, P. R. Kinsey, LaGrange, 10 bales; making a total of sixty-eight bales covered by said warehouse receipts, and the cotton represented by said warehouse receipts was duly received by said Milton L. Walters and stored in said warehouse.

5. That subsequently, to wit, on 17 May, 1923, the said Milton L. Walters borrowed $6,500 from the Murchison National Bank of Wilmington, N. C., and executed his said note to said bank, payable sixty

days after date, a copy of which said note is hereto attached and marked "Exhibit C," and deposited as collateral to said note the certificates for the sixty-eight bales of cotton hereinbefore in paragraph 4 stated, although at said time the said parties who had deposited said cotton for storage had received said cotton from said warehouse and had surrendered said receipts to the said Milton L. Walters, whose duty it was to cancel the same; but the said Walters, in violation of his duty, and contrary to the statute, failed to cancel said receipts, but used the said receipts as collateral security to his said note of $6,500 deposited with the Murchison National Bank of Wilmington, N. C. That the said receipts, those issued to P. R. Kinsey, were endorsed "P. R. Kinsey, LaGrange Storage Warehouse Company, by M. L. Walters, Manager." Those issued to F. Barwick & Bro. were endorsed "F. Barwick & Bro., per W. B., LaGrange Storage Warehouse Company, by M. L. Walters, Manager." The one issued to Hugh E. Hardy was endorsed "Hugh E. Hardy, LaGrange Storage Warehouse Company, by M. L. Walters, Manager." The two issued to H. M. Hardy were endorsed "H. M. Hardy, LaGrange Storage Warehouse Company, by M. L. Walters, Manager." That P. R. Kinsey wrote his name as an endorsement of the warehouse receipts issued to him; so did W. B. Barwick, a partner of F. Barwick & Bro.; and Hugh E. Hardy and H. M. Hardy and the said Milton L. Walters stamped on the back of said receipts the name of the LaGrange Storage Warehouse Company, by the manager, and wrote his name, "M. L. Walters," above the word "Manager."

6. According to the statute, it was the duty of the said Milton L. Walters, when any cotton received on storage was delivered, to take up the warehouse receipts, cancel the same, and return them to the State Warehouse Superintendent at Raleigh, N. C. As regards the certificates or receipts issued to the parties mentioned in paragraph 4 hereof for the said sixty-eight bales, the said Walters did not do so, but fraudulently used said certificates as collateral to his own note. That the said Murchison National Bank of Wilmington, N. C., loaned in the due course of business to the said Milton L. Walters the sum of $6,500 and accepted from said Milton L. Walters as collateral the certificates above stated, without actual knowledge that the said cotton represented by said certificates had been delivered to the parties depositing the same for storage. That the said note falling due and the said bank having made demand for its payment, and the said Walters having failed to pay the same at maturity, and complaint having been made to the State Superintendent of Warehouses, an investigation was made, and it was discovered that the said sixty-eight bales of cotton had been delivered to the persons storing the same, that the warehouse receipts had been

surrendered to the said Milton L. Walters, local manager, and that he had fraudulently used the same as collateral to his own note.

7. That said nine warehouse receipts above referred to in paragraph 4 as "Exhibits Nos. 1-9," inclusive, were issued by said warehouse on the dates appearing thereon, under authority of North Carolina State Warehouse License No. 506, and the United States License No. 506, which said two licenses expired on 27 October, 1922, and said licenses were renewed, but that neither prior nor subsequent to 27 October, 1922, did the lawful holder or holders of any of said warehouse receipts request any renewal or extension of said receipts, and none of said warehouse receipts have ever been renewed or extended.

8. That shortly after the said note matured and was unpaid, and after the discovery that the said Walters had fraudulently used said warehouse receipts, the said Walters died.

9. Whereupon the Murchison National Bank having made demand upon the State Treasurer, B. R. Lacy, to pay the said note, which was of less amount than the value of the cotton represented by said warehouse receipts, the said B. R. Lacy paid said note, with interest thereon at six per cent, and prior thereto made demand and gave due notice to the Globe Indemnity Company, surety on the bonds of the said Milton L. Walters, of the default of the said Milton L. Walters, and the said Globe Indemnity Company denied its liability upon said bonds or either of the same.

Whereupon, upon the facts hereinbefore stated, it is submitted to the determination of the court whether the Globe Indemnity Company, as surety upon the official bond of the said Milton L. Walters, is liable to the plaintiff, and, if so, in what amount? And if it shall be determined that the said Globe Indemnity Company is liable, then judgment will be entered in favor of the plaintiff and against the Globe Indemnity Company for the amount of said liability and the costs of this controversy without action. But, on the other hand, if it shall be determined that the said Globe Indemnity Company is not liable to the plaintiff on the bonds issued as aforesaid, or to the State of North Carolina, then it shall be adjudged that the plaintiff pay the costs of this action, and that the Globe Indemnity Company go hence without day.

And the parties hereto submitting this controversy without action upon the above agreed statement of facts, sign the same, the plaintiff, B. R. Lacy, State Treasurer, by the Attorney-General of North Carolina, and the Globe Indemnity Company, by its counsel, Taliaferro & Clarkson, of Charlotte, N. C.

And the bonds of local manager, Milton L. Walters, covering the period of the alleged default, is in form and terms as follows:

"Know all men by these presents, that we, Milton L. Walters, of the city of LaGrange, State of North Carolina, and conducting the LaGrange Storage Warehouse, a cotton warehouse at LaGrange, State of North Carolina, as principal, and the other subscribers hereto, as surety, are held and firmly bound unto the State of North Carolina in the penal sum of $5,000, for the payment of which, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

"Sealed with our seal and dated this 10 November, 1921.

"The conditions of this obligation are such that—

"Whereas the above-bound principal has applied to the State Warehouse Superintendent for a license for the conduct of a cotton warehouse, under "An act to provide improved marketing facilities for cotton," of 7 March, 1921 (chapter 137, Public Laws 1921), and the regulations for cotton warehouses prescribed thereunder; and

"Whereas the said principal has agreed, and does hereby agree, as a condition to the granting of said license, to comply with and abide by the terms of the said 'An act to provide improved marketing facilities for cotton,' and the regulations for cotton warehouses prescribed thereunder, so far as the same may relate to him; and

"Whereas the said 'An act to provide improved marketing facilities for cotton' provides that the State Warehouse Superintendent shall require each local manager applying for a license to conduct a warehouse in accordance with the terms thereof, as a condition to the granting of the license, to execute and file with the said State Warehouse Superintendent a good and sufficient bond to the State of North Carolina, in order to secure the faithful performance of his obligations as a warehouseman under the terms of the said 'An act to provide improved marketing facilities for cotton,' and the said regulations for warehouses prescribed thereunder, and of such additional obligations as a warehouseman as may be assumed by him under contracts with the respective depositors of cotton in such warehouse:

"Now, therefore, if the said principal shall faithfully perform all of his obligations as a warehouseman under said act, and such additional obligations as a warehouseman arising during the period of such license, or any renewal thereof, as may be assumed by him under contracts with the respective depositors of cotton in such warehouse, then this obligation shall be null and void and of no effect; otherwise, to be and remain in full force and virtue.

"In witness whereof, the said principal and surety have executed this instrument, on the day and year above written.

MILTON L. WALTERS, (Seal)
Principal.

"Witnesses to the signature and seal of principal: E. V. Riggs, LaGrange, N. C.; Jno. L. Phelps, LaGrange, N. C.

GLOBE INDEMNITY COMPANY, (Seal)
Surety.
By W. D. WILKINSON,
Attorney in Fact.

(Corporate Seal)

"Witnesses to signature and seal of surety: H. H. Heafner, Charlotte, N. C.; Jno. M. Huske, Charlotte, N. C."

On these facts the court rendered judgment for plaintiff, and defendant excepted and appealed.

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

Taliaferro & Clarkson and C. W. Tillett, Jr., for defendant.

HOKE, C. J. Chapter 137, Laws 1921, 3 C. S., secs. 4925 (a), etc., entitled "An act to provide improved marketing facilities for cotton," contains preamble as follows:

"That in order to protect the financial interests of North Carolina by stimulating the development of an adequate warehouse system for our great staple crop, cotton; in order to enable growers of cotton more successfully to withstand and remedy periods of depressed prices; in order to provide a modern system whereby cotton may be more profitably and more scientifically marketed; and in order to give this important crop the standing to which it is justly entitled as collateral in the commercial world, a cotton warehouse system for the State of North Carolina is hereby established, as hereinafter provided."

After conferring power to administer the law on the State Board of Agriculture, the statute directs that they shall, in furtherance of this power and purposes, appoint a State Warehouse Superintendent who shall enter into a bond of fifty thousand dollars ($50,000), 3 C. S., sec. 4925 (d), to guarantee the faithful performance of his duties under the law, and also assistant local managers, etc., who shall also give bond ample to safeguard the interest of the State as suggested by ordinary business experience in such cases. The act then in section 5, 3 C. S., sec. 4925 (e), in order to provide an additional guarantee fund, levies a tax of twenty-five (25) cents per bale on each bale of cotton ginned in the State until 30 June, 1922, with privilege of continual till June, 1923, and in reference to same, provides in part as follows:

"In order to provide a sufficient indemnifying or guarantee fund to cover any loss not covered by bonds hereinbefore mentioned, in order to

provide the financial backing which is essential to make the warehouse receipts universally acceptable as collateral, and in order to provide that a State warehouse system intended to benefit all cotton growers in North Carolina shall be supported by the class it is designed to benefit, it is hereby declared: that on each bale of cotton ginned in North Carolina during the period from the ratification of this bill until June thirty, one thousand nine hundred and twenty-two, twenty-five (25) cents shall be collected through the ginner of the bale and paid into the State Treasury, to be held there as a special guarantee or indemifying fund to safeguard the State warehouse system against any loss not otherwise covered."

Recurring to the facts, it appears that in accordance with the provisions of said act, a storage warehouse was established at LaGrange, N. C., in 1921, with M. L. Walters as local manager, who gave bond in defendant company, for 1921-1922, those here sued on, for the faithful performance of his duties. The bond, after reciting that the principal would comply with and abide by the terms of the act, closes with the stipulation that the said principal shall faithfully perform all of his obligations as a warehouseman under said act, and such additional obligation as a warehouseman during the continuance of said license, or any renewal of same, as may be assumed by him under contracts with depositors, etc., and in 1922, renewed his said bond of like tenor, both of said bonds being given to the State. That in the spring of 1921, certain owners stored at said warehouse 68 bales of cotton and were given negotiable receipts therefor, containing among other things, and as provided by other features of the law, "That the State of North Carolina guarantees the integrity of this receipt until the expiration of the licenses, as above indicated, and upon request of the lawful holder, this receipt will be extended, provided the license are renewed, etc." That this cotton was duly delivered to the owners who surrendered their receipts to the local manager, endorsing their names thereon, and thereupon it became, and was the duty of said manager, under the act, as per agreed statement, to cancel the receipts and return same to the general superintendent at Raleigh, N. C. That instead of canceling said receipts and complying with said act, the local manager negotiated the same with the Murchison National Bank of Wilmington, to secure his individual note for $6,500.00, and delivered them to said bank as collateral for said loan, adding to the endorsement of the owners appearing thereon, the further endorsement "LaGrange Storage Warehouse by M. L. Walters, Manager." On the maturity of the note and demand made for the cotton, it was ascertained that the cotton had been delivered to the owners, and that Walters had fraudulently used same as collateral on his own note. Thereupon the bank made demand

on the State treasury to pay the amount of the note out of the guarantee fund, and after investigation of the facts, the demand was complied with, the money represented by the receipts was paid and present suit entered on the manager's bond as stated. It is further stated in the case agreed that the bank loaned the money to M. L. Walters in the due course of business and accepted said receipts as collateral without actual knowledge that the cotton represented by same had been delivered to the parties depositing the same for storage. This, to our minds, presents a clear breach of a specified duty on the part of the local manager, coming directly within the provisions of the bond given by defendant company as his surety, and bringing about the very results that the requirement is intended to guard against, and, in our opinion, defendant has been properly held liable for this misconduct and default of their principal. When these receipts were taken to the bank by Walters, they had on their face a guarantee of the State as to their integrity until the expiration date of the same, and providing for a renewal of such license and, as we understand the facts, the same was renewed covering the period in controversy. They were endorsed in blank by the owners and also by the warehouse through Walters, manager, no doubt required to relieve from any unpaid charges for storage. Being endorsed in blank they were negotiable by delivery, C. S., sec. 3010, and taken as collateral, they conferred upon the bank the position of holder for value to the extent of the bank's lien, C. S., 3005-3007; *Smathers v. Hotel Co.,* 162 N. C., p. 346. The facts agreed upon showing that they were taken in due course of business for full value and without actual notice of any fraud on the part of Walters, there is nothing, in our opinion, to deprive the bank of the position of a holder in due course of the receipts. While there may have been observable irregularities on the face of the instrument, and on conditions presented, sufficient to put one on inquiry under our general statute on negotiable instruments, ch. 58, C. S., this will no longer suffice to effect the rights of a holder in due course, but there must have been either actual knowledge of the infirmity, or knowledge of such facts as to constitute bad faith on the part of the taker, C. S., 3037; *Holleman v. Trust Co.,* 185 N. C., p. 49; *Critcher v. Ballard,* 180 N. C., p. 112; *Smathers v. Hotel Co.,* 162 N. C., p. 346. Not only is this true under the general law, as stated, but under the legislation more directly applicable, in section 4087, it is provided as follows:

"The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession

or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake or duress."

The receipts in question here come directly within the force and effect of this legislation and under its provisions, the bank is clearly entitled to claim as holder in due course, (1) the facts showing that at the time same were negotiated to the bank, they were endorsed by the owners and by the warehouse and delivered. (2) That the bank paid full value and without notice of the fraud and breach of duty on the part of Walters.

This being true, the State authorities having control of the matter were fully justified in paying off the claim out of the funds on hand. They were raised and put into the hands of the State Treasurer for the express purpose of making these receipts "universally acceptable as collateral," and to "safeguard the State Warehouse System." Moreover the tax is to provide an indemnifying fund to "cover any loss not covered by the bonds heretofore provided for," thus constituting the bonds, including that of defendant's, the primary fund from which to make good the default of their respective principals, and the State Treasurer, therefore, as custodian of these funds, in the exercise of a sound discretion, and in the line of his official duty, and for the purposes contemplated by the law, having made good the loss caused by default of defendant's principal, is entitled to be reimbursed according to stipulations of defendant's bond.

There are various irregularities suggested in the learned brief of the defendant's counsel, which might have sufficed to put a business man on inquiry, but none of them go to the integrity of the receipts as a conclusion of law, nor do they suffice to establish bad faith on the part of the bank, and under the statute applicable, they are not, in our opinion, available as a defense.

It is argued for appellant that the bank should have refused the receipts as collateral because they were placed there by Walters, and this because the law provides, that where a receipt is given for cotton belonging to the local manager, it shall specify that fact on its face. But it was not Walter's cotton originally, they were duly and regularly issued to third parties who, as stated, had endorsed and delivered them, and there is nothing in the statute which prohibits Walters from acquiring these receipts.

Again appellant's counsel insist that the facts present a case of double agency, and where the bank should have paused or declined to act because Walters was placing them as collateral for his own personal

obligation, citing *Grady v. Bank,* 184 N. C., p. 158, but in this and all other cases of like kind, so far examined, where a claimant was barred of recovery under the doctrine stated, it appeared that he took with knowledge of the fact that the principal's property was being perverted by the agent to his own use. Here, as stated, Walters offered warehouse receipts endorsed by the original owners, and the case states that the bank had no actual knowledge of Walter's default. It is further argued that before payment made the State Treasurer was warned not to pay and fully informed of the fact that the receipts were reissued by Walters in flagrant breach of his duties, and furthermore, that the defendant denied liability on the bond. But the receipts had already been negotiated for full value, and this legislation having for one of its chiefest purposes to maintain their negotiability, would indeed fall short of both its purpose and meaning if the authorities having control of the indemnity fund were compelled to stay their hand whenever they were notified not to pay and abide the results of a jury trial, whenever the question was so raised. Considering the terms and purposes of the law unless the facts would disclose a case where a claimant bank or other being an endorsee or holder for value acted it becomes the duty of the Treasurer, as heretofore stated, to make good the loss and, this loss being due to their principal's default, defendant, in collusion with the defaulting officer, or had knowledge of the fraud, as stated, is legally and primarily liable therefor.

There is no error and the judgment below is

Affirmed.

CLARKSON, J., not sitting.

ED BULLARD v. PILOT FIRE INSURANCE COMPANY AND ÆTNA INSURANCE COMPANY.

(Filed 24 January, 1925.)

1. Insurance, Fire—Policies—Conditions—Waiver—Iron-Safe Clause.

The provisions of the "iron-safe clause" in a policy of fire insurance for the preservation of the inventories of the merchandise insured, books, etc., may be waived by the company in accepting premiums thereon, knowing that the same was not being complied with, and make ineffective the further provision that the policy would otherwise be void.

2. Same—Principal and Agent—Evidence—Declarations.

While provisions in a policy of fire insurance may render inadmissible as evidence declarations of an agent and hold the party to the terms

expressed in the printed or written form, the principle does not obtain when the local agent knowing that under the circumstances, inventories, etc., could not be made and kept in accordance with the iron-safe clause, delivered the policy and the company has knowingly collected the premiums thereon, such being in effect a valid waiver of the written stipulations.

3. Same—Pleadings—Estoppel.

Where a fire insurance company has waived the requirements of the iron-safe clause provision in its policy of insurance, and the merchandise covered by it has been lost by fire, it is not required that an estoppel be pleaded in order to introduce other and competent evidence of the value of the merchandise thus destroyed, for a recovery in an action on the policy. The difference between a waiver of this character and an estoppel required to be pleaded, pointed out by ADAMS, J.

APPEAL by defendants from *Horton, J.*, at February Term, 1924, of SAMPSON.

On 1 May, 1921, the plaintiff conducted a mercantile business in the town of Roseboro and had his stock of goods insured for the sum of $3,000 in the Pilot Fire Insurance Company, for which he paid a premium of $51; and on 15 September, 1921, he took out a policy in the Aetna Insurance Company for $5,000, for which he paid a premium of $85. On 15 December, 1921, his goods were destroyed by fire, and he thereafter brought suit to recover the amount of the policies.

The defendants admitted the execution of the contract of insurance, each setting up the policy issued by the other company; alleged that the stock of goods was worth not more than $2,400; pleaded the three-fourths liability clause, the inventory clause, the bookkeeping clause, and the iron-safe clause; and alleged the plaintiff's breach of each of these clauses except the one relating to the inventory.

The defendants further alleged that the plaintiff in March, 1921, bought the bankrupt stock of G. P. Cherry at the price of $2,749.09, and for sometime prior thereto had carried insurance in the sum of $5,000 with the Aetna Company and at the time of purchasing this stock borrowed $2,500 from the Coharie Bank, to which he then owed $1,000; that in both companies he carried $8,000 on a stock of goods worth not more than $2,500; and that he had set fire to and burned the insured property for the purposes of collecting the amount of the policies.

The two cases were consolidated and the jury returned the following verdict:

1. Did the plaintiff comply with the provisions contained in the two insurance policies sued on in these actions? Answer: "No."

2. If not, did the defendant after the issuance of said policies have full knowledge and notice of such noncompliance and collect the premiums on said policies and take no steps to cancel said policies on account of such noncompliance? Answer: "Yes."

3. Did the plaintiff burn his stock of goods for the purpose of collecting his policies of insurance, as alleged in the answer? Answer: "No."

4. What was the value of the plaintiff's stock of goods at the time they were burned? Answer: "$10,000."

5. What amount, if any, is plaintiff entitled to recover of the defendants? Answer: "Three-fourths value with interest."

It was agreed that the Aetna Company should be responsible for five-eights and the Pilot Company for three-eights of the amount assessed, if any, in answer to the fifth issue. Judgment, from which the defendants appealed.

A. McL. Graham, Fowler & Crumpler, Faison & Robinson, and J. Abner Barker for plaintiff.

Butler & Herring for defendants.

ADAMS, J. In the first fourteen exceptions the defendants assign as error the admission of evidence tending to show the value at which several witnesses estimated the stock of goods a short time before the fire, the contention being that the records showing purchases, sales, and shipments cannot be supplied in this way.

The clauses referred to are as follows:

"1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year and, unless such inventory has been taken within 12 calendar months prior to the date of this policy, one shall be taken in detail within 30 days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

"2. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause, and during the continuance of this policy.

"3. The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the premises mentioned in this policy are not actually open for business; or, failing in this, the assured

will keep such books and inventories in some place not exposed to a fire which would destroy the property hereby insured.

"In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

The plaintiff introduced an inventory which, according to his testimony, he had taken the first of January, 1921. It showed the total value to be $6,970.79. He testified that his inventory of the Cherry stock amounted to $6,060.95. Also that he had kept his check stubs as a record of cash sales, had paid his bills by checks, and had deposited his receipts in the bank. He offered in evidence a book account which, he stated, covered his credit sales; but his duplicate invoices of purchases during the year were excluded. The verdict shows, however, that the defendant did not comply with all the provisions in the policies.

The "iron-safe clause" in policies of insurance is generally upheld by the courts as a reasonable contract limitation upon the insurer's risk (*Coggins v. Ins. Co.*, 144 N. C., 7); but if the company, knowing the insured has not complied with this provision, collects the premiums and recognizes the validity and binding force and effect of the policy it has issued, it should not be heard to insist upon the introduction of records, the keeping of which it has thus tacitly waived. There is a distinction between waiver and estoppel; but the waiver of a forfeiture, though in the nature of an estoppel, may be created by acts, conduct, or declarations insufficient to create a technical estoppel. 14 R. C. L., 1181, sec. 357; 26 C. J., 281, sec. 352 *et seq.; Argall v. Ins. Co.*, 84 N. C., 355; *Grubbs v. Ins. Co.*, 108 N. C., 472; *Horton v. Ins. Co.*, 122 N. C., 498, 503; *Ins. Co. v. Ins. Co.*, 161 N. C., 485; *Moore v. Accident Assurance Corp.*, 173 N. C., 532; *Paul v. Ins. Co.*, 183 N. C., 159.

But the defendants assert, as their second proposition, that they have not waived the iron-safe clause, that estoppel has not been pleaded, and that no facts are alleged or proved constituting a basis for the second issue.

In regard to the question of estoppel this Court has said: "But if the party seeking the benefit of the estoppel will not rely on it, but will answer to the fact and again put it in issue, the estoppel when offered in evidence to the jury, loses its conclusive character, becomes mere evidence, and like all other evidence may be repelled by opposite proof, and the jury may upon the whole evidence find the truth." *Woodhouse v. Williams*, 14 N. C., 508. Of similar import is *Stancill v. James*, 126 N. C., 190. These and other cases point out the distinction between estoppel as a defense and estoppel as evidence and decide that an estoppel may be introduced as evidence in the absence of a special plea.

However, the principle which applies to the exceptions under discussion is that of waiver. The provision restricting the agent's power to waive conditions does not, as a general rule, refer to or include conditions existing at the inception of the contract, but to those arising after the policy is issued. Conditions which form a part of the contract of insurance at its inception may be waived by the agent of the insurer, although they are embraced in the policy when it is delivered; and the local agent's knowledge of such conditions is deemed to be the knowledge of his principal. *Johnson v. Ins. Co.,* 172 N. C., 142; *Gazzam v. Ins. Co.,* 155 N. C., 336; *Grabbs v. Ins. Co.,* 125 N. C., 395; *Horton v. Ins. Co.,* 122 N. C., 498; *Wilkins v. Suttles,* 114 N. C., 550.

Upon this principle the testimony of the agents, Robinson and Tyson, evidently accepted by the jury, clearly establishes a waiver at the inception of the contract. They testified in substance that they had knowledge of the plaintiff's inventory when the policies were issued. Robinson, when informed that the plaintiff had no iron safe and would not take out the policy if he had to buy one, expressly consented that he should not be required to keep the books in his place of business and should have permission to take them home at night; and Tyson knew that the plaintiff was not qualified to keep a record of purchases and that his bank book was his only record of sales. It was under these conditions that the premiums were accepted and restrained by the defendants and under these conditions forfeiture of the policies for the reasons assigned would be wholly inequitable.

In the next place the defendants insist that by the terms of the contract the policies were to be void if the interest of the insured was other than sole and unconditional ownership; that the plaintiff's title or interest was only that of a partner; and that a prayer for instruction embracing this proposition was refused by the court.

True, the plaintiff testified on the cross-examination that he and his wife were partners when the policies were issued and when the fire occurred; but the plaintiff's sole ownership is alleged in the complaints and not denied in the answers. On the contrary, in each answer the stock of goods is referred to as "owned by the plaintiff," and the defendants neither in the answers nor by way of amendment set up misrepresentation as a defense or in any way formally put the matter in issue. Breach of condition or misrepresentation should be pleaded when relied on as a defense, for proof without allegation is as unavailing as allegation without proof. The fact that the evidence was admitted without objection does not change the nature of the defense set up in the answers. There was no error, therefore, in refusing to give

the instruction which is made the basis of the twenty-first exception. *Lee v. Upton,* 178 N. C., 198; *Green v. Biggs,* 167 N. C., 417; *Abernathy v. Seagle,* 98 N. C., 553; *McLaurin v. Cronly,* 90 N. C., 50; 26 C. J., sec. 704; 14 R. C. L., sec. 591.

In our opinion the merits of the controversy were properly submitted to and determined by the jury, and we find in the record no valid reason to interfere with the judgment.

No error.

E. N. STAMEY v. THE TOWN OF BURNSVILLE, NORTH CAROLINA.

(Filed 24 January, 1925.)

1. **Municipal Corporations—Cities and Towns—Condemnation—Special Benefits—Offsets—Statutes.**

   It is within the legislative power to allow an incorporated town the value of the special benefits of a street improvement to the owner of land abutting thereon, in proceedings by the town to condemn a part thereof for the purpose of widening its streets, and in the absence of statute to that effect such benefits are not allowable.

2. **Same—Negligence—Damages.**

   Where an incorporated town is allowed by statute to take by condemnation the lands of abutting owners along a street improved, the town is liable to the owner for such damages to his land so taken as is caused by its negligent construction of the improvements so made, though not such as may be caused by a construction of the improvements in a careful and workmanlike manner. The charge in this case is not *held* as prejudicial error.

APPEAL by defendant from *Finley, J.,* and a jury, at March Term, 1924, of YANCEY.

This is an action brought by the plaintiff to recover damages of the defendant by reason of the construction of a concrete sidewalk in front of plaintiff's property, which was a town lot in the town of Burnsville, North Carolina. It was contended by the plaintiff that a small strip of his land in front of his house and lying alongside of the public street had been taken. This strip of land was 3½ feet wide at one end and 2½ feet wide at the other, and was 96.4 feet long, making an area of 284.4 square feet taken by the town of Burnsville upon which it constructed its said sidewalk.

The defendant made numerous exceptions and assignments of error and from judgment rendered, excepted, assigned error and appealed to the Supreme Court.

Charles Hutchins for plaintiff.
Watson, Hudgins, Watson & Fouts for defendant.

CLARKSON, J. We will consider only the assignments of error we think material. The court below charged the jury as follows: "In the first place, if the defendant town has built a sidewalk and the sidewalk improves the condition of the public all along the street at this point the plaintiff is not chargeable with any general improvement by reason of the sidewalk being built, because that improvement applies to everybody and there being no special provisions in the charter of the town of Burnsville or in the general law that has been offered or referred to, authorizing these special benefits to be charged up against any damage the plaintiff might sustain, [then you cannot take into consideration any benefit that has been done the plaintiff by reason of the sidewalk being built along the street]."

To the latter part of the charge, in brackets, defendant excepted and assigned error.

It seems that no provision is made in the town charter of the defendant to allow general benefits assessed, the language shows clearly the court was speaking of general benefits, as a set-off against damages for property taken for street improvements. The right of condemnation for towns and cities is provided under public act. C. S., 2791, 2792.

C. S., 2792 is as follows: "If such governing body, board, commission or department of the government of such city are unable to agree with the owners thereof for the purchase of such land, right of way, privilege, or easement, for the purposes mentioned in the preceding section, condemnation of the same for such public use may be made in the same procedure as is provided in chapter Eminent Domain, article 2; and the determination of the governing body, board, commission, or department of government of such city of the land necessary for such purposes shall be conclusive."

Under Eminent Domain, Art. 2, sec. 1721, the latter part of the section, provides that the commissioners, "a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the corporation to the party or parties owning or interested in the real estate appraised by them."

The Legislature has the power to allow municipal corporations to have the general benefits assessed as offsets against damages in an action to acquire land for a public purpose. *Wade v. Highway Com.*, 188 N. C., 210; *Miller v. Asheville*, 112 N. C., 768. There is no power or authority given defendant of this kind either by special charter or general State act.

In *Lanier v. Greenville,* 174 N. C., p. 317, *Allen, J.,* said: "Counsel for the defendant have presented respectable authority supporting the principle embraced in his prayer for instruction and in opposition to the instruction given by his Honor, but we have adhered to the rule, in line with the weight of authority, that in the assessment of damages for land taken for a public improvement, the measure of damages is the difference in value before and after the taking, less the special benefits, and that increased value to the land enjoyed in common with others affected by the improvement is not a special benefit. The question was considered at the last term in *Campbell v. Comrs.,* 173 N. C., 500, in which, after laying down the rule that special benefits are those not common to others, *Clark, C. J.,* says: 'This is the rule laid down in *Bauman v. Ross,* 167 U. S., 548 (17 Sup. Ct., 966; 42 L. Ed., 270), in an exhaustive opinion, and the same rule has been applied in this State. *Asheville v. Johnston,* 71 N. C., 398; *R. R. v. Wicker,* 74 N. C., 220; *R. R. v. Platt Land,* 133 N. C., 266 (45 S. E., 589); *Bost v. Cabarrus,* 152 N. C., 531 (67 S. E., 1006); *R. R. v. Armfield,* 167 N. C., 464 (83 S. E., 809); also 2 Lewis on Em. Dom., 1187, par. 691.' We are less inclined to change the rule since it was held in *Miller v. Asheville,* 112 N. C., 768, that it was within the power of the General Assembly to provide by statute that the damages should be reduced 'not merely by the benefits special to the plaintiff, but by all the benefits accruing to him, either special or in common with others' (*Campbell v. Comrs.*), and the legislative body has declined to act." *Power Co. v. Russell,* 188 N. C., p. 725.

It seems to be the general rule in this jurisdiction that "the compensation which ought justly to be made," "just compensation," under our general statute is such compensation after special benefits peculiar to the land are set off against damages. "The value of the land subject to such special benefits as may accrue to the remainder of the tract." *R. R. v. Platt Land,* 133 N. C., p. 273. In a great many of the decisions of this State special statutes were construed which in express terms provided for the deduction of special benefits. These statutes were merely in affirmance of the "just compensation" rule above mentioned.

Lewis Eminent Domain, Vol. 2 (3d ed.) part of sec. 694, states the rule as follows: "Owing to the variable decisions in regard to benefits as shown in the preceding sections, the only general rule which can be laid down where part of a tract is taken, is that the measure of damages consists of the value of the part taken and damages to the remainder, less such benefits, if any, as may be set off by the law of the forum. Many cases state the measure of damages to be the difference between the value of the whole tract before the taking and the value of the remainder after the taking. This, however, would permit the considera-

tion of benefits of every kind and should be qualified by excluding general benefits, in jurisdictions where only special benefits can be taken into account, and by excluding all benefits, where such is the law."

The charge on this aspect of the case, heretofore referred to, and the charge as given below, the latter part of which is only assigned as error, we think followed the rule laid down in this jurisdiction, and according to Lewis the charge below was more favorable than defendant was entitled to as it included general benefits. This assignment of error cannot be sustained.

The defendant assigned the latter part of the following charge of the court below as error: "The matter is confined to the conditions that existed there that are peculiar to the plaintiff. In other words, it is the difference between the value of this property before the sidewalk was built and after the sidewalk was built, taking into consideration the fact that the defendant, town, appropriates and condemns certain part of plaintiff's property, if you find that it did do it;—and further that you find this taking of this property by condemnation proceedings and building sidewalk in a negligent or improper manner, then you can take into consideration under this limitation what damage, if any, the plaintiff is entitled to recover—."

The defendant complains that this charge was very prejudicial, there being "no allegation in the complaint that the work of constructing the sidewalk was not done with proper care and skill."

After charging the jury as above set forth, the court further said: "In regard to the building of a sidewalk the general rule is that a city or town had a right to raise the grade or lower the grade of its streets in building its sidewalks and streets, that that is a judicial function; that the commissioners are authorized under the charter and under the general law to exercise discretion and that no damage can be recovered against the town for the proper exercise of this discretion. If the sidewalk has been raised four or five feet or lowered eight or ten feet along the street owned by the town, and nothing else appearing, and it has been done in a reasonably workmanlike manner, although the lot of the party aggrieved may be way down below the sidewalk or way above the sidewalk, in any instance that is not a case where the party aggrieved can recover damages because he owns the property subject to the rules of law that prevail, and the decisions of our courts have for a long time held that the town authorities in exercising in a proper way the powers vested in them to make proper streets and proper grades for sidewalks and streets, can do this without being held to damage provided it is done in a reasonably workmanlike manner. The only instance where a town is liable is where under the

exercise of rights and powers delegated to the town by the general law or special charter is where the work is done as a reasonable prudent man under the same circumstances would not have done. That is, the rule of reason applies to this as to all other matters. . . . Everyone who owns real estate in a city or town that adjoins a public street or pavement holds it subject to the right of the town to grade such street down, or elevate it when in the exercise of its judgment, of the authorities of the city it becomes necessary or feasible to do so, and where the grading is done under such conditions and is done properly, that is, when care and skill are used, with due regard to the rights of the property owners, then the law affords no protection to property owners on account of injury to their property resulting from being left higher or lower than the street or because ingress or egress is affected or because of an injury to the appearance of the property. Now that applies to the question of the construction of a sidewalk. The question of taking and appropriating the land, if you find the town did appropriate it, is another question, and not included in the proposition of law as stated, at all. So you see under this ruling as to the construction of sidewalk the only question is whether it was done with care and skill and with due regards to the rights of the property owners."

Under our liberal practice, all the evidence of the contending parties having been introduced, no specific prayer being asked for by defendant, we cannot hold the charge prejudicial. This assignment of error cannot be sustained.

Walker, J., in a well considered and an elaborate opinion, citing numerous cases and the reasons, lays down in *Bennett v. R. R.,* 170 N. C., p. 391, the rule to be: "It is well settled with us, and it is very generally held in other jurisdictions, that, unless otherwise provided by the Constitution or statute, the owner of property abutting on a street cannot recover for any damage to his property caused by a change in the grade of the street under proper municipal authority, where there is no negligence in the method or manner of doing the work."

The other exception and assignments of error we do not think of sufficient importance to discuss *seriatim,* or prejudicial to defendant. This particular case may be of considerable hardship to the defendant, as suggested by it, but the remedy is not with this Court.

It is, perhaps, not out of place, because of defendant's grievance at the amount of the verdict, to call attention to this language of *Justice H. G. Connor,* in *Railroad Co. v. Platt Land, supra,* p. 274: "We may not, listening to suggestions of the public necessity, forget that the most permanent and the wisest institutions of government are designed for the protection of private property and personal liberty. A citizen must surrender his private property in obedience to the necessities of a

growing and progressive State, but in doing so he is entitled to be paid full, fair and ample compensation, to be reduced only by such benefits as are special and peculiar to his land. He has the right to have and enjoy the general benefits which are common to him and to his neighbors, without being required to pay therefor because it so happens that the use of his land is necessary for the needs of the public."

For the reasons given, there is

No error.

FOWLE MEMORIAL HOSPITAL COMPANY ET AL. v. J. L. NICHOLSON ET AL.

(Filed 24 January, 1925.)

1. Corporations—Ultra Vires Acts.

The acts of a corporation will not be declared *ultra vires* when the authority therefor is expressly conferred upon it by the legislature or reasonably incidental thereto, and its general business is confined to the scope or compass prescribed for the general purpose of its creation, or necessary, expedient or profitable in the care and management of the property it is authorized to hold.

2. Same—Charitable Organizations—Hospitals.

Held, under the facts of the case, a lease by an incorporated charitable hospital association made to one of its members of the hospital grounds, buildings and equipment, having management thereof, will not be declared invalid as a matter of law, construing its charter with reference to its powers and the record of the meeting at which the lease was voted to be made, there being some evidence that it was made in pursuance of and in accordance with the powers granted by charter, and that it was necessary to continue in operation thereunder.

3. Corporations — Charitable Institutions — Hospitals—Lease—Majority Vote.

Where a majority vote of the members of a charitable hospital association is necessary to execute a lease of the incorporated association, a majority of a quorum of those present at a duly constituted meeting is sufficient.

4. Corporations—Charitable Institutions — Leases—Management—Good Faith—Appeal and Error—Remanding Case.

Where the affairs of a charitable hospital association are managed by its incorporating members who execute a lease to one of them having the management and exclusive control thereof, the lease is not void but voidable, and it is encumbent upon him to show, when the validity of the lease is attacked for fraud in fact or in law, that the lease was fairly and openly authorized and executed for an adequate consideration, and that its execution was free from his undue or controlling influence, oppression or imposition; and this case is remanded for further inquiry on the subject.

HOSPITAL *v.* NICHOLSON.

APPEAL by plaintiffs from an order of *Devin, J.,* in Chambers, 16 May, 1924.

The plaintiff company was incorporated on 2 May, 1902, for the purpose of building, conducting, maintaining and carrying on a hospital in the town of Washington for the care of the sick and of training people to nurse the sick. It is a charitable organization without capital stock, and the period of existence is unlimited. In section 4 of the certificate of organization it is provided: "All persons in order to be eligible as a member of said organization or company shall be a white person and a bona fide resident of the town of Washington. Five of the members need not be physicians or surgeons. All the members except five constituting the organization or corporation, shall be reputable, white physicians in good standing, holding license to practice medicine or surgery and the branches thereof from the State Medical Association or other body authorized under the laws of North Carolina to grant a license to practice medicine or surgery and the branches thereof in said State. The members other than physicians shall be elected by ballot by a two-thirds vote of the persons constituting the body or organization. The members who are physicians shall be elected by ballot by a majority vote of the members or persons constituting the body or organization. Whenever a person ceases to be a bona fide resident in the town of Washington he shall forfeit his membership and his successor shall be elected as aforesaid. Any member may be expelled upon a three-fourths vote by ballot for any improper, immoral or dishonest conduct, or conduct prejudicial to the welfare of the society or the institution."

Section 7. "Every member of the organization shall have one vote and no more at any meeting of the members of the corporation which vote may be cast by written proxy."

On 20 May, 1902, the commissioners of the town of Washington executed to the plaintiff company a deed for two lots, 81 and 84, in trust, "That the party of the second part shall build, erect, maintain and operate a hospital for the care and treatment of the sick and for the training of nurses to care for the sick and for no other purpose." It was also provided that failure or neglect for five successive years to maintain and operate a hospital in accordance with the terms of the deed should revest title in the grantors.

About 1906 dissension arose among some of the members which seems to have continued with more or less intensity until 25 February, 1920, when the defendant J. L. Nicholson proposed that the company lease to him the hospital and its other property for a period of 20 years. This effort failed.

At a meeting held 4 January, 1921, J. L. Nicholson submitted a lease which he wished the company to give him on the hospital property for a period of fifty years. According to the minutes the motion to grant the lease was carried, and a paper purporting to be the lease was offered in evidence. It contains these provisions: "It is understood and agreed that any additions, improvements or repairs which may be made by the party of the second part under this lease are to be made by him at his own expense or from income received from the operation of said hospital. Said party of the second part is to have full control of the operation of said hospital and he is to attend to employing and paying nurses, etc., and he is to attend to buying and paying for all supplies or equipment used by him in the operation of said hospital under this lease. Said party of the second part is to manage and look out for said property the same as if it were his own, except of course, that he is not to sell or in any way encumber any of said property. It is understood and agreed that if the said party of the second part should at any time decide that he should, for any reason, be unable to fulfill the terms of this lease, that he may cancel same by giving thirty days notice of such intention, provided, that in the event that he should so cancel this lease, then all improvements or repairs made by him on the said property are to belong to the hospital institution whether the party of the second part has been reimbursed for the same or not. It is also understood and agreed that Dr. John C. Rodman, Dr. P. A. Nicholson and Dr. S. T. Nicholson are to have the same rights of using said hospital that they now enjoy. It is understood that the party of the second part will not allow said hospital to cease to be operated as such for the period of time named in the deed to the party of the first part for the lot on which said hospital is situated."

The suit was brought on 3 April, 1924, and upon the pleadings and exhibits motion was made by the plaintiffs at the May term of the Superior Court to set aside the lease and enjoin the exclusive control of the hospital by J. L. Nicholson. The motion was denied and the plaintiffs appealed.

W. C. Rodman and Small, McLean & Rodman for plaintiffs.
Ward & Grimes and H. C. Carter for defendants.

ADAMS, J. The plaintiffs' motion to cancel the alleged lease and to prevent exclusive control of the hospital by one of the defendants is based upon three propositions: (1) The making of the lease was *ultra vires;* (2) it was not authorized by a majority of the members of the company; (3) the defendant J. L. Nicholson was an officer of the com-

pany and by exercising a controlling influence over the other members acquired exclusive control of the hospital without substantial consideration.

1. The general rule is that a corporation possesses only such powers as are expressly conferred upon it or such as are reasonably incidental to the powers expressly conferred and that its principal business is to be confined to the scope and compass prescribed for the general purpose of its creation; but it may ordinarily engage in transactions incidental to its main business when they are necessary, expedient, or profitable in the care and management of the property which it is authorized to hold. "To ascertain whether any particular act is *ultra vires* (beyond the powers) of the corporation or not, the main purpose must first be ascertained; then the special powers for effectuating that purpose must be looked for, and then, if the act is not within either the main purpose as described in or the special powers expressly given by the statute, the inquiry remains whether the act is incidental to or consequential upon the main purpose and is a thing reasonably to be done for effectuating it." *Attorney-General v. Mersey Ry. Co.*, L. R. (1907), 1 Ch. Div., 81; L. R. (1907), A. C., 415 (Eng.).

We have given the certificate of incorporation, the deed executed to the hospital company, the instrument purporting to be a lease, and the record evidence our careful consideration, and have concluded that upon the facts now appearing we cannot hold as a matter of law that the execution of the lease (if it was authorized and properly executed) was beyond the powers conferred upon the plaintiff company; but as the corporate object was to build, conduct, maintain, and carry on a hospital for the care of those who are sick and to train nurses for them, we are of opinion that the lease, possibly incidental to the main purpose of the corporation, can be sustained only on the ground that its execution was necessary to the accomplishment of the object originally contemplated in the certificate of incorporation, and that the burden is upon the lessee to establish such necessity.

The plaintiffs contend that the effect of the lease is to destroy the coöperative character and the democratic control of the association and to defeat the very purpose for which the company was organized; and the defendants insist that the former method of control resulted in failure and menaced the usefulness, as well as the continuance, of the institution. The evidence in reference to these contentions is meagre and inadequate and further inquiry concerning them as hereafter indicated, is essential to the final determination of the controversy.

2. The plaintiffs insist also that the lease was not executed by a majority of its members and is therefore void, even if its execution was not *ultra vires*.

It will be noted that this is a charitable organization, without capital stock, composed of reputable white physicians residing in the town of Washington, with the exception of five members who are not and need not be physicians or surgeons. In the certificate, as in the by-laws, the corporators are designated as "members"; the word "trustee" is not used. There is no board of directors, though the by-laws provide for a board of three supervisors. On 25 February, 1920, the members were increased to ten and on 20 of the following August to thirteen: S. T. Nicholson, P. A. Nicholson, J. L. Nicholson, L. H. Swindell, John W. Williams, C. McGowan, J. C. Rodman, E. M. Brown, physicians, and C. G. Morris, A. M. Dumay, E. M. Ayers, S. R. Mixon, and J. I. Randolph, laymen.

The minutes of the meeting held on 4 January, 1921, record the following as voting for the lease: C. G. Morris, A. M. Dumay, E. W. Ayers, E. R. Mixon, P. A. Nicholson, L. H. Swindell, C. McGowan, and S. T. Nicholson; and John W. Williams and J. L. Nicholson as not voting. J. C. Rodman, E. M. Brown and J. F. Randolph did not attend the meeting.

The plaintiffs contend that in the absence of a special provision to the contrary the vote of a majority of all the members of the association was essential to granting the lease, and that a majority of the members did not vote for it. It is particularly contended that although L. H. Swindell is recorded in the minutes as having voted he was called away before any business was transacted and did not vote in the meeting of 4 January, 1921; that McGowan was not a duly elected member and had no right to vote; that J. L. Nicholson did not vote; and that only six votes were cast in favor of the lease. This position is assailed by the defendants, who say only nine members of the association attended this meeting, eight of whom voted for the lease. These contentions present two questions: (1) Whether the vote of a majority of all the members was necessary to authorize and effectuate the lease; (2) whether McGowan's vote should be excluded from the count.

In *Cotton Mills v. Comrs.* 108 N. C., 678, it is said: "The courts of this country have generally adopted the common-law principle that if an act is to be done by an incorporated body, the law, resolution, or ordinance, authorizing it to be done is valid if passed by a majority of those present at a legal meeting."

This is the prevailing rule. If then, the names of L. H. Swindell and C. McGowan be excluded, it still appears that a quorum attended the meeting and that a majority of those present voted for the lease. For this reason it is not necessary to consider the latter of the two questions.

3. The plaintiffs say, in addition, that J. L. Nicholson, the lessee, was not only a member of the corporation, but an officer when the lease

was executed and for several years had been in charge of the hospital as superintendent and financial manager. They contend that he exercised a controlling influence over the members who voted for the lease; that the transaction in effect was a contract made by himself and others with himself contrary to the purpose of the founders of the institution, and effected by means of a constructive fraud upon the minority.

When an officer or director of a corporation purchases or leases its property, the transaction is voidable, not void, and will be sustained only when openly and fairly made for an adequate consideration. The presumption is against the validity of such contract and when it is attacked the purchaser or lessee must show that it is fair and free from oppression, imposition, and actual or constructive fraud. Firmly established in our jurisprudence is the doctrine that a person occupying a place of trust should not put himself in a position in which self-interest conflicts with any duty he owes to those for whom he acts; and as a general rule he will not be permitted to make a profit by purchasing or leasing the property of those toward whom he occupies a fiduciary relation without affirmatively showing full disclosure and fair dealing. Upon this principle it is held that a director who exercises a controlling influence over codirectors cannot defend a purchase by him of corporate property on the ground that his action was approved by them. 14 A. C. J., 112, sec. 1880; *Railroad v. Bowler,* 1 Bush (Ky.), 468; *Wing v. Dillingham,* 239 Fed., 54; *Lime Works v. Moss,* 70 So. R. (Ala.), 292; *Hoffman v. Reichart,* 37 A. S. R. (Ill.), 219; *McIver v. Hardware Co.,* 144 N. C., 478.

Though not occupying the technical position of agent, trustee, or director, the lessee at the time the lease was executed was one of the members who had the management of the institution and the effect of the lease is to vest in him the exclusive control with right to receive the entire revenue. In these circumstances it is encumbent upon him to show that the lease was fairly and openly authorized and executed for an adequate consideration and that its execution was free from undue or controlling influence, oppression or imposition.

The facts in regard to these matters as well as to the necessity of the lease may be submitted to and determined by the jury upon proper issues.

It is suggested by the defendants that the present action cannot be maintained; but there is some evidence that it was duly authorized, and as the evidence concerning the contention is not satisfactory we think a more comprehensive statement of the facts is expedient if not absolutely necessary.

We approve his Honor's judgment denying the motion to cancel the lease or to continue the restraining order upon the present record, but we think the cause should be remanded for determination of the two questions involved in the first and third propositions on which the plaintiffs insist, and for additional evidence as to the circumstances under which the suit was brought.

Remanded.

THE WACHOVIA BANK AND TRUST COMPANY, ADMR., ET AL. v. R. A. DOUGHTON, COMMISSIONER OF REVENUE.

(Filed 24 January, 1925.)

1. Statutes—Decisions of Other States on Statutes Adopted Here.

Great weight will be given by our courts to the decisions of another state upon its statute which has been substantially adopted by our legislature as a law.

2. Wills—Statutes—Legislative Powers.

The right to make testamentary disposition of property is subject to the legislative power of the State and may be denied or allowed upon such constitutional conditions as the legislature may impose.

3. Same—Transfer Tax—Constitutional Law.

The tax imposed by ch. 34, sec. 6 of the Laws of 1921, upon any person or corporation exercising a power of appointment derived from any disposition of property as a "transfer taxable," is a constitutional and valid provision and does not attempt to impose a tax upon personal property having its *situs* outside of the State when coming under its provisions, but upon the exercise of the power of appointment itself by a resident of this State.

4. Same—Situs of Property.

A nonresident of this State devised certain personal property in trust for his daughter at the place of his domicile and gave her the power of disposition thereof by will. Afterwards she became a resident of this State, and died having exercised her power of appointment by will in North Carolina. *Held*, the intent of ch. 34, sec. 6, of the Laws of 1921, was to levy an inheritance or transfer tax, upon the exercise of the power by a resident here and such exercise of the power is construed to be valid transfer tax under the provisions of this act though the *situs* of the property disposed of was in the State wherein her father died a resident.

5. Same—Succession Tax.

The transfer tax imposed by ch. 34, sec. 6, Laws of 1921, is a succession tax and collected as such as the statute provides.

APPEAL by plaintiffs from *Grady, J.*, at Chambers, 8 February, 1924, from WAKE.

Controversy without action, submitted on an agreed statement of facts, the determinative portion of which appears in the opinion of the court.

From a judgment in favor of the defendant, upholding the validity of the tax, the plaintiffs appeal.

R. G. Stockton, Manly, Hendren & Womble for plaintiffs.

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

STACY, J. There being a question in difference between the parties to this proceeding, which might properly become the subject of a civil action, the same has been submitted for adjudication, on an agreed statement of facts, as provided by C. S., 626.

The question to be determined is the liability or nonliability of the estate of Mrs. Theodosia Haynes Taylor, or the appointees under her will, to an inheritance tax, or transfer tax, levied under the Revenue Act of 1921, upon the exercise in this State, by testamentary instrument, of a certain power of appointment, over property consisting of stocks and bonds in foreign corporations, said power being given and conferred by the will of Stanford L. Haynes who was a resident of the State of Massachusetts at the time of his death, and whose will is probated in that State.

The said Stanford L. Haynes died 21 May, 1920, leaving a last will and testament, bearing date 15 September, 1919, in which he bequeathed certain stocks and bonds of foreign corporations, in trust to the Springfield Safe Deposit & Trust Company of Springfield, Mass., for the benefit of his daughter, Theodosia Haynes, and with power of appointment over said property to her by will. The following is the item of said will, pertinent to the present controversy:

"Fifth, all the rest, residue and remainder of all my goods and estate, both personal and real, of every kind and description, and wherever situated, I give, devise and bequeath to said Springfield Safe Deposit & Trust Company in trust to hold, manage, control, invest and reinvest in accordance with its best judgment and discretion as follows:

"A. One-half of said rest, residue and remainder shall be set apart and kept in a separate trust fund for the benefit of my daughter, Theodosia Haynes, and the net income therefrom shall in quarterly installments be paid to my said daughter as long as she shall live. Upon the death of said Theodosia, I direct that the principal of said trust fund be paid and transferred to such person or persons and in such proportions as said Theodosia shall by will appoint, or in the event that said Theodosia shall fail to exercise the power of appointment

hereby conferred upon her and shall leave issue surviving her, such payment and transfer shall be made to such issue by right of representation."

After the death of her father, Theodosia Haynes intermarried with Alexander Taylor of Morganton, N. C., and thereby became a resident of North Carolina. Mrs. Taylor died 23 June, 1921, leaving a last will and testament, which has been duly probated in this State, and in which she appointed her husband for a portion of the trust estate and her infant son for the remainder. Her will was executed in conformity with the laws of North Carolina, and it is also sufficient in form to meet the requirements of the laws of Massachusetts. Both of the beneficiaries, who take the appointed property under Mrs. Taylor's will, are residents of this State; and the Wachovia Bank and Trust Company is the duly appointed and qualified administrator, *c. t. a., d. b. n.,* of the estate of Mrs. Taylor, and guardian of her infant son.

The individual estate of Mrs. Taylor, which is located in North Carolina, amounts to $8,743.84. The assessed valuation of the trust estate in the hands of the Springfield Safe Deposit and Trust Company, which consists entirely of investments in stocks and bonds of various foreign corporations, is placed at $395,279.93.

The defendant claims and has assessed an inheritance tax of $3,995.65 against the husband's share of the appointed property, and $5,317.09 against the share of the infant son in said property, under an amendment to the inheritance-tax laws of North Carolina, incorporated therein for the first time on 24 August, 1920 (section 2, chapter 24, Public Laws, Extra Session 1920), and again on 8 March, 1921 (section 6, chapter 34, Public Laws 1921), after the death and probate of the will of Stanford L. Haynes, but before the death and probate of the will of Theodosia Haynes Taylor, in words and terms as follows:

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of this act, such appointment when made shall be deemed a transfer, taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer, taxable under the provisions of this act, shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded

thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

This provision, added as an amendment to the Revenue Acts of 1920 and 1921, is taken almost literally from a similar act of the State of New York, and it would seem that the interpretation placed upon the New York act by the courts of that State, and approved by the Supreme Court of the United States, ought to prove quite helpful and beneficial in the interpretation and construction of our own statute. In at least two cases, substantially similar to the one at bar, the New York Court of Appeals has upheld the tax and sustained the validity of the New York statute. *In re Delano,* 176 N. Y., 486, affirmed, *sub nom. Chanler v. Kelsey,* 205 U. S., 466; *In re Daws,* 167 N. Y., 227, affirmed, *sub nom. Orr v. Gilman,* 183 U. S., 278. We think a like conclusion should be reached in construing our own statute in the present case. "Where a statute is adopted from another State or country, and the same has been construed by the courts of such State or country, it is the general rule that the statute is to be held to have been adopted with the construction so given to it, and particularly where the statute itself does not express an intention to the contrary." *Duncan, J.,* in *People v. Trust Co.,* 289 Ill., 475.

The amendment, as we understand it, does not attempt to impose a tax upon property having its *situs* outside of the State, but upon the exercise of a power of appointment within the State. We had occasion to consider the general nature and character of inheritance taxes in the case of *Trust Co. v. Doughton,* 187 N. C., 263. It would only be a work of supererogation to repeat in substance here what has been so recently said there, and we content ourselves by referring to that case for a discussion of the principles involved. In *Magoun v. Bank,* 170 U. S., 283, it is said of such taxes: "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right; a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation." The same doctrine was reasserted in *Knowlton v. Moore,* 178 U. S., 41.

It clearly appears, we think, from the language of the statute, that the Legislature intended to levy an inheritance tax, or transfer tax, on the exercise of the power of appointment; for it is specifically provided that "such appointment when made shall be deemed a transfer, taxable under the provisions of this act."

But it is insisted that the title of the present owners is deduced from the will of Stanford L. Haynes, and not from the will of Mrs. Taylor. It would probably be more nearly correct to say that it is derived in part from each, because it is dependent upon both. They must resort to both in order to establish their full title, for the will of neither alone will suffice. But whatever be the exact source or sources of title of those who take the appointed property, it cannot be denied that, in its final analysis, the execution of the power is what gives them the property; and this is the transfer, transaction or change of ownership which is taxed under the statute. *Trust Co. v. Doughton, supra.*

The last will and testament of Stanford L. Haynes gave his daughter, Theodosia, a power of appointment, to be exercised only in a particular manner, to wit, by will. If the right to take property by bequest or devise be not an inherent or natural one, but a privilege accorded by the State, which it may grant or withhold at its pleasure, it follows that the right to make a will, or to exercise the power of appointment by testamentary disposition, is equally a privilege and equally subject to the taxing power of the State. Speaking to the question in the case of *In re Delano,* 176 N. Y., 486, *Vann, J.,* said: "The privilege of making a will is not a natural or inherent right, but one which the State can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the Legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn as to all others. The Legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of a gross or ratable sum for the privilege. It could exact this condition, independent of the date or origin of the power. All this necessarily flows from the absolute control by the Legislature of the right to make a will."

When Stanford L. Haynes gave or devised the property in question to the appointees under the will of his daughter, he necessarily subjected it to the charge or tax which the State might impose upon the privilege accorded to her of making a will. Had the property passed in default of an exercise of the power of appointment, a very different case would have been presented. In that event the husband of the testatrix would have taken no part of the trust estate, and her infant son would have taken the entire property under his grandfather's will. We express no opinion on the question whether, under such circumstances, the tax imposed by the amendment of 1921 could be deemed a valid exercise of the taxing power. *In re Canda's Estate,* 189 N. Y. Supp., 917.

The recent case of *In re Taylor's Estate,* 204 N. Y. Supp., 367, and the cases of *In re Frazier,* 188 N. Y. Supp., 189; *In re Seaman,* 187 N. Y. Supp., 254, and *State ex rel. Smith v. Probate Ct.,* 124 Minn., 508, are in line with the above position and the decisions cited. See, also, valuable note on the subject in 18 A. L. R., p. 1470.

The exercise of the power of appointment now under consideration took place by the permission and under the direct protection of our laws. This would seem to bring it within the reach and power of the State to tax. *Thomas v. Matthiessen,* 232 U. S., 235; *Hooper v. Shaw,* 176 Mass., 190. The question presented to us is not one of policy for the courts, but one of power for the Legislature. It is peculiarly the function of the lawmaking body to levy assessments and to devise a scheme of taxation. *Trust Co. v. McFall,* 128 Tenn., 645; *Person v. Watts,* 184 N. C., p. 514.

It will be observed that the power of appointment, bestowed upon Mrs. Taylor by the will of her father, is a general power, as distinguished from a special power; and, for the purposes of taxation, the donee of a general power, when an appointment is made thereunder, is usually regarded as the one from whom the estate comes. *Hicks v. Ward,* 107 N. C., 393; *Rogers v. Hinton,* 62 N. C., 102; *S. c.,* 63 N. C., 80; *United States v. Field,* 255 U. S., 257; *Chanler v. Kelsey,* 205 U. S., 466; 2 Sugden on Powers, p. 26. In this respect, the instant case may be partly distinguishable from the cases cited and relied upon by appellants; but, if not, we must decline to follow them, as we think the act in question is constitutional. It is conceded that, in some of the States, notably Massachusetts and California, apparently contrary views are taken of similar statutes. *Walker v. Mansfield,* 221 Mass., 600; *In re Bowditch,* 208 Pac. (Cal.), 282. But we are disposed to follow the New York decisions, as above indicated.

Plaintiffs take the further position that if the act in question be valid, the tax in strictness is not a succession tax, but a tax on the exercise of the power of appointment, collectible only out of Mrs. Taylor's estate, and that a sufficient amount of her estate will not come into the hands of her administrator to pay the tax. It will be observed that, by the terms of the statute, the exercise of the power, or the appointment when made, is to be deemed a transfer, "taxable under the provisions of this act"; and it has been held by us in a number of cases that such taxes, when levied under the statute, are to be dealt with as succession taxes and collected as such in the manner therein provided. *Trust Co. v. Doughton, supra.* See sections 7, 9, 10, and 12, chapter 34, Public Laws 1921.

Upon the record, and as now advised, we think the judgment entered below, upholding the tax, should be sustained.

Affirmed.

GEORGIA-CAROLINA LAND AND TIMBER COMPANY v. J. W. POTTER, TRADING AND DOING BUSINESS AS TOWNS LUMBER COMPANY, AND H. C. MOORE, LAWRENCE MOORE, AND OTHERS.

(Filed 24 January, 1925.)

1. Grants — State's Lands — Adverse Possession — Deeds and Conveyances—Boundaries.

Where plaintiffs have located senior grants under which they claim title, defendants seeking to establish title by adverse possession under junior grants must show adverse and exclusive occupation of the lappage under color of title for seven years, or without color such possession for twenty years, under known and visible lines and boundaries. C. S., 428, 430.

2. Same—Lappage—Color of Title—Statutes.

In this case, the principal lappage on plaintiff's grants being under a junior grant bearing date in 1895, the same is rendered void, C. S., 7545, and unavailable as color of title, and defendants asserting title thereunder may not use same as color, and may only establish title by showing adverse exclusive possession under known and visible lines and boundaries for twenty years.

3. Same—Senior Grants—Evidence.

Defendants being without written document of colorable title delimiting their claim, in order to establish title by adverse possession to known and visible lines and boundaries, there must be actual occupation asserting ownership with evidence tending to connect such occupation with the boundaries claimed, or some exclusive control and dominion over the unoccupied portion sufficiently definite and observable to apprise the true owner of the extent of the claim, and in this case as to the principal lappage, there is no sufficient evidence to uphold the title of defendants to the lines and boundaries established in their favor.

4. Same.

As to a second and different lappage, this interference and claim of ownership being under a junior grant of date in 1886, such grant not coming under the effect and operation of the statute referred to (C. S., 7545), same is available as color, and exclusive occupation thereunder for seven years asserting ownership would ordinarily mature title to the boundaries of such colorable claim, but where as in this case the lappage is on plaintiff's senior grants such occupation to have the effect stated must be of the lappage and not otherwise. An instruction therefore that occupation anywhere within the lines of the junior grant would mature title to the outer boundaries of such grant whether within or without the lappage, is error.

CIVIL ACTION, tried before *Harding, J.*, and a jury, at June Special Term, 1924, of CLAY.

The action is for trespass, in wrongfully cutting timber by defendants shortly before action brought, on lands alleged to belong to plaintiffs. The suit was commenced by issuing summons, 5 January, 1923, on defendants, the Towns Company, J. W. and Eli Potter, and H. C

Moore, served shortly thereafter, and on 7 May, 1923, the other defendants made themselves parties, alleging ownership of lands on which the alleged cutting of timber took place.

Plaintiff offered in evidence three grants conveying the land in controversy to W. H. Herbert, issued on 18 December, 1865, and introduced mesne conveyances conveying the lands therein granted to the present plaintiff. These three grants, numbered, respectively, Nos. 2784, 2804, and 2826, covering contiguous lands, purport to corner on a chestnut at H, and are shown on the map below, as follows: 2784 as H-1-2-3-H; 2804 as H-4-5-6-H; 2826 as H-7-8-4-H.

Defendants introduced two grants, constituting a lappage on the lands claimed by plaintiff's grants:

1. No. 16634, dated 30 December, 1905, and shown on map below as A-B-C-D-E-G-H-Z-I-K-L-M-N-O, and various courses to the beginning at A.

2. Grant 7499, dated January, 1886, and shown on map as 10-9-Y-C-D-E-Q-R-10.

Defendants, admitting the cutting of trees, claimed to have acquired title by adverse possession to so much of the lands in plaintiff's boundaries, if established, as their own grants cover. The cutting of timber complained of, by defendants and their assignees, took place, as stated, a short while before action brought, and was chiefly on the lappage shown by the grant, No. 16634, and, if said cutting is established as wrongful, parties have agreed on the amount of damage. In addition to the denial of any wrong or injury, defendants, in their answer, aver their ownership of lands covered by grants Nos. 7499 and 16634, having shown mesne conveyances or descent from said grantees, and ask that the alleged claim of plaintiff be removed as a cloud on their title. The cause was submitted to the jury, and verdict rendered on the following issues:

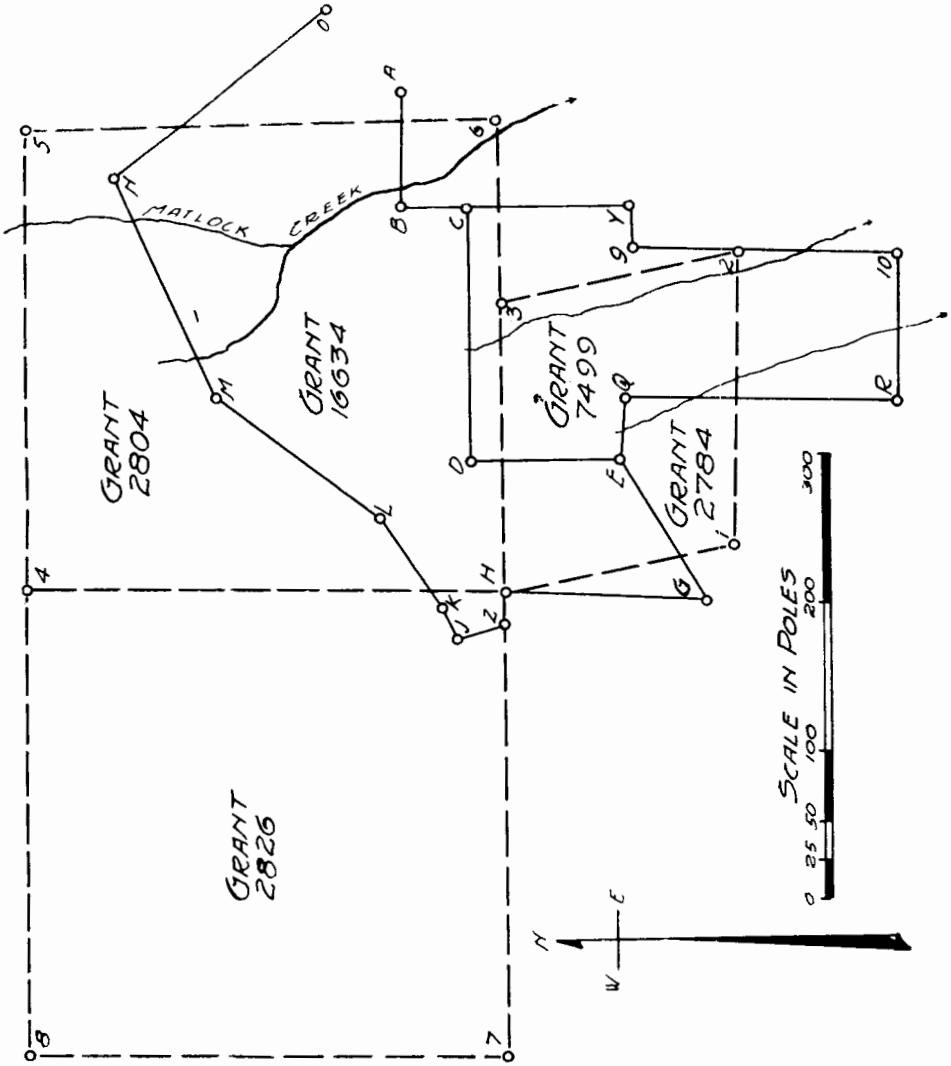
"1. Is the plaintiff the owner of the land described in the complaint and reply, or any part thereof, and if so, what part? Answer: 'Yes, with the exception south from Z to X.'

"2. Are the defendants, H. C. Moore and others, the owners of entry 417, grant 92, described in the answer? Answer: 'Yes, by consent of all parties.'

"3. Are said defendants the owners of entry 2381, grant 7499, described in the answer? Answer: 'Yes, all.'

"4. Are the defendants, interpleaders, the owners of entry No. 11, grant No. 81, or any part thereof; and if so, what part, as alleged in the answer? Answer: 'Yes, by consent of all parties.'

"5. Are the defendants the owners of entry 896, grant 16634, as alleged in the answer, or any part thereof; and if so, what? Answer: 'Yes, all.'


MATLOCK CREEK
GRANT 2804
GRANT 16634
GRANT 7499
GRANT 2784
GRANT 2826
SCALE IN POLES
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N
E
W

"6. Did the defendant J. W. Potter, doing business under the name of Towns County Lumber Company, wrongfully and unlawfully cut and remove timber from said entry 6771, as alleged in the complaint? Answer: 'No.'

"7. What damage, if any, are the plaintiffs entitled to recover of the defendant J. W. Potter, doing business under the name of Towns County Lumber Company, for such wrongful cutting and removing of timber, as alleged in the complaint? Answer: 'Nothing.'"

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

Anderson & Gray, R. L. Phillips, Francis J. Heazel, and D. Witherspoon for plaintiff.

Moody & Moody and M. W. Bell for defendants.

HOKE, C. J. The jury, by their verdict, having established the location of plaintiff's grants, bearing date in 1865 and covering the *locus in quo,* it is encumbent on the defendants, asserting ownership by adverse possession, and on the facts of this record, to show occupation under color of title for the requisite period, or they must establish by the greater weight of the evidence actual occupation of the land claimed, and in the assertion of ownership under known and visible lines and boundaries, adversely to all others, for twenty years next before action brought.

In regard to defendants' alleged ownership of the land covered by their grant, No. 16634, which, as we understand the record, will include the greater part of the trespass complained of, that grant bears date in 1905 and comes under our statute on the subject (C. S., 7545), in terms, as follows:

"Every entry made, and every grant issued, for any lands not authorized by this subchapter to be entered or granted, shall be void; and every grant of land made since the sixth day of March, one thousand eight hundred and ninety-three, in pursuance of the statutes regulating entries and grants, shall, if such land or any portion thereof has been heretofore granted by this State, so far as relates to any such land heretofore granted, be absolutely void for all purposes whatever, shall confer no rights upon the grantee therein or those claiming under such grantee, and shall in no case and under no circumstances constitute any color of title to any person."

Under the force and effect of this statute, therefore, this grant of defendants can afford no color of title for this claim, and defendants' ownership must be established, if at all, by actual occupation and under known and visible lines and boundaries. Speaking to the character of

the possession required for the maintenance of such a claim, in *May v. Mfg. Co.*, 164 N. C., pp. 262-265, the Court, among other things, said:

"There must be actual possession, . . . some possession of a hostile character sufficiently definite and observable to apprise the true owner that his proprietary rights are being invaded, and of the *extent* of the *adverse claim.*

"Where one is in possession under color of title, having definite lines and boundaries, the calls and descriptions of the deed may be sufficient; but where there is no deed or color giving description of the property, their actual possession must be shown. It is not always required for this purpose that there should have been an inclosure or a clearing defining the full extent of the claim. As indicated by the statute, it may be sufficient to show possession, 'ascertained and identified under known and visible lines and boundaries.' Revisal, sec. 380. But when it is sought to extend the effect of an adverse occupation beyond an actual inclosure or clearing and up to marked lines and boundaries, there must be some evidence tending to connect the physical occupation with the boundaries claimed, or some exclusive control and dominion over the unoccupied portion sufficiently definite and observable, as stated, to apprise the true owner of the extent of the adverse claim." Citing, among other authorities, *Davis v. McArthur,* 78 N. C., p. 357; *Wallace v. Maxwell,* 32 N. C., p. 110; *S. c.,* 29 N. C., pp. 135-137; *Bynum v. Thompson,* 25 N. C., p. 578; *Wade v. McDougal,* 59 W. Va., p. 113; *DeFrieze v. Quint,* 94 Cal., p. 653.

The opinion then quotes from *Bynum v. Thompson, supra,* as follows: "It is admitted that, upon a long possession, all necessary assurances may and ought to be presumed. But the question is: What is possession for that purpose? Plainly, it must be actual possession and enjoyment. It is true, indeed, that if one enters into land under a deed or will, the entry is into the whole tract described in the conveyance, prima facie, and is so deemed in reality, unless some other person has possession of a part, either actually or by virtue of the title. But when one enters on land without any conveyance or other thing to show what he claims, how can the possession by any presumption or implication be extended beyond his occupation de facto? To allow him to say that he claims to certain boundaries beyond his occupation, and by construction to hold his possession to be commensurate with the claim, would be to hold the ouster of the owner without giving him an action therefor. One cannot thus make in himself a possession contrary to the fact." And *Logan v. Fitzgerald,* 87 N. C., p. 314, and *McLean v. Murchison,* 53 N. C., p. 39, are in support of the position as stated, and many other cases to same effect could be cited.

Plaintiff, then, being without color or any written paper defining the extent of his claim, on careful examination of the record, we find no evidence of actual occupation under known and visible lines and boundaries by defendants sufficient to uphold or extend their claim of ownership to the line established in their favor by the jury, to wit: H-Z-I-K-L-M-N-O.

There was some evidence of adverse occupation down near the corner at H, and perhaps some other occupation on the lower part of the lappage, for twenty years and more, but if it be conceded that such occupation by defendant was within the lappage on plaintiff's grants, and this is not at all clear from the inspection of the record, there is nothing to carry their claim to the extended line asserted by them around the northern boundary by reason of the lack of any known and visible boundaries existent for twenty years enclosing or purporting to enclose the land in dispute or any tract of land in that locality.

As to the grant and survey in part relied on for that purpose, they are both of date within the twenty year period next before action brought and before the last of the defendants were made parties in May, 1923, and therefore they will not suffice.

Recognizing that this presents serious objection to the validity of their recovery, defendants endeavor to support their title by reference to the entry which was said to be of date prior to the twenty year period. We do not find that either the entry or its contents are in evidence, and this being true it cannot avail to establish the existence of visible lines and boundaries enclosing a tract of land. We all know how vague and indeterminate these entries usually are, the most of them, the reason a survey is required is to afford a description sufficiently definite to enable the State to issue a valid grant conveying the land paid for. Such entries are not void as against the State, and on payment of the price the enterer may call for his grant, but the mere existence of an entry not in evidence and with no testimony as to its contents does not constitute any muniment of title to land, nor is it sufficient to show visible lines or boundaries enclosing a tract of land and enabling a claimant to establish title beyond his actual occupation, his *possessio pedis* as heretofore defined. *Cain v. Downing,* 161 N. C., p. 593; *Grayson v. English,* 115 N. C., p. 358; *Johnston v. Shelton,* 39 N. C., p. 85; *Harris v. Ewing,* 21 N. C., p. 374.

As pertinent to this question, in *Cain v. Downing, supra,* it was said among other things: "It is plain that it was not intended that the entry should be so specific as entirely within itself to identify the land by its boundaries, because the same statute commands a survey to follow the entry at a short interval, and in the seventeenth section points out a means of identity to be set out in the certificate of survey.

The truth is that the interest of the State, as vendor, was not at all concerned in the entry's being more or less special. The quantity was alone important to her, because that regulated the price. Again, the entry has never been considered in this State as a constituent part of the legal title, and for that reason such precision in its terms is not necessary as will upon their face connect and identify the land granted with that entered. It appears to the Court, therefore, that a vague entry is not void, as against the State, but gives the enterer an equity to call for the completion of his title by the public officers. If it be not void against the State, it is a necessary consequence as we think, that it is likewise not so as against a subsequent purchaser from the State with notice. . . . We have before stated that the only purpose on which a special entry is preferred to a general and vague one is to give notice to a second enterer. If that be correct, the specific notice established in this case must supply the original defect in the entry. It is a defect which does not avoid it altogether, but only displaces it when otherwise it would prejudice the ignorant and the innnocent. And this idea, that certainty in the entry is required in order to protect innocent subsequent purchasers of the land from the State, that is, junior enterers, runs through all the cases upon the subject."

On the record, therefore, and as now advised, the Court is of opinion that defendant has thus far presented no evidence to uphold his assertion of ownership beyond the portion of the land covered by plaintiff's grants, which he shows he has actually possessed for twenty years next before action brought and in a manner required to mature his title to such portion.

And in reference to the grant No. 7499, all of which has been awarded to defendants in the verdict on the third issue. That grant, as we understand the evidence, bearing date in 1886, does not come within the operation and effect of the statute heretofore discussed, C. S., 7545, and is therefore available as color of title, and possession under it in the assertion of ownership for the required period would ordinarily establish title to the outer bounds of the grant. But this principle does not always prevail when a portion of this boundary laps on a superior title. In that event, to mature a title under the junior grant, there must be shown adverse and exclusive possession of the lappage, or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant. *Land Co. v. Floyd,* 167 N. C., p. 686; *Currie v. Gilchrist,* 147 N. C., p. 648; *McLean v. Smith,* 106 N. C., p. 172; *Boomer v. Gibbs,* 114 N. C., p. 76.

On this the third issue, there was evidence on the part of defendants tending to establish open possession in the assertion of ownership for

the necessary period both outside and within the lappage on plaintiff's older title, but that within the lappage is not so definite as the other, and both in its nature and extent is the subject of dispute. And speaking to the question, his Honor charged the jury as follows:

"The court charges you that if the defendants under their grant 7499, entry 2381, dated 7 January, 1886, if they have satisfied you that the land covers the land in controversy set out in defendant's answer as entry 2381, grant No. 7499, and have established the corner of this land as indicated on the map as the lands described in that grant and the same as described in the answer, then it is your duty to answer the issue 'Yes.'"

This instruction, in our opinion, is not in accord with the authorities cited and the principles they illustrate and approve, for his Honor here instructs the jury in effect that possession at any place under the grant 7499 would mature defendant's title to the outermost bounds of the grant, and without reference to whether it was within the lappage on plaintiff's superior title.

For the errors indicated we are of opinion that plaintiffs are entitled to a new trial of the cause and it is so ordered.

New trial.

COLEY FARMING COMPANY, INC., v. SEABOARD AIR LINE RAILWAY COMPANY AND LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(Filed 24 January, 1925.)

1. Carriers—Railroads—Livestock—Negligence—Evidence—Nonsuit.

Evidence that a carload of livestock transported over several lines of connecting carriers were received at destination in bad condition consisting of internal bruises as well as inter-diseases, is sufficient to carry the case to the jury, and there was no error in so holding.

2. Same—Damages.

In an action to recover damages against a railroad company for a negligent injury to a carload shipment of livestock, the measure of damages, when recoverable, is the difference between the reasonable market value of the animals when they arrived at destination when they were found to have reached there in a damaged condition and what the reasonable market value would otherwise have been except for the carrier's negligence.

3. Negligence—Evidence—Opinion Upon Facts—Carriers—Railroads.

Where a carload of livestock over connecting carriers has been received at destination in bad condition, a witness experienced in such matters may testify that he had seen the livestock when they left the initial point of shipment, and also en route, and when they arrived at destination, and

as to their appearance and condition at the time he observed them, as conclusions derived from his own observation as facts, and *Held*, competent in this case for him to testify that they were in good condition except upon their arrival at their destination.

APPEAL by defendant from *Shaw, J.*, and a jury, at March Term, 1924, of RICHMOND.

The plaintiff contends that the action is to recover damages to a load of livestock, shipped by it from East St. Louis, Ill., to Rockingham, N. C. When the shipment left East St. Louis, the animals were all in sound health and good condition, but when they arrived at Rockingham many of the animals were in a sick and dying condition—gaunted— not fed or watered—in bad shape—bunged up. One died on the same day the shipment arrived in Rockingham within three hours after the delivery of the shipment by the Seaboard, three died the next day and another 8 or 10 days later. The shipment, consisting of 20 mules and 6 horses, was received by the defendant the L. & N. Railroad Co., at East St. Louis, Ill., in the afternoon of 12 December, 1922, at 3:30 or 4 o'clock, and was delivered at destination at Rockingham, N. C., at 6:46 o'clock a. m., on 17 December, 1922, having traveled about 1,000 miles and having been handled by the following lines of railroad: L. & N. to Nashville, N. C. & St. L. to Atlanta and defendant Seaboard to destination. In addition to the sick and dying condition of a number of the animals, the tails and manes of some of the horses were gone. The post-mortem examination of one of the dead animals disclosed that it was bruised on the inside. The usual and customary time for a shipment to take between St. Louis and Rockingham is about 80 hours.

The plaintiff alleged and offered evidence to prove that the sickness, damaged condition, injuries and death of the animals were the result of negligence of the defendants.

The plaintiff offered a number of witnesses in substantiation of its allegations, and showed that the stock was unloaded in the stock pen of the Seaboard at Monroe, N. C., at a time when it was raining and sleeting, and that the pen at Monroe was an uncovered pen, built of 2x8 boards, nailed to posts, and that this pen was in a muddy condition. The defendants did not offer any evidence.

The defendants contended that there was no evidence as to the nature or character of the sickness, except that one witness stated the animals had "colds." That the veterinary surgeon employed by plaintiff to treat the animals and conducted the postmortem over one was called and sworn by plaintiff, but never put on the stand.

The defendants concede that the animals were in good condition when received by the L. & N. Railroad Co., at East St. Louis, but allege "That

when said shipment of livestock was delivered to the plaintiff that certain of the animals were sick with influenza, pneumonia and hemorrhagic septicaemia, natural diseases to which livestock are subject, and which was in no way due to any negligence or carelessness on the part of this defendant, and over which it had no control. . . . That any damage or injury done to or sustained by the said livestock was not the result of any carelessness or negligence on the part of this defendant, but was the result of and was directly due to natural causes, to wit, sickness and disease such as influenza, pneumonia and hemorrhagic septicaemia, which this defendant could not prevent, and which it could not control, and against which it did not insure."

The following issues were submitted to the jury:

"1. Was plaintiff's stock injured by the negligence of the Seaboard Air Line Railway Co., as alleged in the complaint? Answer: 'Yes.'

"2. Was plaintiff's stock injured by the negligence of the Louisville & Nashville Railroad Company, as alleged in the complaint? Answer: 'No.'

"3. Is the defendant, Louisville & Nashville Railroad Company liable to plaintiff for injury to its stock as the initial carrier as alleged in the complaint? Answer: 'Yes.'

"4. What damages, if any, is plaintiff entitled to recover of the defendants? Answer: '$1,500.' "

Numerous exceptions and assignments of error were made. The material ones will be considered in the opinion. Judgment was rendered for plaintiff against defendant Seaboard Air Line Railway Co., and also against L. & N. Railroad Co., as follows:

"The judgment hereby rendered in favor of plaintiff as against the Louisville and Nashville Railroad Company is not rendered on account of any negligence on the part of said Louisville and Nashville Railroad Company in connection with its handling of the plaintiff's stock, but solely under and on account of the provisions of the Federal statute making the initial carrier liable for any damage sustained through the negligence of any of the participating carriers."

From judgment rendered defendants excepted, assigned error and appealed to the Supreme Court.

H. S. Boggan and J. Chesley Sedberry for plaintiff.
Bynum & Henry for L. & N. Railroad Co.
McIntyre, Lawrence & Proctor for S. A. L. Ry. Co.

CLARKSON, J. The first contention of defendants is: "The motion for nonsuit and the prayer for a directed verdict should have been granted. So far as we have been able to find, this is a case of first

impression in this State. It has been held in many cases that proof of receipt by a carrier in good condition, and delivery in a damaged condition furnished sufficient proof to call upon the carrier to go forward with the evidence. An examination of these cases, however, will disclose that the injuries invariably consisted of broken bones, cuts, wounds, or other manifest and physical injuries. No such question is presented on this record. We have been unable to find any case where mere proof of sickness from a natural disease to which livestock is subject has been held sufficient to take the case to the jury on the issue of negligence." The evidence of the plaintiff showed that the animals when shipped from St. Louis "All were in good shape when they were loaded on the car. . . . An inspection was made of the mules by a veterinary before they were loaded." The same witness who saw them loaded saw them unloaded at Rockingham. "They were in bad shape. . . . they were all gaunted and looked like they had not been fed or watered." The animals were fed and watered at Monroe. The pen at Monroe "is an open shute and has a fence built around it of about 2x8 boards nailed to posts and it is not covered and it is muddy." When the animals were unloaded at Rockingham "the weather was cold and raining and sleeting." It was in evidence that every care and treatment was given by plaintiff at Rockingham to the sick animals when it received them from the Seaboard. One of plaintiff's witnesses, who testified he had been in the stock business and was a "horse nurse" and had 35 or 40 years experience around barns, described the animals "all pretty sick and had colds and were all bunged up and some nearly dead and others dying."

A motion for judgment as in a case of nonsuit the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. This is the well settled rule in this jurisdiction. The court below was correct in refusing to nonsuit plaintiff.

At the request of defendant, the court below gave the following instruction, but added the words "and diseases": "The rule as to livestock is that if they were shipped in good condition, but upon reaching destination have bruises, cuts, wounds, broken bones and other injuries (and diseases) such as are not the ordinary and usual result of transportation, then proof of such condition is sufficient to take the case to the jury and to support a verdict for the plaintiff if the jury should find the ultimate issue of negligence in favor of the plaintiff. But even where there are wounds, broken bones or other manifest injuries, the jury is not on that account to say necessarily that such injuries resulted from the negligence of the railroad. It is simply evidence from which the jury may or may not infer the ultimate fact of negligence."

In *Davis Livestock Co. v. Davis,* 188 N. C., p. 221, it is said: "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."

We think the addition of "and diseases," added by the learned judge who tried this case, was not prejudicial when read in the light of the entire charge. We think this controversy, from all the facts appearing of record, embodied in one of defendants' prayers and also given in the charge of the court, is as favorable to the defendants as it is entitled to. The charge prayed for and given is as follows: "The court charges you, that in this case the railroad companies are responsible only for such sickness, whether resulting in death or not, as was due to the carelessness and negligence of the defendants or one of them, or unless such negligence materially contributed thereto. A railroad company is not liable for colds, pneumonia, influenza or other natural diseases which are contracted by animals before or during the course of transportation and which were in no way due to any negligence on the part of the railroad company. If, notwithstanding all due and reasonable care exercised by the railroad while the animals were being transported, some of the animals developed colds, pneumonia, influenza, or other natural disease, so that the animals sickened or died therefrom, then and in that event the railroad company would not be responsible in damages on account of such sickness and death." And further charged: "Now the court instructs you if you find from the greater weight of the testimony that upon the arrival of the stock they were in a damaged condition and that such damaged condition was not due to natural causes or from the innate or vicious nature of the animals, then the court instructs you, if you find that to be true, that would be evidence against the Seaboard from which the jury might find, or they might not find, that such condition of the stock was due to the negligence of the Seaboard. The rule being, gentlemen, when stock in a damaged condition, not caused by natural causes or by the innate or vicious nature of the stock, is found in the possession of the carrier, the presumption is that the carrier in whose possession the stock was found was responsible for any injury. And that means not that the burden is shifted from plaintiff to the railroad company, but simply that the fact of finding the stock in a damaged condition in possession of the carrier and if it is not due to natural causes or to the innate or vicious character of the animals is evidence to go to the jury from which the jury may infer that the damaged condition of the stock was due to the negligence of the carrier in whose possession it is found. Now, the rule

applies if you find that the stock were found in a damaged condition when received here and that such damaged condition was not due to natural causes or to the innate or vicious nature of the animals, then that would be evidence from which the jury might infer and find that the stock was damaged while in the possession of the Seaboard, but that is no evidence against the Louisville & Nashville because that only applies to the carrier in whose possession the stock was found."

On the question of damage the court charged as follows: "The fourth issue is: What damages, if any, is plaintiff entitled to recover of the defendant? The burden is upon the plaintiff to show by the greater weight of the testimony what damages it is entitled to recover. And as I have heretofore explained, the plaintiff would be entitled to recover only such damages as it has shown was caused by the negligence of the defendant and was not caused by natural causes and not caused by the innate and vicious nature of the animals, but only such damages as the plaintiff has shown by the greater weight of the testimony was caused by the negligence of the defendant, Seaboard. On the issue of damages, the measure of damages is the difference between the market value of the animals, the reasonable market value, when they arrived at Rockingham and what the reasonable market value would have been had it not been for the negligence of the defendant."

The court gave defendant's prayer for instruction on damages, as follows: "If you find from the evidence that a part of the sickness and death was due to natural causes over which the defendants had no control, and that another part was due to negligence on the part of the defendants or one of them, then you can return a verdict for only such part of the damages as you find was due to or caused by the negligence of the defendants or one of them. In considering the question of damages, you have the right to consider the estimates of damage given by the witnesses, but you do not have to adopt such estimates as your own. You should consider all the surrounding facts, circumstances and conditions found by you to be true, and after doing this, return a verdict for such sum of money, if any, as you find was the value of the damage due to the negligence of the defendants or one of them." We think the charge as favorable as defendants would be entitled to.

The defendant excepted and assigned error to the following questions and answers:

"I was present here at Rockingham when the shipment was delivered here. The weather was cold and raining and sleeting when they were delivered here at Rockingham.

"Q. What was the condition of the animals at that time? Answer: 'They were in bad shape.'

"Q. Give us in detail the condition of each animal. Answer: 'They were all gaunted and looked like they had not been fed and watered.' "

These questions were asked the witness P. C. Coley, a dealer in live-stock, a man experienced in his business, connected with plaintiff's live-stock corporation. He saw the animals when they were shipped, saw them loaded on the car at East St. Louis, saw they were in good shape then, was present at Rockingham when the animals were unloaded. The witness by personal observation knew all about the condition of the animals before they were loaded and when they were unloaded. The witness had personal knowledge and was experienced in his line of business, and we think the evidence admissible. *Renn v. R. R.,* 170 N. C., p. 128.

"The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence." McKelvey on Evidence (2d Ed.) p. 220.

We think the court below charged the law on the facts. The evidence was sufficient and competent to base the charge. The court carefully charged in regard to "sickness from a natural disease." The rule of damages was in accordance with law under the facts and circumstances as appear from the record. The court below gave the contentions fairly and a most painstaking and careful charge. The remaining exceptions and assignments of error present no questions not heretofore settled by our decisions and we do not think material or prejudicial.

We can discover on the record

No error.

ELON BANKING & TRUST COMPANY v. J. W. BURKE.

(Filed 24 January, 1925.)

1. Statutes—Rights and Remedies—Special Remedies.

Where a statute creates a new right or liability and provides a special remedy for its enforcement, the remedy thus prescribed is exclusive, and actions or proceedings otherwise and ordinarily available may not be resorted to.

2. Same—Banks and Banking—Corporation Commission—Assessments—Sale of Stock—Personal Judgments.

Where the shareholders in a State bank have voted an assessment among themselves to make good a deficiency in its capital stock, at a meeting called for that purpose under the direction of the Corporation Commission, according to the amendment to our general banking laws of 1921, the statutory remedy provided where one of its stockholders fails

to pay the assessment against him is by the sale of his stock, and there being no other statutory remedy, a personal judgment in the bank's action may not be maintained when the stock has failed to bring the amount of the assessment at the sale.

CIVIL ACTION heard on demurrer to complaint before *Cranmer, J.*, at September Term, 1924, of ALAMANCE.

The complaint and prayer for judgment are as follows:

The plaintiff, complaining of the defendant, alleges:

"1. That the plaintiff is a corporation duly organized and existing under the laws of the State of North Carolina, and having its principal place of business at Elon College, N. C., and that the defendant is a citizen and resident of Guilford County, N. C.

"2. That the plaintiff corporation is engaged in the banking business and is amenable to the banking laws of the State of North Carolina.

"3. That the defendant is a stockholder in said bank and is a holder of ten shares of the capital stock of said bank, each share being of the par value of $50.00. That said defendant has held said stock since the first day of July, 1919.

"4. That on the 1st day of November, 1923, the Corporation Commission of the State of North Carolina, ordered the officers and directors of the Elon Banking & Trust Co., to levy an assessment of 100 per cent on all stockholders for the purpose of strengthening the capital stock of said bank, which had become impaired by reason of a robbery and other losses; said assessment to be paid within 60 days from the date of said order and that in pursuance of said order, the plaintiff through its officers and agents, and stockholders, levied an assessment of 100 per cent upon all stockholders and this defendant was given notice of the order issued by the said Corporation Commission and demand was then made, and has been made at various times since then upon him to pay the 100 per cent assessment on his ten shares of stock but he has failed and refused to pay said assessment.

"5. That in accordance with chapter 56 of the Public Laws of North Carolina, the Extra Session of 1921, the stock of this defendant was canceled and sold to the highest bidder for cash at public auction, as required by the above statute and said stock when sold brought $10.00, leaving a balance due plaintiff by this defendant of $490.00.

"Wherefore, plaintiff prays judgment against the defendant for the sum of $490.00 with interest thereon from the 1st day of January, 1924, for the cost of this action to be taxed by the clerk and for such other and further relief as the plaintiff is, in law and equity, entitled to receive."

Defendant demurred for that said complaint does not state a valid cause of action against defendant. Judgment overruling demurrer and giving defendant 30 days to answer. Defendant excepted and appealed.

Carroll & Carroll for plaintiff.
Wharton & Koonts, Hines & Kelly for defendant.

HOKE, C. J. In chapter 56, Laws of 1921, Extra Session, our General Banking Act was amended in several respects, that contained in section 3 of said chapter being as follows:

"Section 3. Add another section between twenty-five and twenty-six, to be marked 25a, as follows: 'The Corporation Commission shall notify every bank whose capital shall have become impaired from losses or any other cause and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within sixty days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: *Provided,* that such bank may reduce its capital to the extent of the impairment, as provided in chapter four, section eleven, Public Laws one thousand nine hundred and twenty-one.

" 'If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon thirty days notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none therein, a newspaper circulating in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders.

" 'If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the Corporation Commission, the Corporation Commission may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law.

" 'A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock.' "

And the question presented on the record is whether the assessment made pursuant to this amendment and for the purposes therein contemplated will in any event constitute a personal liability of the stockholder or is the remedy restricted to a sale of the holder's stock as

therein directed. A perusal of the amendment will disclose that in so far as same confers upon the bank the power to make the assessment, its provisions are substantially similar to that provided in the National Banking Act, 6 Federal Statutes, Annotated, sec. 5205, designed principally for the strengthening of banks whose capital has become impaired, and the Federal cases construing the latter act are to the effect that no personal liability is contemplated or provided for. These decisions proceed upon the principle very generally accepted, that where a statute creates a new right or liability and provides a special remedy for its enforcement such remedy is to be regarded as exclusive and actions or proceedings ordinarily available may not be resorted to. *Fourth National Bank v. Francklyn,* 120 U. S., p. 747; *Pollard v. Bailey,* 87 U. S. (20 Wallace's), p. 520; *Hulitt v. Bell,* 85 Fed., p. 98. Our own decisions are in full recognition of the principle. *S. v. R. R.,* 145 N. C., pp. 495-529, and authorities cited, and their proper application to the amendment justify and require the interpretation that a bank acting under its provisions may only proceed by sale of the stock and that a personal action to enforce collection is not allowed.

We are not inadvertent to the expression in the amendment that the assessment is "payable in cash," but to our minds that merely means that the amount is presently due, and its payment may be presently enforced, but only by the methods the statute specifies, to wit, a sale of the stock.

As to both the State and Federal statutes, the true position, we think, is very well stated in 7 C. J., p. 768, as follows:

"The statute provides for an assessment on the stockholders in case of an impairment of capital, and for proceeding to collect such assessment from delinquent stockholders. Such an assessment must be made by the stockholders themselves, and an assessment by the directors without action by the stockholders is void. If a stockholder will not comply, enough of his stock to pay the assessment may be sold, but no action will lie against the stockholder personally on such assessments."

It may be well to note that in the case of *Taylor v. Everett,* 188 N. C., p. 247, where the subject in some of its aspects was very learnedly discussed by *Associate Justice Connor,* and in which a recovery as on a personal liability was upheld, the decision was made to rest on the mutual and express agreement of the defendants to that effect, and the question of personal liability as imposed by the statute was not passed upon or determined.

It is suggested that in *Smathers v. Bank,* 135 N. C., pp. 410-418, this Court has held that the Legislature may not impose an additional liability of this kind on stockholders in behalf of existent creditors. A recurrence to that opinion, however, will disclose that the Court did

not, and did not intend to, pass on the extent of the legislative power under its reserved right of amendment in our Constitution to impose burdens of this character, but only said that the act there in question should be so construed as to give only a prospective effect. The matter is not further pursued, nor is it determined, for the reason that the suit here is not primarily for the benefit of creditors, nor are they directly before the Court. On the contrary, it appears that such an assessment can only be made by the bank itself and for its benefit, on authority given by a vote of the stockholders; apparently, it is a conditional privilege, extended by the Corporation Commission to banks whose solvency is threatened, but whose assets afford reasonable promise of recovery, and to be carried out according to the terms and requirements of the law. Thus an assessment must be made within sixty days, and, as stated, it is to be presently due. By one of the later clauses of the amendment it is provided, in effect, that if any such bank shall fail to cause to be paid in the deficiency for three months after the notice given, the Corporation Commission shall take possession of the property and business until its affairs are liquidated.

In *Delano v. Butler,* 118 U. S., p. 634, the United States Supreme Court, construing the Federal statute, has said that it is in addition to and entirely distinct from the stockholders' liability to creditors, as in case of insolvency; and it would seem, from a consideration of the amendment in connection with the provisions of the general law, that if the deficiency is not paid in three months, as required, that in some instances the entire scheme might well be held to have failed and the affairs of the bank wound up, as on an original case of insolvency. Such a result may have been in effect attained by a decision of the Supreme Court of Georgia involving a construction of the Federal statute referred to, and wherein it was held, on a sale of stockholder's entire stock to pay such an assessment, it must bring the full amount of the assessment, or the sale is void. *Bank v. Fouche,* 103 Ga., p. 851. These suggestions, while to some extent involved in the inquiry, are not, as stated, definitely determined upon, and are here only referred to and approved in so far as pertinent, and as they may help to a proper apprehension of the question directly presented, to wit, the right of plaintiff to have personal judgment against defendant, a stockholder, on the assessment in the instant case for the amount of excess of the sum realized from the sale of his entire stock.

For the reasons heretofore given, we are of opinion that no such recovery can be had, and the judgment overruling the demurrer must be

Reversed.

DAISY L. THOMAS, BESSIE WHITTINGTON, ANNA BROWNING WEBB, AND AL WOOTERS v. ERIE SUMMERS, LAKE MAY, JOHN HOLT, OLLIE DICK, AS GUARDIAN OF LUCY DICK AND FRED DICK, INFANTS; FRED DICK, AND LUCY DICK.

(Filed 24 January, 1925.)

Wills—"Home Place"—Evidence de hors.

In construing a devise of testatrix's home on a designated street of a city, it is competent to introduce evidence *de hors* the description in the devise to fit the place to the description, as in this case, where there were two adjoining lots, it was competent to show by parol that the testatrix had instructed that a fence be put around them both, and that in her payment of taxes and otherwise she regarded the adjoining vacant lot as a part of the home place in which she had resided.

APPEAL by plaintiff from *Lane, J.*, and a jury, at June Term, 1924, of GUILFORD.

This was a special proceeding, brought by the plaintiffs against the defendants, in which they allege that they and the defendants are tenants in common of certain land, described in the petition as lot No. 5. The defendant Erie Summers sets up the plea of "sole seizin."

The following issue, and answer thereto, was submitted to the jury: "Are the plaintiffs and defendants tenants in common of lot No. 5, as set out in the complaint? Answer: 'No.'"

Judgment was rendered in accordance with the verdict. The plaintiff assigned numerous errors, and appealed to the Supreme Court.

R. C. Strudwick for plaintiff.
Wilson & Frazier for defendant.

CLARKSON, J. The sole question involved in this case is the construction of the will of Emma Buchanan Clymer. Under section 6 she wills and devises "to my niece, Erie Summers, my home place on McIver Street." The will was dated 26 November, 1919. Her husband died in 1920, and the testatrix died in 1922. Her will made provision for her husband, who died before she did.

The evidence introduced showed that Mrs. Clymer had purchased three lots on McIver Street—lots Nos. 4, 5, and 6 in the subdivision of Greensboro known as Lenora; No. 6 being purchased on 2 July, 1912, and later sold by her to J. H. Buchanan; No. 4 being purchased on 29 October, 1915, and No. 5 on 19 November, 1915. Lots 4 and 5 adjoin each other and are on McIver Street, and the residence is on lot 4. Lot 5 adjoins this residence lot on the south. Lot 6, she sold, was adjoining lot 5, further south. Mr. Buchanan's home was south

of lot 6, that he purchased. There were no buildings on lot No. 5. The residence was on lot 4. It had a 50-foot frontage, with an alley on north side. Mrs. Clymer, the testatrix, planted flowers on lots 4, 5, and 6, and had it beautified with a flower garden. The flower garden extended along the front of lot 4, the residence lot, and lots 5 and 6. She had the front lots filled up, level, back as far as the building line of Buchanan home lot, which was south of lot 6. When Mr. Buchanan bought lot 6, she moved the fence and put it between lots 5 and 6. She had fruit trees and grape vines on lot 5. Her husband, who died before testatrix, planted rye on lot 5 and put chicken-wire across the lot, and the rye patch was for the chickens. She rented the residence lot, No. 4, to Mr. Lucas, about a year before she died. She did not rent lot 5 to Mr. Lucas.

The following question was asked the witness, R. T. Thomas, by defendant; objection was made by plaintiff to question and answer, and exception and assignment of error taken:

"Q. Before her death, didn't testatrix tell you, as looking after her business, to place around both of those lots an iron fence embracing the whole? Answer: 'She did.'

"Q. You didn't do so? Answer: 'No, sir. She told me to embrace the whole with an iron fence. I don't know that thereafter she asked me to go to Mr. Lucas and ask him if he had any objection to embracing it all in the iron fence.'"

The witness, Thomas, further said: "I can't say how many times she spoke to me about the fence. She asked me probably three or four times about it—if it had been put up. I told her I could not get the material. I went to see the hardware men about buying material to put up that fence across the front of the two lots—the one the house was on, and the other one."

It was shown that prior to 1920 the lots were listed separately, but under the Revaluation Act the returns or sheets showed 100 x 150 feet, on which there is a house, and all valued together, and the land returned as one lot was signed by Mrs. Emma B. Clymer, the testatrix.

J. H. Buchanan, a nephew, by marriage, of testatrix, who lived on lot south of lot 6, and who purchased from testatrix lot 6, said: "I attempted to buy the other lot." The following question and answer was duly objected to, and exception taken and assignment of error made:

"Q. Did she say anything to you about your buying the other lot? Answer: 'After Uncle Joe died, I said to her she would not need the vacant lot, and I would like to buy it. She said, "No; that belongs to my home place."'"

He further testified: "I am familiar with the premises there. After she acquired the house and lot and the other lot next to it, she used the two lots as one lot, so far as that is concerned, in planting flowers and shrubbery or garden—used it as a chicken-yard or anything of that kind. It was used as one lot. She made no discrimination in the two lots, so far as I have been able to see or know. She used the lot her house was on, and the one next to it, as her flower garden—the front side—and as a garden, orchard and chicken-yard and grape vines—all of the lot the house was on, and the one next to it. Both lots, flowers went across the other one as one yard. There are rose bushes, evergreens and magnolia tree on the vacant lot. There are some peach trees, grape vines, plum trees and damson trees—such as that—I don't know just definitely. . . . I heard Aunt Emma say that she told Mr. Thomas to put up the iron fence around the lots—that is all I know—around her lots or premises."

S. C. Summers testified to a conversation with testatrix, to which objection and exception was taken to question and answer, and assignment of error was duly made as to the request he heard the testatrix make to R. T. Thomas that he put an iron fence around lots 4 and 5. "He came to see her, and she asked him had he put up that wire fence, and he said no, he hadn't put it up, and he said he never got the stuff to put it up. She says, 'I want you to put it up; I want you to put it from Jim Buchanan's line to the Reitzel line, clear across my lot'; and she was after him, time and time again, to put that fence up. I heard her say this to him several times."

The plaintiff contends that the evidence to which assignments of error were made was incompetent, that the words of the will were not ambiguous, there was no ambiguity, either latent or patent. We cannot so hold. We think the court below made no error in admitting parol testimony to fit the description to the land intended to be conveyed, to identify the land, "my home place on McIver Street."

Pearson, J., in *Institute v. Norwood*, 45 N. C., p. 68, so well states this matter that we reproduce it:

"There are two principles settled and, in fact, admitted, on all hands: 1. If there be a *patent* ambiguity in an instrument, the instrument must speak for itself, and evidence *dehors* cannot be resorted to. 2. In cases of *latent* ambiguity, evidence *dehors* is not only competent, but *necessary*. The difficulty grows out of the application of these two principles, so as to say when a particular case falls under the operation of the one or the other. To remove this difficulty, it is necessary to go to the fountain, and trace these two streams down, and thereby avoid confounding them; for, although they run close together, there is a plain, marked line between them, which has but seldom been crossed.

The fountain of the first, in the rule as to *patent* ambiguity, is, that it is a *question of construction.* Hence, the instrument must speak for itself, and in case of doubt, no evidence *outside* can be called in aid; for the only purpose of construction is to find out *what the instrument means,* and that must depend upon *what the instrument says.* The fountain of the second, in the rule as to *latent* ambiguity, is, that it is a *question* of identity—a fitting of the description to the person or thing, which can only be done by evidence outside or *dehors* the instrument; for how can any instrument identify a person or thing? It can describe, but the identification, the fitting of the description, can only be done by evidence *dehors.*" *Sherrod v. Battle,* 154 N. C., 352; *Green v. Harshaw,* 187 N. C., 221; *Kidder v. Bailey, ibid.,* 505.

Allen, J., in *Fulwood v. Fulwood,* 161 N. C., p. 602, says: "The description of land devised to the defendant as 'the homestead tract' presented the case of a latent ambiguity, as it was uncertain, what land was intended to be included under that designation, after it appeared that the 200-acre tract and the first, second and third tracts described in the petition were adjoining tracts, and that the lands were acquired under different descriptions and at different times. *Sherrod v. Battle,* 154 N. C., p. 353. It was then permissible to introduce extrinsic evidence to fit the description, and for that purpose the declarations of the testator at the time of making the will and at other times, and his manner and dealing with the land, as by listing for taxation as one tract, were competent evidence. *Kincaid v. Lowe,* 62 N. C., 42; *McLeod v. Jones,* 159 N. C., 76."

We think the evidence objected to by plaintiff competent. The question as to the identity of the land "my home place on McIver Street" was a question of fact for the jury to fit the description to the land intended to be conveyed.

From a careful review of the case, we can find

No error.

JOHN O'DONNELL v. PATRICK CARR.

(Filed 24 January, 1925.)

Principal and Agent—Special Authority—Evidence—Contracts—Specific Performance—Equity.

Evidence that a resident real estate agent began by correspondence a negotiation of sale with the nonresident owner of a city lot, who rejected several tentative propositions to sell to customers of the real estate agent and finally stated a minimum price at which he would sell, is not, in itself, sufficient to authorize the agent to sell at that price

or for the attempted purchaser to enforce specific performance of a contract of sale against the owner he had made with the supposed agent; and *Held, further*, the fact that the supposed agent had advertised the sale of the lot without the owner's knowledge cannot vary the result.

APPEAL by defendant from *Ray, J.*, at June Term, 1924, of BUNCOMBE.

A trial by jury was waived by the parties. The controversy was submitted to the court upon a statement of facts agreed.

Defendant, Patrick Carr, is now, and has been for more than seventeen years, the owner of lot No. 74, on Charlotte Street in the city of Asheville, N. C. On 13 March, 1919, J. R. Law, a licensed real estate agent, residing and engaged in business in said city, under the name of J. R. Law Realty Company, submitted, for a customer, by letter to defendant then residing in Philadelphia, Pa., an offer for said lot of $3,000, advising defendant that the commission for making the sale was 5 per cent. Defendant declined this offer. In his letter, declining this offer, defendant stated that his price for the lot was $4,000, "terms to suit purchaser." Prior to this date, there had been correspondence between defendant and J. R. Law Realty Company in regard to business matters, but none relative to this lot. Patrick Carr had formerly resided in Asheville.

In August, 1919, defendant, replying to telegram from J. R. Law Realty Company, sent telegram to J. R. Law, as follows: "Your telegram received offering $3,500 cash for lot. Best price on same is $4,000, cash or time."

On 20 August, 1919, defendant, by letter, inquired of J. R. Law Realty Company if the offer of $3,500 was genuine, stating that the purpose of the inquiry was to obtain information to enable him to answer questionnaire, submitted to him, by the supervisor of Buncombe County, in connection with the assessment of said lot for taxation. In this letter defendant stated that he had owned the lot for more than seventeen years and that it had cost him more than $4,000. There was no other or further correspondence between defendant and said J. R. Law Realty Company until 7 April, 1920.

It is agreed "that the said Patrick Carr never withdrew the offer of sale, or changed the price upon said lot after said date and that the said J. R. Law continued to offer and advertise the said land for sale by placing 'For Sale' notices on same and by advertisements in the newspapers in the city of Asheville."

On 7 April, 1920, J. R. Law, as agent of defendant entered into a contract with John O'Donnell, plaintiff, to sell and convey the said lot to plaintiff for $4,000. J. R. Law executed and delivered to plaintiff a

receipt, in writing, for $100 paid to him by plaintiff, part of cash payment, as agreed upon, the terms of said contract being fully stated in said receipt. Thereupon J. R. Law Realty Company advised defendant, by letter, of the contract of sale, stating the terms in full, but not disclosing the name of the purchaser. Plaintiff soon thereafter tendered to defendant performance on his part of said contract and demanded performance by defendant. Defendant refused to comply with said contract, denying that he had authorized J. R. Law Realty Company to make or enter into same.

Judgment was rendered in favor of plaintiff, and a decree was signed, directing defendant, upon payment by plaintiff of purchase price, in accordance with contract, to execute and deliver to plaintiff a good and sufficient deed, conveying said lot to plaintiff. Defendant excepted to said judgment and appealed therefrom to the Supreme Court. The only assignment of error is based upon this exception and presents the question whether or not there was a contract between plaintiff and defendant by which defendant had contracted to convey the said lot to plaintiff.

J. E. Swain, R. M. Wells and Mark W. Brown for plaintiff.
Zeb V. Curtis and Merrimon, Adams & Johnston for defendant.

CONNOR, J. This is a civil action to enforce by decree of specific performance a contract to convey land. It is not contended that defendant, personally, entered into the contract, which plaintiff seeks to have thus enforced. Plaintiff contends that the contract was made, on behalf of defendant, by a real estate agent, under authority conferred upon him by defendant. Defendant admits that the real estate agent made the contract, in form, as contended by plaintiff, but denies that the said agent was authorized by him, to sell his lot or to bind him, by contract, to convey the same to plaintiff.

The facts are not in controversy. Defendant, residing in the city of Philadelphia, owned a lot of land, situate in Asheville, N. C. A real estate agent, engaged in business in Asheville, submitted to defendant, in Philadelphia, for customers, two offers for said lot, one, by letter, in March, 1919, of $3,000, and one by telegram, in August, 1919, of $3,500. The lot was not listed by defendant for sale with the said real estate agent, at the time either of said offers were submitted. Both were declined by defendant. In his letter and in his telegram, declining these offers, defendant stated to said agent that his best price for said lot was $4,000. Soon after the second offer, on 20 August, 1919, defendant wrote the agent, inquiring whether the offer of $3,500 was genuine, stating that the purpose of the inquiry was to secure informa-

tion to enable defendant to answer a questionnaire submitted by the supervisor of Buncombe County in connection with the assessment of said lot for taxation. These are the only communications which defendant had with the said agent, relative to the said lot, prior to 7 April, 1920, when said real estate agent, assuming to act as agent for defendant, made the contract with plaintiff, for the enforcement of which this action was brought. Unless the relation of principal and agent, with respect to the sale and conveyance of said lot, existed between defendant and said real estate agent, at said date, plaintiff can in no event recover, and it becomes needless to consider the other interesting questions discussed in the argument and in the briefs, upon this appeal.

The burden of establishing the relation of principal and agent between defendant and said real estate agent is upon plaintiff. The relation can arise only from a contract between the parties, express or implied. The statement of facts agreed does not disclose any express contract, by which defendant employed or authorized the real estate agent to sell his lot. The law will not imply such a contract unless the same is clearly established by the facts as they appear in the statement agreed upon by the parties.

The real estate agent, upon his own initiative, and without any request from defendant, submitted for his customers, offers for the lot. These offers were promptly declined by defendant. Defendant, in his letter and in his telegram, declining these offers, stated to the agent that his best price was $4,000. The real estate agent had not inquired whether defendant wished to sell his lot or at what price he would sell same. The statement of defendant that $4,000 was his best price on his lot did not necessarily mean that defendant was willing to sell at that price; it may be construed as an explanation of defendant's refusal to accept either of the offers made by the real estate agent for his customers. It cannot be construed as authorizing the agent to sell the lot at that price. "A mere statement, or answer to an inquiry, by an owner of land, that he will take a certain sum for it is not sufficient to authorize the person to whom the statement is made to act as agent for its sale." 2 C. J., 610. *Smith v. Brown*, 132 N. C., 365.

It is agreed that defendant did not withdraw the offer of sale or change the price on the lot, between the dates of submission by the agent of the offers for the lot, and the date of the contract by the agent and plaintiff. It is also agreed that the agent continued to advertise the lot for sale. There is no evidence, however, and no facts agreed from which it can be inferred that defendant knew that the agent was advertising his lot for sale. The mere advertising of defendant's lot for sale, either in newspapers, or by signs placed upon the lot, by the real

estate agent, certainly with the knowledge of defendant, is not evidence that the relation of principal and agent existed between them, with authority to the agent not only to sell, but also to bind defendant by a contract to convey his lot. Defendant, having declined the offers for the lot, and having received no further communications from the agent, was under no obligation to communicate further with the agent with respect to said lot.

"An agent's authority to sell real estate is not to be readily inferred, but exists only where the intention of the principal to give such authority is plainly manifest." 2 C. J., 609. Even if defendant had listed his lot with the real estate agent for sale, and named the best price which he would take for the lot, nothing else appearing, the authority of the real estate agent would have been limited to finding a purchaser, ready, willing and able to enter into contract with the principal upon the terms specified by or acceptable to the principal. In the absence of special authority, the agent could not bind his principal by a contract to convey to a purchaser. 9 C. J., 526.

The real estate agent was not authorized to make the contract which plaintiff seeks to enforce. The exception to the judgment is well taken and the same must be

Reversed.

W. L. JOHNSON, ADMINISTRATOR OF MILLARD JOHNSON v. BLACKWOOD LUMBER COMPANY AND DEVEREUX HAMILTON.

(Filed 24 January, 1925.)

Removal of Causes — Federal Courts — Petition — Bond — Fraudulent Joinder—Parties.

Upon the filing in apt time by a nonresident defendant of a proper and sufficient petition and bond for the removal of a cause from the State to the Federal Court, under the Federal Removal Act, and sufficient allegation of a fraudulent joinder of a resident defendant to oust the jurisdiction of the Federal Court, the cause should be removed and the controverted facts determined in the latter court upon the plaintiff's motion to remand.

APPEAL by plaintiff from order of removal made by *Ray, J.*, at August Term, 1924, of CHEROKEE.

Above entitled action was begun and was pending on 29 July, 1924, in the Superior Court of Cherokee County. Duly verified complaint was filed by plaintiff, and before time for answering same had expired, defendant, Blackwood Lumber Company, filed with the clerk of said

court, its petition, duly verified, praying that said court proceed no further in said action, except to make an order of removal, and to accept bond, filed with said petition, as required by statute, and to cause the record in said action to be removed from said court into the District Court of the United States for the Western District of North Carolina. Upon denial of said motion by the clerk, petitioner appealed to the judge presiding at the next ensuing term of said court. The judge presiding, at said term, having heard and considered said petition, ordered that the action be removed. Plaintiff excepted to said order, and appealed therefrom to this Court. Assignment of error is based upon said exception.

Moody & Moody for plaintiff.
Martin, Rollins & Wright and M. W. Bell for defendants.

CONNOR, J. This is a civil action, pending in the Superior Court of Cherokee County, to recover of defendants damages for the death of plaintiff's intestate, caused, as alleged in the complaint, by the joint wrong of defendants, Blackwood Lumber Company, a corporation, and Devereux Hamilton, its foreman.

Defendant, Blackwood Lumber Company, upon petition filed in apt time, prayed that the action be removed from said court to the District Court of the United States for the Western District of North Carolina. The facts upon which the motion is made are set out in the petition, which is duly verified, and are (1) That plaintiff is a citizen and resident of the State of North Carolina; (2) That petitioning defendant, Blackwood Lumber Company, a corporation, is a citizen and resident of the State of Virginia; (3) That the amount in controversy exceeds three thousand dollars, exclusive of interest and costs; and (4) That defendant, Devereux Hamilton, a citizen and resident of the State of North Carolina, was wrongfully and fraudulently joined, with petitioner, as a defendant for the sole and only purpose of preventing a removal of the action to the Federal Court and of depriving said court of its rightful jurisdiction of the action.

The only question presented by this appeal is whether or not the facts and circumstances set out in the petition are sufficient, if true, to sustain the general allegation that the joinder of the two defendants—one, a nonresident, and the other, a resident of the State of North Carolina—in an action to recover damages alleged to have been caused by their joint tort, was fraudulent and for the sole and only purpose of preventing a removal of the action from the State Court to the Federal Court, by the nonresident defendant.

In *Wilson v. Republic Iron and Steel Co.,* 257 U. S., 92; 66 L. Ed., 144, *Mr. Justice Van Devanter,* writing for the Court, reviews the authorities and says: "A civil case, at law or in equity, presenting a controversy between citizens of different states, and involving the requisite jurisdictional amount, is one which may be removed from a State Court into the District Court of the United States by the defendant, if not a resident of the State in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant, having no real connection with the controversy. If in such a case, a resident defendant is joinded, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly leading to that conclusion, apart from the pleader's deductions. The petition must be verified, and the statements must be taken by the State Court as true. If a removal is effected, the plaintiff may, by a motion to remand, plea or answer, take issue with the statements in the petition. If he does, the issues so arising must be heard and determined by the District Court, and at the hearing, the petitioner defendant must take and carry the burden of proof, he being the actor in the removal proceeding. But if the plaintiff does not take issue with what is stated in the petition, he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it."

The decisions of this Court, upon this question, are in entire accord with this clear and succinct statement of the law approved by the Supreme Court of the United States. In *Rea v. Mirror,* 158 N. C., 28, *Justice Hoke,* writing for this Court, states the law as follows: "Where the petition for removal, properly verified, and accompanied by proper and sufficient bond, has been filed in the State Court, and the same contains allegations of fraudulent joinder, together with full and direct statement of the facts and circumstances of the transaction, sufficient, if true, to demonstrate that there has been a fraudulent joinder of the resident defendant, in such case the order for removal should be made, and the jurisdiction of the State Court is at an end. If the plaintiff desires to challenge the truth of these averments, he must do so on motion to remand or other proper procedure in the Federal Court. That court, being charged with the duty of exercising jurisdiction in such case, must have the power to consider and determine the facts upon which the jurisdiction rests." This statement of the law has been often cited and approved in opinions filed in this Court. *Herrick v. R. R.,* 158 N. C., 307; *Smith v. Quarries Co.,* 164 N. C., 338; *Cogdill v. Clayton,* 170 N. C., 526; *Hollifield v. Telephone Co.,* 172 N. C., 714; *Fore v. Tanning Co.,* 175 N. C., 583; *Stevens v. Lumber Co.,* 186 N. C., 749.

In *Cogdill v. Clayton,* 170 N. C., 526, *Justice Allen,* with his usual clearness, states the rules deducible from the decisions of this Court and of the Supreme Court of the United States, relative to petitions for removal of actions pending in State Courts to Federal Courts.

Defendant contends that its petition contains "a full and direct statement of the facts and circumstances surrounding the death of plaintiff's intestate, sufficient, if true, to demonstrate that the joinder, with it, of the resident defendant was fraudulent and with a fraudulent purpose." This contention is controverted by plaintiff, who insists that the petition does no more than deny the allegations of the complaint, upon which liability of the resident defendant depends. It has been held that "Merely to traverse the allegations upon which the liability of a resident defendant is rested, or to apply the epithet, 'fraudulent,' to the joinder, will not suffice. The showing must be such as compels the conclusion that the joinder is without right and made in bad faith." *R. R. v. Cockrill,* 232 U. S., 146, cited and approved in *Cogdill v. Clayton,* 170 N. C., p. 528.

If it be true, as alleged in the petition, that plaintiff's intestate was an employee of defendant, Blackwood Lumber Company, but, at the time he received his fatal injuries, without orders or instructions, had gone over voluntarily on the landing upon the side of the mountain and attempted to roll three logs down the side of the mountain, and was injured by the logs rolling over him; that defendant, Devereux Hamilton, although a foreman of the petitioner defendant, had not employed said intestate, was not present at the time he was injured, had nothing to do with the accident, and no connection, directly or indirectly, with the injury, and did not know that said intestate was attempting or about to attempt to roll the logs down the mountain side, these facts are sufficient to demonstrate that the joinder of the defendant Devereux Hamilton with the defendant Blackwood Lumber Company was fraudulent and with a fraudulent purpose, as alleged. The acts of negligence alleged in the complaint as the basis of plaintiff's cause of action are failures to perform the duties which the law imposes upon an employer to an employee. If this relation did not exist between plaintiff's intestate and defendant Devereux Hamilton, who, for the purpose of this motion, was not present at the time of the injury and did not know that the defendant had placed or was about to place himself in a position of danger, we are unable to see upon what principle of law he would be liable for the result of the attempt to remove the logs by plaintiff's intestate. If he is not liable for the death of plaintiff's intestate, the only effect of joining him as a defendant is to prevent a removal of the cause by the nonresident defendant. This must

be the purpose of joining him, and it is therefore a fraudulent purpose, as alleged in the petition.

It is further alleged in the petition that prior to the institution of this action plaintiff had begun an action against the defendant Blackwood Lumber Company and one E. J. Bryson, a resident of the State of North Carolina. This action had been removed, upon the petition of Blackwood Lumber Company, from the Superior Court of Cherokee County to the District Court of the United States for the Western District of North Carolina, upon the ground that the joinder of the resident defendant, Bryson, with the nonresident defendant, Blackwood Lumber Company, was fraudulent. Plaintiff took a voluntary nonsuit in said action after same had been removed to the District Court, and at once began this action upon the identical allegations as those set out in his complaint in the former action, except that defendant Devereux Hamilton was joined as a defendant instead of E. J. Bryson. This is a circumstance which defendant contends is evidence of the fraudulent purpose of the plaintiff, as alleged in the petition. While not sufficient in itself to establish the fraudulent purpose, as alleged, it is a fact to be considered, together with all the other facts and circumstances set out in the petition tending to show the truth of the general allegation of fraudulent joinder of a resident with a nonresident defendant for the purpose of preventing a removal by the nonresident defendant. *Southern R. R. Co. v. Miller,* 217 U. S., 209; 54 L. Ed., 732.

There was no error in the order from which the plaintiff appeals, and the same is

Affirmed.

BETTIE WILSON v. GEORGE WILSON.

(Filed 24 January, 1925.)

Descent and Distribution—Statutes—Illegitimate Children—Widow.

Where the owner of lands dies without lineal or collateral heirs, leaving a widow, the illegitimate son of his mother, born before her marriage with his father and being thus of the half blood, may not claim the estate from his father by descent, and the widow takes under the provisions of C. S., 1654, Rule 8.

APPEAL by defendant from judgment rendered by *Devin, J.,* at June Term, 1924, of MECKLENBURG.

Defendant demurs to the complaint *ore tenus* and thereby admits the facts to be as alleged therein.

Plaintiff, Bettie Wilson, is the widow of W. B. Wilson, who died, intestate, in June, 1921. No children were born of said marriage.

W. B. Wilson was the only child of Jane Wilson and of her husband, Lafayette Wilson. He was never married, except to plaintiff. He left no lineal descendant, or collateral relation, who can claim as his heir, unless defendant, George Wilson, who is the illegitimate son of his mother, Jane Wilson, born before her marriage to his father, Lafayette Wilson, can claim as his heir. Both Jane and her husband, Lafayette Wilson, were negroes, of the whole blood. George Wilson, son of Jane Wilson, is a mulatto.

At his death W. B. Wilson was seized in fee and in possession of a lot of land in the city of Charlotte, N. C., and of an undivided one-half interest in a lot of land in Newton, N. C., both lots being fully described in the complaint.

Plaintiff, Bettie Wilson, contends that W. B. Wilson, her husband, left no one who can claim as his heir; that she, as his widow, is deemed his heir, under C. S., 1654, Rule 8, and that she is therefore the owner and entitled to the possession of the land described in the complaint, of which W. B. Wilson died seized in fee, and prays that the adverse claim of defendant be adjudged and decreed a cloud upon her title to the said land.

Defendant George Wilson contends that, upon the facts alleged in the complaint and admitted by his demurrer, he is the sole heir of W. B. Wilson, deceased, and is therefore the owner of said land, and prays that he be so declared.

From judgment sustaining the contention of plaintiff defendant appealed. The only assignment of error is based upon defendant's exception to the judgment.

Thaddeus A. Adams for plaintiff.
Jones, Williams & Jones, and Clarkson & Taliaferro for defendant.

CONNOR, J. Jane Wilson, at her death, left surviving two sons—one born out of wedlock, before her marriage, and therefore illegitimate; the other, born after and during her marriage to Lafayette Wilson, and therefore legitimate. Jane Wilson and her husband, Lafayette Wilson, were both negroes. George Wilson, the illegitimate son of Jane Wilson, is a mulatto. It is admitted that Lafayette Wilson, husband of Jane, was the father of W. B. Wilson. He is dead, leaving a widow, but no lineal descendant, or collateral relation, who can claim as his heir, unless the defendant, the illegitimate son of his mother—his half-brother—is such collateral relation and can claim as his heir. Otherwise, plaintiff, his widow, shall be deemed his heir. C. S., 1654, Rule. 8.

The only question presented by this appeal is whether an illegitimate child is a collateral relation of, and capable of inheriting from, a legiti-

mate child of the same mother, under C. S., 1654, Rule 5. The answer to this question must be negative, and the judgment below affirmed, unless there was some statute in force in North Carolina, at the death of the legitimate child, under the provisions of which an illegitimate child can inherit from a legitimate child of the same mother. "At common law, there is no collateral descent to or from a bastard." *Flintham v. Holder,* 16 N. C., 345.

In this case it was held that, by virtue of the act of 1799, chapter 522, which is set out in the opinion, "Where there are children of the same mother, some born in wedlock and some illegitimate, the former class may inherit from the latter, and the latter may inherit from each other, but the latter cannot inherit from the former." The act of 1799, chapter 522, as amended, is brought forward in the Consolidated Statutes as rule 9 and rule 10 of section 1654, chapter 29, entitled "Descents." *Judge Ruffin,* construing this act, and discussing the reasons for its enactment, says: "It is manifest that the moral and political consideration which excluded bastards from the succession to the mother, where there is legitimate issue, have no force to exclude the legitimate from the succession to a bastard brother. They powerfully apply, indeed, when a bastard shall claim to succeed to a legitimate brother. Accordingly, we find nothing of the sort in the act. There is no provision for a descent from a legitimate to a bastard."

Under this act, the inheritance of a mother descended to her illegitimate children only when she left no children born in lawful wedlock. If there were both legitimate and illegitimate children, only the former inherited from the mother. The latter were excluded. The reason for this provision, as stated by *Judge Ruffin,* was as follows: "To encourage the marriage, and prudent marriage, of the mother, and thereby promote the real good of the illegitimate issue themselves, the statute holds out the inducement to a husband that *his* children shall succeed to the whole of their mother's estate, in exclusion of others." The General Assembly of a later day evidently did not think this a sufficient reason for the exclusion of the unfortunate children of a nameless father, who, in addition to bearing through life the burden of a social stigma, for which they were not responsible, were deprived by the law of a share in their mother's property if she left surviving legitimate children. Chapter 71, Laws 1913, provides that "every illegitimate child of the mother, and the descendants of such child, deceased, shall be considered an heir." Thus the law now makes no discrimination between legitimate and illegitimate children with respect to the inheritance from their mother, except that the illegitimate child or children shall not be capable of inheriting of such mother any land or interest therein which was conveyed or devised to such mother by the father of the legitimate child or children;

and except, further, that such illegitimate child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral.

Chapter 71, Laws 1913, now rule 9, C. S., 1654, does not apply, however, to this case, for here the inheritance is not claimed from the mother. Rule 9 provides only for descents from a mother who leaves surviving an illegitimate child or descendants of such child. Such a child is an heir of the mother, without regard to whether she leaves or does not leave a legitimate child.

Rule 10, C. S., 1654, relates only to descents from illegitimate children. Its provisions are identical with those of the act of 1799, chapter 522, in this respect. It expressly provides that "Illegitimate children shall be considered legitimate as between themselves and their representatives. In case of the death of any such child, or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock." The rule does not apply to descents from a legitimate child, and the law in this State, with respect to such descents, is the same now as it was when the opinion in *Flintham v. Holder, supra,* was delivered at December Term, 1829. It was then held to be the law that "bastards can never inherit but from the mother and from each other." Thus the law remains.

Defendant cites and relies upon the opinion in *University v. Markham,* 174 N. C., 338, to sustain his contention that under rule 10 he can claim as heir of his legitimate brother. *Justice Walker,* discussing this rule, says: "It will be seen from a literal recital of the statute that illegitimates are deemed, in law, legitimate as between themselves and their representatives, and their estates descend accordingly—that is, as if they had been born in wedlock. There is nothing dubious about this part of the statute, but, on the contrary, its language is plain, direct and perfectly intelligible. The statute, therefore, further provides that where there are legitimate and illegitimate children of the same mother, and one of them, whether of one class or the other, shall die without leaving issue, or if, having issue, one or more of such issue should die without leaving issue, the descent will be the same as if all of the children had been legitimate, or born in lawful wedlock." Rule 10 clearly applies to descents from illegitimates only. The learned justice had this in mind, for he cites, with approval, *Arrington v. Alston,* Taylor's Law and Equity, p. 310; *Flintham v. Holder,* 16 N. C., 345, and *McBryde v. Patterson,* 78 N. C., 412. It is held that a legitimate child may, by virtue of this statute, inherit from an illegitimate brother or sister. This Court has held, both expressly and by implication, that the converse of the proposition is not the law.

Defendant, illegitimate son of Jane Wilson, mother of W. B. Wilson, her legitimate son, is not a collateral relation of W. B. Wilson, capable of inheriting from him. W. B. Wilson left no one who can claim as his heir, and therefore plaintiff, his widow, is deemed, in law, his heir, and as such inherits his estate. The judgment is

Affirmed.

W. O. CRISP v. HANOVER THREAD MILLS, INC.

(Filed 24 January, 1925.)

1. Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Sufficient Help—Vice Principal.

The principle requiring an employer to furnish his employee a reasonably safe place in which to perform his duties, under the circumstances thereof, applies also, in like manner, to his furnishing him reasonable help for his safety under conditions reasonably requiring it, and, this duty not being delegable, he is answerable in damages for an injury negligently caused to an employee by the acts of his vice principal in the failure to perform this duty.

2. Same—Evidence—Nonsuit—Questions for Jury.

Evidence in this case tending to show that an employee at a yarn mill was injured or ruptured by being required by his boss, representing his employer, to work with insufficient help after he had notified him thereof, and who had failed to supply the help reasonably necessary, is *held* sufficient to take the issue to the jury, and deny a motion as of nonsuit thereon.

3. Same—Assumption of Risks—Burden of Proof.

In order to defeat recovery in an action of an employee to recover damages for an injury caused by his continuing to work after he had knowledge of the danger therein, under the doctrine of assumption of risks, it must be made to appear that he continued to work under the circumstances when a man of reasonable prudence would not have done so, with the burden of this issue on defendant.

APPEAL by defendant from *McElroy, J.*, and a jury, at Spring Term, 1924, of CLAY.

Anderson & Gray and R. L. Phillips for plaintiff.
Merrimon, Adams & Johnston for defendant.

CLARKSON, J. The only question involved is whether, on all the evidence, taken, as in a case of nonsuit, most favorable to plaintiff, the court below should have granted a nonsuit at the close of plaintiff's evidence and at the close of all the evidence.

The plaintiff's contention was that the defendant furnished and required him to use a box for the purpose of carrying out spools from the thread machine which was too cumbrous and heavy for one man to lift and carry, and negligently failed to furnish him with a helper to do the work; that defendant knew the situation, and plaintiff informed the defendant's boss, Mr. Lyda, after he started carrying out the big box, that they were putting too much on him. He was ruptured and seriously injured in doing the work. When he first went to work they were emptying the spools in small boxes, 10 or 12 inches high. That after he had worked some time, Mr. Lyda, the boss of the mill, put him to carrying a box which was about 6 feet long and about 12 or 14 inches at the top and weighed 75 or 100 pounds. He got ruptured lifting that box. The evidence showed that there was no danger of hurt when two men were carrying the box. Plaintiff complained to the boss regarding this work. When he first went to work he was measuring up yarn. He worked there some three or four months, and was later required to remove the box. The box before mentioned was placed under the machinery, and operatives would drop empty spools in it when they had finished with them, and he was required to replace these empty spools in a bin made for that purpose.

"I had carried these boxes eight or ten nights. All except Mr. Allman helped me one or two nights. There were four or five boxes, and I carried them out once a night. I made four or five trips every night with these boxes that were just alike."

The record discloses no assignments of error as to the competency of the evidence in the court below. The charge of the court below is not in the record.

The only issues submitted to the jury, and the answers thereto, were as follows:

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

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

There are no exceptions to these issues, and no issues tendered by defendant.

Judge M. H. Justice, long years a Superior Court judge, a man of unusual common sense, in *Pigford v. R. R.,* 160 N. C., p. 96, charged the jury as follows: "Plaintiff suffered a rupture, which was progressive in its nature, and resulted in serious and permanent injury. After he was first hurt, Spradlin furnished the help asked for, and he then performed the work assigned to him. Three issues were submitted to the jury as to negligence, contributory negligence, and damages. There was nothing said in the answer, nor was there any issue,

as to assumption of risk. The court charged the jury as to the duty of defendant to provide for its employees reasonably safe means and sufficient help to perform his work, and that if it failed in this duty—the special act of negligence being the failure in furnishing necessary or adequate help—and this was the proximate cause of plaintiff's injury, they would answer the first issue 'Yes'; and that if plaintiff undertook to do the work, after Spradlin had failed, upon proper application, to give him help, and that a man of ordinary prudence would not have undertaken the performance of the task under the circumstances, or if plaintiff did not exercise ordinary care in the manner of doing the work, and either act of carelessness proximately caused the injury, they would answer the second issue 'Yes,' the burden as to the first issue being upon the plaintiff, and as to the second, upon the defendant. There was a verdict for plaintiff, and defendant appealed from the judgment thereon."

Justice Walker, in a well considered opinion in that case says: "The duty of defendant to supply help sufficient for the safe performance of the work allotted to the plaintiff is not questioned by the appellant, but it is contended that if it failed to do so, the plaintiff was guilty of such negligence in going on with the work, after the refusal to comply with his request, as bars his recovery, it being an act of contributory negligence on his part, which was the proximate cause of the injury to him. We cannot assent to this proposition, except in a qualified sense. The doctrine of assumption of risk is dependent upon the servant's knowledge of the dangers incident to his employment and the ordinary risks he is presumed to know. But extraordinary risks, created by the master's negligence, if he knows of them, will not defeat a recovery, should he remain in the service, unless the danger to which he is exposed thereby is so obvious and imminent that the servant cannot help seeing and understanding it fully, if he uses due care and precaution, and he fails, under the circumstances, to exercise that degree of care for his own safety which is characteristic of the ordinarily prudent man. 26 Cyc., 1196-1203. We consider the rule to have been settled by this Court in *Pressly v. Yarn Mills,* 138 N. C., 410, and subsequent decisions approving it. . . ." (p. 101). It is as much the duty of the master to exercise care in providing the servant with reasonably safe means and methods of work, such as proper assistance for performing his task, as it is to furnish him a safe place and proper tools and appliances. The one is just as much a primary, absolute, and nondelegable duty as the other. When he entrusts the control of his hands to another, he thereby appoints him in his own place, and is responsible for the proper exercise of the delegated authority, and liable for any abuse of it to the same extent as if he had been personally present and acting in

that behalf himself. This principle is well settled. *Shaw v. Mfg. Co.*, 146 N. C., 239; *Tanner v. Lumber Co.*, 140 N. C., 475; *Mason v. Machine Works*, 28 Fed. Rep., 228; *R. R. v. Herbert*, 116 U. S., 642; *Shives v. Cotton Mills*, 151 N. C., 290; *Pritchett v. R. R.*, 157 N. C., 88; *Holton v. Lumber Co.*, 152 N. C., 68." *Hines v. R. R.*, 185 N. C., 72.

In *Tull v. Kansas City So. R. Co.* (Mo.), 216 S. W., p. 572, a case similar to the case at bar, the Court said: "It is not enough that plaintiff has reason to believe that there was an insufficient number of men to do the work, and that his strength was not equal to the task. For if the danger or risk of doing the work was not such as to threaten immediate injury, and plaintiff by reason of the order of his foreman was led to believe that he could carry his part of the load by the use of care and caution, and he proceeded to do the work with the exercise of such care, he is not barred from recovery from the master for the injury received."

This Court, in *Medford v. Spinning Co.*, 188 N. C., p. 127, said: "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.*, 139 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; *Tate v. Mirror Co.*, 165 N. C., 273."

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 witnesses on the trial. *Indemnity Co. v. Tanning Co.*, 187 N. C., 196; *In re Westfeldt*, 188 N. C., 705.

We think the evidence was sufficient to be submitted to the jury. In law there is

No error.

STATE v. R. P. ROBERTS.

(Filed 24 January, 1925.)

1. **Criminal Law—False Pretense—Evidence—Questions for Jury—Nonsuit.**

Where there is evidence under a criminal indictment that the defendant knowingly and falsely misrepresented that he owned a certain tract of land of value by reason of its having on it a mill shoal, and that he had included it within the description of certain tracts he had mortgaged to the prosecuting witness to secure a loan, and that acting thereon and induced thereby the prosecuting witness had loaned the money, and that the lands included in the mortgage were grossly inadequate to secure the loan resulting in a loss to the prosecuting witness, an illiterate man, who could not read and understand his deed, or know that the mill shoal tract had not been included in the description, it is sufficient to sustain a verdict of conviction. C. S., 4643.

2. **Same—Burden of Proof.**

Upon a criminal indictment for obtaining a thing for value by false pretense, the plea of not guilty places the burden of proof on the State to establish defendant's guilt beyond a reasonable doubt. C. S., 4277.

3. **Criminal Law—False Pretense—Collection of Debt—Appeal and Error.**

It appearing upon the trial of the criminal offense of obtaining goods under false pretense, that the jury have found the defendant guilty upon competent evidence: *Held*, the defendant's objection that the prosecuting witness was attempting to collect a debt by criminal process cannot be sustained on appeal.

APPEAL by defendant from *Ray, J.*, and a jury, at August Term, 1924, of CHEROKEE.

The substance of the contentions are as follows: The defendant, Roberts, represented to the prosecuting witness, A. M. Garrett, who could not read and write, that he owned two pieces of land situated in Beaver Dam Township, Cherokee County. Upon one of these tracts the defendant at the time of the treaty represented to Garrett that there was a mill shoal. The intent with which these representations were made to Garrett was to obtain from him a loan of $200, to be secured by a trust deed upon the two tracts, one of which had the mill shoal on it. The inducement to Garrett to lend the money was the enhanced value of the mill shoal tract by reason of its having this shoal upon it. Garrett did lend the money to the defendant in consequence of these representations, and defendant delivered to him a trust deed upon two tracts of land to secure payment of the $200 borrowed, but one of these tracts was not the one which he represented to Garrett he owned and upon which was the mill shoal. This mill shoal tract he did not own.

Garrett, being illiterate, did not discover that the defendant had worked this wrong upon him until about a year after the trust deed was delivered to him. The two tracts of land contained in the trust deed were of very small value, not sufficient to repay Garrett the money advanced. The defendant paid the amount down from $200 to $120. The tract of land which the defendant represented he owned and the mill shoal was on, belonged to some other person, and at the time the representation was made, he did not own the same. The defendant denied any false representation, but claimed that it was a simple transaction in which he borrowed $200 from the prosecuting witness upon the two tracts of land conveyed in the trust deed; that he made no representation of any sort in regard to the mill shoal being upon the place, and that he paid the amount down to $120, and would have paid the rest in the course of time—but the trust deed had run without this payment for nearly four years.

The prosecuting witness, A. M. Garrett, testified in part:

"I know the defendant, R. P. Roberts. I let him have $200. He was to make me a deed of trust against two pieces of land. He brought me a deed of trust purporting to be on these two tracts of land. I cannot read. He told me the tracts of land before he drew the deeds of trust. I know the tracts of land I was to get the deed of trust on. I delivered him $100 when he brought the deed of trust and $100 later. The deed of trust he delivered did not cover the tract of land he told me it did. I know part of the land this deed of trust is given on. There is two tracts in the deed of trust. I know the one he represented to be 40 acres. I know the tract on the deed of trust he delivered, the 40 acres, it is worth $10 or $15. It is on the side of a laurel mountain. I know where the other tract lies but I don't know the bounds of it. The second tract is just a small place, not an acre of it. He represented a mill shoal on the tract he was to give the deed of trust on.

"Q. Is there any mill shoal on the two tracts covered by this deed of trust? Answer: 'No, sir.'

"This was about four years ago this October. It was in this county. This is the deed of trust and note he delivered to me to secure the $200. I had it read over to me since."

There was a verdict of guilty. Defendant excepted to the judgment pronounced, assigned numerous errors and appealed to the Supreme Court.

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

Moody & Moody for defendant.

CLARKSON, J. The defendant moved for judgment of nonsuit at the close of the State's evidence and at the close of all the evidence. C. S., 4643. We think the motion was properly overruled.

In *S. v. Phifer,* 65 N. C., p. 325, *Reade, J.,* said: "We state the rule to be, that a false representation of a subsisting fact, calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing or in words, or in acts, by which one man obtains value from another, without compensation is a false pretense, indictable under our statute. But this must not be understood to extend to the mere 'tricks of trade,' as they are familiarly called, by which a man puffs his wares and deceives no one—as, this is an excellent piece of cloth; or, this is the best horse in the world. Against such craft, ordinary prudence is a sufficient safeguard; or if it be not, the injured party must be left to his civil remedy." C. S., 4277.

To constitute the crime here charged of false pretense, a mistake, a pretense, a false pretense, a mere promise or opinion is not sufficient. It must be a (1) false representation of a subsisting fact, whether in writing or in words or in acts; (2) which is calculated to deceive and intended to deceive and (3) which does in fact deceive (4) by which one man obtains value from another without compensation.

Judged by this well-settled law, what are the facts? As an inducement to obtain the money, defendant represented that he owned two tracts of land and on one tract there was a "mill shoal." This "mill shoal" tract was well known to prosecutor and of considerable value, and defendant agreed to give a deed in trust on this tract and another. The deed in trust on the land defendant gave did not cover the "mill shoal," and he did not own the tract that the "mill shoal" was on. Prosecutor could not read and did not discover this for sometime after the transaction. The lie about the subsisting fact was defendant representing a mill shoal to be on the tract he gave the deed in trust on and he owned that tract; whereas, in fact, he did not own that tract and the deed in trust given did not cover the tract with a "mill shoal" on it. The land on which the deed in trust was given was a different tract and of little value. *S. v. Munday,* 78 N. C., p. 460; *S. v. Carlson,* 171 N. C., 818; *S. v. McFarland,* 180 N. C., 726.

The court below on the presumption of innocence and reasonable doubt, charged the jury: "The defendant, to this bill of indictment, pleads not guilty, and says that he is not guilty and swears that he is not guilty before you, and the law immediately, upon his plea of not guilty, raises a presumption of innocence in his favor, which presumption remains with him throughout the trial until the State has proven to you beyond a reasonable doubt, if it does so prove, that he be guilty. And the law, to be consistent, will not presume a man to be innocent

and then make him offer evidence that he is not guilty. The law casts the burden upon the State to satisfy you beyond a reasonable doubt of his guilt." The court further read C. S., 4277—obtaining property by false token and other false pretense, and charged them as follows: "Now that is the statutory definition, and this bill is drawn in accordance with this statute. But, before you can proceed to determine intelligently in this cause, you will have to have a definition of false pretense, which definition is defined to be in an indictment for obtaining goods by false pretense under the statute—now this must be a false representation of a subsisting fact, that is representing a fact existing which does not exist. It is a lie told and acted and operated upon the other party to his hurt, and which was in fact a misrepresentation, and which caused him to separate with things of value to his hurt. There must be a false representation of subsisting fact calculated to deceive the party to which it is made, and does deceive, whether it be in writing, words or acts, whereby the defendant obtains something for (of) value from the other without compensation. Now that could not be clearer, no matter how long I might dilate upon it and talk about it. A false representation of a subsisting fact, calculated to deceive, intended to deceive, and which does deceive, whether it be in writing, words or acts, whereby one man obtains value from another without compensation. Now you will keep that definition before you when you go to consider the guilt of this defendant."

The court below gave proper instruction as to the elements comprised in the offense of false pretense.

We do not think the facts here constitute a mere promise to be performed in the future, as in *S. v. Knott,* 124 N. C., p. 814, cited by defendant, but a false representation of a subsisting fact.

The defendant in his brief says: "It appears to us that the whole record contains a state of facts, plainly showing that the prosecuting witness had resorted to the criminal side of the docket in order to enforce the collection of a simple debt, and we feel that upon this record the defendant is entitled to a new trial and a fair charge by the court."

The criminal side of the docket should never be used for the collection of a debt. Taking the defendant's version, this may be true, the prosecutor with knowledge of the wrong waited a long time before bringing the criminal action, but, on the State's testimony, which was accepted by the jury, the charge of false pretense was sustained and the jury believed the State's evidence.

From a critical examination, we cannot find any error in the exceptions taken to the evidence or to the charge that we can hold for prejudicial or reversible error.

No error.

EMMA A. O'QUINN v. EDWARD E. CRANE AND WIFE, FLORENCE E. CRANE.

(Filed 24 January, 1925.)

Wills—Devise—Powers—Estates—Trustees—Title—Remainders.

A devise to a trustee of testator's estate with direction that the trustee shall turn over to the testator's wife a part or all thereof, to be used by her without let or hindrance, upon her written demand, with direction that the receipt shall be a full and complete discharge of the trustee's liability, and should any part remain, then to his wife's daughter by a former marriage whom he designated as his own daughter in his will: *Held*, upon the wife's demand in conformance with the terms of the will of the entire estate, it was the testator's intent that she should have a fee-simple title thereto; the limitation over to take effect only as to such part, if any, as the widow may not have thus acquired.

APPEAL by defendants from *Horton, J.*, at November Term, 1924, of WAKE.

Controversy submitted upon an agreed case. Material facts:

On the 12th day of July, 1921, J. L. O'Quinn, late of Wake County, State of North Carolina, died leaving surviving him his widow, Emma A. O'Quinn, the plaintiff in this controversy. No child was born of the marriage between the said Emma A. O'Quinn and the said J. L. O'Quinn, but the said Emma A. O'Quinn has one child born of a prior marriage, this child being a daughter whose name was Willie Myatt (the first husband of the said Emma A. O'Quinn having been named Myatt). After the marriage between the said Emma A. O'Quinn and the said J. L. O'Quinn and after the said Willie Myatt, daughter of the said Emma A. O'Quinn, the plaintiff herein, had reached the age of twenty-one, the said Willie Myatt made application under the provisions of chapter 57, North Carolina Consolidated Statutes for the change of her name to Willie O'Quinn, her application being made to the clerk of the Superior Court and reciting that she had resided with the said J. L. O'Quinn since the marriage of her mother, and that her esteem for the said J. L. O'Quinn was that of a daughter, and that she desired to adopt his name; upon which application an order was signed changing the name of Willie Myatt to Willie O'Quinn. (See Special Proceedings, Book Q, page 59.) Subsequently, the said Willie O'Quinn intermarried with E. L. Coble, and both are now living, and of said marriage there has been born one child, Edward Lee Coble, Jr., who is also now living. The will of said J. L. O'Quinn referred to in paragraph 2 refers to the said Willie O'Quinn Coble as 'my daughter, Willie O'Quinn Coble.' There appears to have been no formal adoption of said Willie O'Quinn Coble by the said J. L. O'Quinn other than his designation of her in the will as 'my daughter.' The said J. L. O'Quinn

also was survived by three brothers and three sisters of the whole blood and three brothers and two sisters of the half blood and by his father. The said J. L. O'Quinn left a last will and testament, which has been duly admitted to probate, and is recorded in Book of Wills, I, at page 191, in the office of the clerk of the Superior Court of Wake County; that no caveat has been filed to the said will, and no contest or litigation with respect to the same has been initiated or is pending.

The question involved in the controversy is whether or not the plaintiff Emma A. O'Quinn, upon the facts agreed and stated in the record, has a fee-simple title to the real estate therein referred to and described. The answer to the question raised depends upon the construction of the will of J. L. O'Quinn, which is set forth fully in the record, with particular reference to paragraph 2 of item 4 of the will reading as follows: "Upon the written demand of my said wife, my trustee shall turn over to my wife any part or all of my said estate for her own use and benefit without let or hindrance, and the receipt of my said wife, duly signed by her personally, shall be a full and complete discharge to my said trustee of and for any and all liability or responsibility to the extent of the property so turned over to my said wife." And item 3 reading as follows: "Should any part of my estate remain in the hands of my trustee at the death of my said wife, then my trustee shall pay over the income therefrom to Mrs. Willie O'Quinn Coble, for and during the term of her natural life."

The trustee under the will was the Raleigh Savings Bank and Trust Co. Plaintiff, under sec. 2 of item 4, in accordance with the will, made written demand on the trustee for all of the estate. It duly complied with the written demand and released all the estate to plaintiff, her heirs and assigns. The release deed under the power was regularly executed on 29 June, 1922 and recorded. On or about 1 October, 1924, plaintiff entered into a written agreement with defendants to convey to them in fee simple a part of the land. Plaintiff tendered a deed in proper form, in accordance with the contract, but the defendants refused to comply with their contract on the ground that plaintiff could not convey to them a fee-simple title. The court below was of the opinion that plaintiff could convey to defendants a fee-simple title and rendered judgment accordingly. Defendants excepted, assigned error and appealed to the Supreme Court.

J. M. Broughton for plaintiff.
A. J. Templeton for defendants.

CLARKSON, J. The only question presented for our consideration is the meaning of the language in the section of the will before mentioned, "turn over to my wife any part or all of my estate for her own use and benefit without let or hindrance."

C. S., 4162 is as follows: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

If the testator had intended a life estate he could have said so, but, on the contrary, he provided, if his wife made the written demand on the trustee, all of the estate should be turned over to her for her own use and benefit without let or hindrance. The words are not the ordinary technical, legal words, as frequently found in wills, but the language, we think, broad and comprehensive enough to show a clear intent that his wife was the primary and principal object of testator's bounty. He had no child, but his wife had a daughter that he treated as his own. Not only the statute, but the decisions of this Court, construe a devise to be in fee unless it appears otherwise by clear and express words. *Fellowes v. Durfey,* 163 N. C., 305; *Smith v. Creech,* 186 N. C., 187; *Weaver v. Kirby,* 186 N. C., 387.

Following section 2 of item 4 of the will, section 3 is as follows: "Should any part of my estate remain in the hands of my trustee at the death of my said wife, then my trustees shall pay over the income therefrom to Mrs. Willie O'Quinn Coble, for and during the term of her natural life."

This section by clear inference explains section 2, and indicates conclusively that all the estate could be demanded and disposed of under section 2, and if all should not be and some remained, how it should devolve.

These two sections are the only ones we consider materially pertinent to gather the intention of the testator—the polar star in the construction of the will. We are of the opinion that plaintiff has a fee-simple title to the land under the will and can make her contract good. We are of the opinion that the judgment of the court below was in all respects correct, and it is hereby

Affirmed.

MARION MANUFACTURING COMPANY v. BOARD OF COMMISSIONERS OF McDOWELL COUNTY, COMPOSED OF J. LOGAN LACKEY ET ALS.

(Filed 24 January, 1925.)

1. Taxation—Statutes—Remedies—Actions—Procedure.

Where a statute prescribes the method for the valuation of property for taxation, and a remedy for the taxpayers who desire to contest the validity of the assessment thereunder made against his property, he must first exhaust the statutory remedy given before he can successfully apply to the court for redress.

2. Same—State Board of Examiners—Appeal.

Chapter 12, Laws 1923, provides for the local assessment of property for taxation, among other things constituting certain State officials the State board of assessors to receive complaints as to property that has been fraudulently or improperly assessed, through the county commissioners constituting the local board, and acting through certain designated agencies in certain detail respects, gives express authority to the State Board of Examiners, or any member thereof, "to take such action and do such things as may appear necessary and proper to enforce the provisions of this act."

3. Same—Pleadings—Demurrer.

A taxpayer paid his taxes under protest on an assessment of his property by the county board of equalization, ch. 12, Laws of 1923, and in his action to recover an alleged excess he had been required to pay, he alleged that the county board acted arbitrarily and without evidence as required by sec. 70 of said act, and it appeared from his complaint that he had not appealed to the State Board of Equalization in the manner prescribed by the statute: *Held*, a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was properly sustained.

4. Same—Public Officers—Mandamus.

In this action the complaint alleged that upon inquiry made to the State Board of Equalization the plaintiff was informed they were without power to proceed to pass upon the assessment of the local board: *Held*, upon proper application to the State Board and its refusal to act the plaintiff's remedy was by mandamus to compel them to act in the matter under the power conferred by the statute.

CIVIL ACTION heard on demurrer to the complaint before *Webb, J.*, at July Term, 1924, of MCDOWELL.

The action is: First, to compel defendants as the local board of revaluation and review to reassess defendant's property on averment that same has been arbitrarily and wrongfully valued to amount greatly in excess of its true value. Second, to recover the amount wrongfully collected on such excessive valuation, same having been paid under protest.

On matter pertinent to the inquiry, the complaint alleges:

"Sec. 3. That the Board of Commissioners of McDowell County, composed of J. Logan Lackey, Chairman, John L. Wilson and E. E. English, were duly elected to office and duly qualified and are now the duly qualified officers filling said office and were on 1 May, 1923, and since that date, under and by virtue of the laws of the State of North Carolina constituted a Board of Equalization in said county of McDowell; that said county board of commissioners, as the law directs, did in April in the year 1923, duly appoint and elect T. W. Wilson as county supervisor of taxes, and did duly appoint tax assessors in every township in McDowell County, North Carolina, and among others,

appointed W. M. Goodson as tax assessor or lister for Marion Township; that in the year 1923, it was the duty of T. W. Wilson and W. M. Goodson to revalue all the real estate in McDowell County, in Marion Township, at its true value; that in derogation of this duty, said supervisor and tax lister, or assessor, valued all of the individual real estate in Marion Township—in fact, throughout the county of McDowell—at sixty per cent (60%) of its true value and the valuation of sixty per cent was placed on the real estate of McDowell County by said supervisor, T. W. Wilson, with the consent, approval and ratification of the Board of Commissioners of McDowell County, acting as the Board of Equalization of said county.

"Sec. 4. That the said T. W. Wilson and W. M. Goodson, arbitrarily and without investigation, placed an assessment on the real property of the plaintiff in the sum of $985,779.00 which is greatly in excess of its true value, to wit, $496,340.00, and when compared with the average valuation of real property of like kind, as the law requires, the excess valuation placed on the said property of plaintiff, as aforesaid, amounts to $359,438.00."

Sec. 5. Contains detailed statement tending to show unfair and excessive valuation by comparison with the valuation of other property in like condition and circumstance.

"Sec. 6. That plaintiff applied to the said T. W. Wilson and W. M. Goodson, officers appointed by the defendant as above set forth, at the time they assessed the real property of plaintiff, for a reduction of the assessed value thereof so as to bring such assessment down to its true value of said property, to wit, $496,341.00; that said Wilson and Goodson thereupon informed plaintiff that they had no way of ascertaining the value of said real estate of plaintiff and that they would therefore return or send up the old valuation, or valuation placed thereon prior to 1923, during the inflated war time prices and values, as the value for 1923, and let the board of equalization fix the value of plaintiff's real estate; that application was duly made according to law to the said Board of Equalization of McDowell County to reduce the valuation of said real estate as certified to said board by said Wilson and Goodson, to its true value; that evidence was produced on the hearing before said board of equalization showing the true value of said property, and that said defendants, sitting as the board of equalization, did make a reduction in the valuation of said real estate in the sum of $130,000.00, but said action of said defendants was entirely arbitrary, made without any evidence whatever (except that produced by plaintiff, as aforesaid, which was uncontradicted and unquestioned), that the defendants arbitrarily refused to equalize the real property of plaintiff with other property of like kind and character, stating that they had no way of ascertaining the value of the plaintiff's real estate.

"Sec. 7. That, as plaintiff is informed and believes, the Commissioner of Revenue, the Attorney-General and the Chairman of the Board of the Corporation Commission of the State of North Carolina, constitute the State Board of Assessment; that application was made to said State Board of Assessment for relief from the arbitrary, inequitable and unjust assessment of plaintiff's property, as above stated, and the plaintiff was informed that said board of assessment had no authority in the premises and that this matter of assessment of real estate of plaintiff was entirely in the hands of the board of equalization, to wit, the defendants in McDowell County.

"Sec. 8. That plaintiff has paid the taxes assessed against it for the year 1923, to the sheriff of McDowell County, but paid same under protest."

Prays judgment that plaintiff's property be reduced from $985,779.00 to its true valuation alleged to be $496,340.00. And, second, that plaintiff recover of defendants $6,110.45, the amount alleged to be wrongfully collected by reason of said unlawful assessment, same having been paid under protest. Defendant demurs for that the complaint fails to state a cause of action generally and in several specified particulars. Judgment sustaining demurrer and plaintiff excepted and appealed.

Morgan & Raglan, Hudgins, Watson & Washburn and Frank Carter for plaintiff.

Pless, Winborne & Pless for defendants.

HOKE, C. J. It is conceded by appellant that the taxes must be collected in accordance with the valuation and assessment as existent and as fixed by the official board, and that unless this can be properly corrected, no recovery can be had for the moneyed demand by reason of the taxes heretofore paid. *Guano Co. v. New Bern,* 172 N. C., p. 260; *Pickens v. Comrs.,* 112 N. C., p. 699; *Stanly v. Board of Supervisors,* 121 U. S., p. 535.

And as to the other relief sought in the complaint to compel a reassessment of appellant's property by defendants as the local board of equalization, the question is one very largely for the Legislature and in this instance is regulated and controlled chiefly by ch. 12, Laws of 1923, making provision for the assessment of property in the State for purposes of taxation, etc. The statute referred to, in sections one and two constitutes the Commissioner of Revenue, the Attorney-General and Chairman of the Corporation Commission, "The State Board of Assessment," with all the powers and duties prescribed by the act. In sec. 3, various duties are imposed and powers conferred upon the board, clauses 3 and 4 of this section being as follows:

"3. To receive complaints as to property liable to taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, and to investigate the same, and to take such proceedings and to make such orders as will correct the irregularity complained of, if found to exist.

"4. The said board or any member thereof may take such action and do such things as may appear necessary and proper to enforce the provisions of this act."

Again, in section 70 of the act referred to, "the boards of commissioners of the counties of the State are constituted a board of equalization with direction to meet in their respective counties on the second Monday in July to revise the tax lists and the valuations reported to them, and sit until the revision is complete. They shall have power to summon and examine witnesses, shall correct the lists of the list takers and assessors as may be right and just, so that the valuation of similar property throughout the county shall be as near uniform as possible, etc."

From a consideration of these and other pertinent provisions of the law, it is clear, in our, opinion, that the State Board of Assessment is given supervisory powers to correct improper assessments on the part of the local boards and that on complaint made in apt time and on notice duly given and on sufficient and proper proof before this State board, plaintiff could have obtained or had full opportunity to obtain the relief he now seeks. This being true, the judgment of his Honor sustaining the demurrer must be upheld, for it is the accepted position that a taxpayer is not allowed to resort to the courts in cases of this character until he has pursued and exhausted the remedies provided before the duly constituted administrative boards having such matters in charge. *Gorham v. Mfg. Co.*, Current Supreme Court Reporter, U. S., pp. 80, 81. *First National Bank v. Weld*, 264 U. S., p. 450; *Farncomb v. Denver*, 252 U. S., p. 7.

In *Gorham's case, Associate Justice Sanford* states the controlling principle as follows: "We are of opinion that without reference to the constitutional questions, the bill was properly dismissed because of the failure of the company to avail itself of the administrative remedy provided by the statute for the revision and correction of the tax. A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax cannot be heard by a judicial tribunal to assert its invalidity."

Our State decisions to the extent they have dealt with the subject are in full approval of the principle, holding that a taxpayer must not only resort to the remedies that the Legislature has established but that he must do so at the time and in the manner that the statutes and

proper regulations provide. *R. R. v. Comrs.*, 188 N. C., p. 265; *Wolfenden v. Comrs.*, 152 N. C., p. 83; *Comrs. v. Murphy*, 107 N. C., p. 36; *Wade v. Comrs.*, 74 N. C., p. 81.

In *Murphy's case, supra, Chief Justice Merrimon*, delivering the opinion said: "The statutes in respect to revenue and taxation contemplate and intend that taxes shall be levied and the collection thereof promptly enforced in the way and by the means and remedies therein prescribed, and no action like the present can be employed to enforce collection until the statutory remedies shall be exhausted."

Recurring to the complaint, it appears from plaintiff's own averments that he appeared in apt time before the local board and procured a reduction of the assessment to the amount of $130,000.00; that no exception to the action of the local board was made at the time, and so far as appears, no appeal was taken or asked for, and no formal and sufficient application has ever been made to the State Board to have the action of the local board reviewed or corrected, but the present suit is instituted to compel the local board to take further action on a matter they had already considered and passed upon more than twelve months before. True, the complaint alleges that "application was made to the State Board and that plaintiff was informed that they were without power in the premises." This was evidently no formal application, but was only by way of inquiry, and if proper application to the State Board had been made and refused, the plaintiff's remedy was by mandamus to compel them to act in the matter under the powers conferred by the statute. *Board of Education v. Comrs.*, 150 N. C., p. 116.

There is no error presented and the judgment sustaining the demurrer is

Affirmed.

STATE v. JOHN D. STALLINGS.

(Filed 24 January, 1925.)

Highways—Automobiles—Speed Regulations—Crossings—Municipal Corporations—Cities and Towns—Ordinances.

Our statute regulating traffic at public crossings applies to the streets of a city or town, and requires that a person operating a motor vehicle must have it under control and operate it with due regard to traffic and to the safety of the public, and cross the intersecting street at a speed not exceeding ten miles an hour; and a town ordinance that requires him to come to a full stop before crossing certain streets, irrespective of traffic conditions at the time and place, is in conflict with the statute. C. S., 2616, 2601.

STATE *v.* STALLINGS.

APPEAL by defendant from *Bond, J.,* at September Term, 1924, of VANCE.

The defendant was prosecuted for a breach of the following ordinance of the city of Henderson: "It shall be the duty of all drivers of automobiles, and other vehicles, before entering Garnett Street and Williams Street and Chestnut Street, from intersections, to come to a stop and get the right of way before entering either Garnett or Williams or Chestnut Street." Said ordinance was adopted in the year 1921.

The jury returned this special verdict: "The defendant, in May, 1924, drove a motor driven vehicle along Breckenridge Street to and across Chestnut Street, both being residential streets in the city of Henderson, N. C., without stopping before entering Chestnut Street. No other vehicle was passing the point on either street at said time. Said street and crossing are embraced in the ordinance of the city, requiring all vehicles on Breckenridge Street at said crossing to stop before entering and crossing Chestnut Street. At said crossing there was a sign, plainly painted with the words 'Through Street, Stop.' If your Honor shall be of opinion that defendant is guilty upon the foregoing facts, we find him guilty, otherwise we find him not guilty."

The defendant was adjudged to be guilty. From the judgment pronounced he appealed, assigning error.

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

T. T. Hicks & Son and A. A. Bunn for defendant.

ADAMS, J. In section 2616 (ch. 55) of the Consolidated Statutes is the following provision: "Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway or a curve, or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn, or other device for signaling. Upon approaching an intersecting highway, a bridge, dam, sharp curve, or deep descent, and also in traversing such intersecting highway, bridge, dam, curve, or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed ten miles an hour, having regard to the traffic then on such highway and the safety of the public." Section 2601 (ch. 55) provides that no governing board of any city or town shall pass or have in effect or in force any ordinance contrary to the provisions of the chapter containing these sections.

The words "intersecting highway" have been construed as applying to public streets; also to railroads, although within the corporate limits of a city. *Manly v. Abernathy,* 167 N. C., 220; *Hinton v. R. R.,*

172 N. C., 587. It is evident, then, that the ordinance is invalid if it antagonizes the State law; for we have held that an ordinance was void which purported to reduce the speed of motor vehicles below the maximum speed fixed by the General Assembly. *S. v. Freshwater,* 183 N. C., 762.

To say that the ordinance of the city of Henderson is a traffic and not a speed regulation; or, if we declare the ordinance void, that the city cannot regulate or control the use of one-way streets, or the movement of vehicles under the direction of police officers, would indicate, we think, a misapprehension of the scope and purpose of the statutes which we have cited. The ordinance is void only so far as it may conflict with the State law. To what extent are the ordinance and the State law inconsistent?

The statute provides that upon approaching an intersecting highway a person operating a motor vehicle must have it under control, and that he must operate it with due regard to the traffic and the safety of the public. Under some conditions he may travel at a rate of speed not exceeding ten miles an hour; under other conditions the congested traffic or the safety of the public may demand, not only a "slow-down," but a full stop. When he has proper notice of circumstances calling for a reduction of speed below the maximum prescribed in the statute, whether by his own observation, the warning of a police officer, or otherwise, he must strictly conform his conduct to the requirements of the State law. He is permitted by the State law to enter upon and go across an intersecting highway at a speed not exceeding ten miles an hour unless due regard to the traffic or to the safety of the public requires a reduction of the speed; but the ordinance in question deprives him of this right by prescribing an arbitrary rule that he shall always and under all circumstances stop his vehicle before entering Garnett, Williams, or Chestnut Street. To this extent the ordinance is inconsistent with the statute and therefore not enforcible. Although a railroad is a highway (*Hinton v. R. R., supra*), an amendment of the statute was necessary in order to compel the operator of a motor vehicle to bring it to a full stop before crossing or attempting to cross a railroad track. Public Laws 1923, ch. 255.

In the discussion of an ordinance which required the operator of a motor car to come to a full stop before crossing an intersecting street the Supreme Court of Illinois said: "The ordinance in question shows on its face that it is clearly an ordinance limiting and regulating the speed at which motor vehicles may cross boulevards within the control of the park commissioners. The object and purpose of causing the vehicle to come to a full stop is to insure its proceeding across the boulevard at a rate of speed less than 6 miles an hour. It is clear that it has nothing to do with the regulation of traffic, for the reason that the

amount or character of traffic on the boulevard is not taken into consideration. The ordinance requires vehicles to come to a full stop at every intersection, regardless of the amount or character of traffic using the boulevard at that particular point. Such a regulation would have no basis in reason, where the boulevard passes through a sparsely populated section, or where the traffic on the boulevard is unusually light. The primary and paramount object in establishing streets and highways is for the purpose of public travel, and the public and individuals cannot be rightfully deprived of such use. This right to use the highways and streets for purposes of travel is not, however, an absolute and unqualified one. The right may be limited and controlled by the State, or by a municipality under its authority derived from the State, in the exercise of its police power, whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people, and is subject to such reasonable and impartial regulations adopted pursuant to this power as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement and to provide for their safety while using it." . . . If an ordinance requiring all motor vehicles to stop before crossing a boulevard at every point where such boulevard intersects a street is valid as a traffic regulation, then an ordinance requiring a motor vehicle to stop at every street intersection in the city is a valid traffic regulation. Such an ordinance would not regulate traffic, but would tend to congest traffic, and would not promote the safety or the welfare of the public." *Elie v. Adams Express Co.,* 133 N. E., 243. The ordinance was declared void. The authorities are collected and intelligently discussed in a note appended to *Ex parte Daniels,* 21 A. L. R., 1186.

With characteristic frankness the Assistant Attorney-General, who argued the case on behalf of the State, expressed the opinion that the ordinance is inconsistent with the State law and for that reason invalid. We concur in his opinion. As we see it the ordinance is void and the verdict and judgment cannot be upheld.

Error.

CENTRAL BANK AND TRUST CO. ET AL. v. N. M. WYATT ET AL.

(Filed 24 January, 1925.)

1. Deeds and Conveyances—Mines—Minerals—Exceptions from Deed—Fee Simple—Statutes—Estates.

A conveyance of land in fee simple with habendum excepting one-half of all the mineral which thereafter may be found upon the premises which is hereby expressly reserved by the grantors, is *held* to be an

exception from the deed conveying the land, as to the minerals, and the mineral rights are descendible to the heirs of the deceased grantor, without the use of the word heirs. C. S., 991. The distinction between an exception in the deed to the thing granted, and a reservation therein, discussed by ADAMS, J.

2. Same—Partnership.

And, *held*, *further*, the exception in the deed, being followed by a stipulation that if minerals should be found upon the lands the parties shall incur equal expense in testing the mine and divide the profits, creates, in the event stated, a partnership between the grantor and grantee, the termination thereof by the death of the grantor not affecting the inheritance from him.

APPEAL by plaintiffs from *Webb, J.*, at August Term, 1924, of YANCEY.

Watson, Hudgins, Watson & Fouts for plaintiffs.
Charles Hutchins for defendants.

ADAMS, J. The controversy arises upon a proceeding brought before the clerk for the sale for partition of a mineral interest in land. On 17 July, 1877, J. W. Higgins and his wife executed and delivered to Edward E. Wilson a deed conveying a tract of land containing about two hundred acres with this habendum: "To have and to hold . . . with the exception of one-half of all the mineral found upon the premises, which is hereby expressly reserved by the parties of the first part." It is admitted that the plaintiffs have succeeded to whatever title J. W. Higgins had in the minerals at the time of his death and that the defendants claim to have derived their title from him. The trial court directed a nonsuit on the ground that the grantor had reserved a one-half mineral interest during the term of his life and that the plaintiffs had failed to establish their alleged title. Whether this conclusion is correct is the only question presented for decision.

In 1879 the General Assembly modified the principle which obtained at common law by providing that a conveyance of real property executed after 7 March, 1879 should be construed to be a conveyance in fee without the use of the word "heirs," unless it appeared from the language of the instrument that the grantor meant to convey an estate of less dignity. Public Laws 1879, ch. 148; C. S., 991. Prior to the enactment of this statute, in order to constitute a reservation in fee it was necessary that the reservation be limited to the heirs of the grantor. "But for this word of limitation (heirs) the estate reserved would have been for life only, and upon the death of the vendors their personal representatives could set up no claim to the trees left standing, because they

were attached to the soil and formed real estate; nor could their heirs, because the estate was not one of inheritance." *Pearson, J.*, in *Whitted v. Smith*, 47 N. C., 36. But in a conveyance executed since the act went into effect (7 March, 1879) the word "heirs" is not necessary to a reservation in fee. "If it be contended that the clause was in effect a reservation, and that under the strict rule of law an instrument creating an easement in fee by way of reservation must contain words of inheritance, such contention is met and avoided by the provisions of our statutes in existence at the time of the conveyance (section 1280, Code of 1883; now C. S., sec. 991), which provides that conveyances are held and construed to be in fee unless a contrary intention appears from the conveyance." *Clark, C. J.*, in *Ruffin v. R. R.*, 151 N. C., 330.

There is a distinction, however, between a reservation and an exception. Technically, a reservation is a clause in a deed whereby the grantor reserves something arising out of the thing granted not then in esse, or some new thing created or reserved, issuing or coming out of the thing granted and not a part of the thing itself; whereas, by an exception the grantor withdraws from the effect of the grant some part of the thing itself which is in esse and included under the terms of the grant. 3 Washburn on Real Prop., 645; 2 Devlin on Deeds, sec. 979; 4 Kent's Com., 468. The distinction is noted in some of our decisions. An estate to A. in fee, with a reservation to the grantor for life, represents a technical reservation. *Jones v. Potter*, 89 N. C., 220; *Savage v. Lee*, 90 N. C., 320. In *Bond v. R. R.*, 127 N. C., 125, the deed construed on the plaintiff's appeal embraced a tract of land with all the privileges, etc., "except the good heart timber suitable for mill timber." It was held that this language constituted an exception and not a reservation and that the timber was not conveyed.

In neither of the deeds construed in these cases did the grantor use both the words "reserve" and "except," or "reservation" and "exception"; but in the deed under consideration the language is, "with the exception of one-half of all the mineral found upon the premises, which is hereby reserved by the parties of the first part." Does this clause constitute an exception or a reservation?

"Where the words 'reservation' and 'exception' are used together, without evincing any definite knowledge of their technical meaning, the intention of the parties must be ascertained from the instrument interpreted in the light of the surrounding circumstances." 18 C. J., 341 (339) and cases cited. The "reservation" in the deed before us is followed by a stipulation that if mineral should be found upon the land, the grantor and the grantee should incur equal expense in testing and

working the mine and should divide the profits—a contract with elements of a partnership in the minerals.

Upon consideration of the deed with a view to ascertaining the intention of the parties, we are satisfied it was their purpose to except from the operation of the conveyance one-half of all the mineral found upon the land, and should any mineral be discovered it should be mined by the grantor and the grantee as partners; and further that the termination of the partnership relation by the death of one of the parties did not affect the grantor's exception of "all the mineral upon the premises."

In our opinion the deed excepts in fee and not for life the mineral interest. The judgment of nonsuit is therefore

Reversed.

FRED O. SCROGGS ET AL. v. BOARD OF EDUCATION OF CLAY COUNTY ET AL.

(Filed 24 January, 1925.)

Schools—Education—County-wide Organization—Statutes—Taxation.

The provisions of C. S., 5473, with regard to counties adopting a county-wide plan of organization of public schools, is brought forward and enlarged under those of sec. 75, ch. 136, Public Laws of 1923, and under neither statute is it required that the voters of combined districts approve the plan of consolidation when the tax rate of each remains the same.

APPEAL by defendants from *Ray, J.*, at Fall Term, 1924, of CLAY.

Civil action tried upon the following issues:

"1. Had a county-wide plan been legally adopted by the County Board of Education of Clay County, prior to the presentation of the petition for an election by the voters of Brasstown School District to the county board of education for its endorsement and approval? Ans.: 'No.'

"2. Was there any valid and legal indebtedness against Brasstown School District at the time of the presentation of said petition? Ans.: 'No.'

"3. Was the school site selected by said county board in Ogden District in accordance with said adopted county-wide plan? Ans.: 'No.'"

The trial court ruled that the burden of proof was on the defendants; and at the close of their evidence, the plaintiff offering none, the following instruction was given to the jury:

"Gentlemen, if you believe the evidence in this case you will answer the first and second and third issues 'No,' in accordance with the burden of proof. I have answered them 'No,' and you will adopt them as your verdict."

Judgment on the verdict for plaintiffs. Defendants appeal, assigning errors.

Dillard & Hill for plaintiffs.
A. W. Horne and Anderson & Gray for defendants.

STACY, J. The record in this case is quite voluminous, but the questions presented fall within a very narrow compass. It was conceded on the argument that, if the Board of Education of Clay County did, on 14 May, 1923, properly adopt what is known as the "County-wide plan of organization" for the management of the public schools of the county, in accordance with the provisions of ch. 136, sec. 73a, Public Laws 1923, the plaintiffs are not entitled to the relief sought; contra, otherwise.

The pertinent provisions of the minutes of a meeting of the Board of Education for Clay County, held on the date above indicated, and which were duly offered in evidence, are as follows:

"Office, Board of Education, Clay Co.,
"Hayesville, N. C., 14 May, 1923.

"Board met with all members present, and the following business was transacted:

"Ordered that the county schools be conducted on the 'county-wide plan' in conformity with the new school law of 1923. Under this order the county schools were reorganized as follows:

"Brasstown Township.

"Districts Nos. 2 and 3 to be immediately consolidated and the building so located as to include 1 and 4, nonlocal tax districts, when they are willing to come into this consolidation by petition or otherwise, and assuming the rate of local tax equal to that paid by 2 and 3. Brasstown Township is to have the first attention of the board in carrying out the county-wide plan.

"(Other Townships not involved.)

"Ordered that the board of education locate the site for the central school in Brasstown Township, 19 May, 1923."

His Honor was of the opinion that the order of the board of education appearing on the record was not sufficient to bring Clay County within the provisions of ch. 136, Public Laws 1923, and at the same

time to effect a consolidation of Districts Nos. 2 and 3 in Brasstown Township—the real question at issue—because of the further provision looking to the subsequent inclusion of Nos. 1 and 4 and which was dependent upon some action on their part. In this we think there was error. Indeed, even under the old law, C. S., 5473, school districts, with the same tax rate, as was the case with Nos. 2 and 3 here, could be consolidated by the county board of education, without a vote of the people in the consolidated district. *Board of Education v. Bray,* 184 N. C., 484; *Paschal v. Johnson,* 183 N. C., 131. The powers conferred under C. S., 5473 have been enlarged and this section, as amended, is brought forward as section 75 of ch. 136, Public Laws 1923.

It was clearly the purpose and intent of the Board of Education to adopt the "County-wide plan of organization" for Clay County, and, as now advised, we see no valid objection to the order of 14 May, 1923, undertaking to accomplish this result.

We deem it unnecessary to discuss the remaining exceptions. The verdict and judgment will be vacated and the cause remanded for another hearing.

New trial.

STATE v. DAVE BRYANT.

(Filed 24 January, 1925.)

1. Courts—Improper Remarks—Statutes—Prejudice.

A remark made by the judge in reference to the testimony of a witness prejudicial to a party to the litigation in criminal and civil cases, is forbidden by C. S., 564, and when once made an instruction intending to eradicate the impression is ineffectual, irrespective of the intention of the judge in uttering the prejudicial words.

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

Where the judge in the presence of the jury remarks about the manner in which a witness is giving his testimony, to the prejudice of a party, it is not necessary for the party to except at the time, the requirements of the statute in such instances being prohibitory.

3. Same.

The remarks of the judge during the giving of evidence on the trial, and in the presence of the jury, "This witness has the weakest voice or the shortest memory of any witness I ever saw," is susceptible of the construction that the testimony of the witness was at least questioned by the court, and comes within the inhibition of C. S., 564.

APPEAL by defendant from *McElroy, J.,* at March Term, 1924, of CHEROKEE, upon a conviction for murder in the second degree.

The defendant testified as a witness in his own behalf and on cross-examination was asked, "Why is it you can talk so much plainer and louder when Mr. Witherspoon is asking you questions than you can when I am talking to you?" A moment later the court said: "This witness has the weakest voice or the shortest memory of any witness I ever saw." This statement was made by the judge after he had requested the defendant several times to answer the questions asked him by counsel and to speak in a louder voice. This remark, which was made in the presence and hearing of the jury, was not objected to or excepted to at the time the same was made, but it is now assigned as error.

During the examination of John Loudermilk, a witness for the defendant, the following occurred:

"Q. Did you ever have a conversation with the deceased, Lewis Adams, any time before the shooting occurred? A. 'Just a word or two is all.'

"Q. I will ask if you heard him make any threats against Dave Bryant?

"By the court: Was this before or after the killing?

"The foregoing question by the court was not objected to, or excepted to, by the defendant at the time the same was made by the court, and the same is assigned as error."

And during the examination of Andy Henson, another witness for the defendant:

"Counsel for the defendant asked the witness, Henson, the following questions:

"Q. Did you ever have a conversation with Mr. Adams, in which he made threats against Mr. Bryant? A. 'Why, yes. Running Mr. McGee's lines, and he came out to the stump where the corner was, and he said he had it in for Mr. Bryant, and I didn't know what way, and the deceased, Adams, said he had his gun and "toted" it all daytime and slept with it under his head at night. I don't know whether he did or not, and I studied, and I didn't know what he could have it in for Mr. Bryant for, unless it was for having him arrested—him and the woman.'

"Q. Did he say anything else? A. 'No, the crowd came on, and he didn't say any more.'

"Q. Where did he have his pistol? A. 'Inside his shirt and jacket, and had on his overcoat.'

"By the court: When was this, in regard to the killing, before or after?

"The foregoing remark of the court, which was made in the presence and hearing of the jury, was not objected to, or excepted to, at the time the same was made by the court, and is assigned as error."

During the argument of the case before the jury, the solicitor for the State, commenting upon the demeanor of the defendant upon the stand, stated that his conduct upon cross-examination had been such that the court had stated that he had the weakest voice or the shortest memory of any man he ever saw. To this statement before the jury defendant's counsel objected as being prejudicial to the rights of the accused and an improper argument. The judge sustained the objection of the defendant's counsel to the argument of the solicitor, and told the jury that it was not a proper argument and should not be considered, and stated that this remark in reference to the prisoner's demeanor was not to be construed by the jury as being an expression of opinion.

After the trial, a formal exception was taken by the defendant to the remarks of the court in each instance.

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

F. O. Christopher, J. H. McCall, and D. Witherspoon for defendant.

ADAMS, J. "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising therein." C. S., 564. In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or even an intimation by the judge, at any time during the trial, which is calculated to prejudice either of the parties. *Morris v. Kramer,* 182 N. C., 87, 91. And when once expressed, such opinion or intimation cannot be recalled. In the case last cited, the Court said: "When the damage is once done, it cannot be repaired, because, as we know, the baneful impression on the minds of the jury remains there still. . . . One word of untimely rebuke of his witness may so cripple a party as to leave him utterly helpless before the jury." *Bank v. McArthur,* 168 N. C., 48; *S. v. Cook,* 162 N. C., 586; *S. v. Dick,* 60 N. C., 440. It is also held that the probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial.

Illustrations of the principle are found in *S. v. Ownby,* 146 N. C., 677, in which the judge remarked that certain witnesses were not interested in the result of the action; in *S. v. Rogers,* 173 N. C., 755, in which the judge directed a witness to answer the questions concisely and "not be dodging"; in *Morris v. Kramer, supra,* in which the judge

propounded impeaching questions to a witness; and in *Greene v. Newsome,* 184 N. C., 77, in which the judge said that the absence of the defendants was "a circumstance that a fraud had been committed." See, also, *S. v. Hart,* 186 N. C., 582. In *S. v. Jones,* 181 N. C., 546, the remark excepted to was not fatal to the conviction, because it was "necessarily understood as a mere pleasantry and could have reasonably had no applicable effect on the result."

If we treat the remarks made by the presiding judge to the witnesses, Loudermilk and Henson, as harmless inadvertences, we are still confronted with the expression, "This witness has the weakest voice or the shortest memory of any witness I ever saw"—language which was clearly susceptible of the construction that the testimony of the witness was at least questioned by the court, if not unworthy of credit.

The fact that exception was not entered at the time the remark was uttered is immaterial. The statute is mandatory, and all expressions of opinion by the judge during the trial, in like manner with the admission of evidence made incompetent by statute, may be excepted to after the verdict. *Broom v. Broom,* 130 N. C., 562.

We are confident that the expression of an opinion was utterly foreign to the purpose of the discreet and conservative judge who presided at the trial, and that the objectionable remark may have been impelled by a just and natural sense of impatience or displeasure, but the inadvertence was one that could not be corrected and its influence such as could not be dispelled.

We are of opinion that the defendant is entitled to a

New trial.

J. H. GOSSETT ET AL. v. H. C. McCRACKEN.

(Filed 24 January, 1925.)

1. Principal and Agent—Commission.

In order for an agent for the sale of real estate to recover commissions on the sale of lands under his contract, he must show that he has obtained a bona fide purchaser upon its terms, etc.

2. Same—Revocation.

Under a written contract for the sale of a farm, the owner agreed that the agent therein appointed may sell at a certain price per acre net to him, or at a price he would thereafter consent to, with the provision to pay commissions under further-stated conditions: *Held,* the contract was revocable at the will of the owner before a sale had been effected by the agent under the terms of his contract.

3. Same—Agency Coupled With an Interest.

Where there is an agency for the sale of real estate created, in order for it to be irrevocable by the owner for an interest therein of the agent, such interest must be in the land, and not merely in the result of the sale or the execution of the power.

4. Principal and Agent—Revocation—Damages.

The damages recoverable by an agent for the sale of land revocable at the will of the owner, when the former has not procured a purchaser upon the terms specified, are such expenses as had been incurred by the agent prior to the revocation of the power to sell, and a reasonable compensation for any labor performed and services rendered which were fairly within the contemplation of the parties at the time of the making of the contract.

APPEAL by defendant from *Ray, J.*, at September Term, 1924, of HAYWOOD.

Civil action, to recover commissions arising out of the following contract:

"HAYWOOD COUNTY—North Carolina.

23 SEPTEMBER, 1921.

"This is to certify that I give the Canton Real Estate Company the exclusive right to sell my farm, of 119 acres, more or less, at $90.00 per acre net to me, or, in case they fail to get an offer of $90.00 per acre, I agree to pay 5 per cent commission on whatever it is sold and confirmed for; and if sold for more than $90.00 per acre, they shall be paid 10 per cent commission, and the profits, if any, over and above the 10 per cent, I will divide 50/50 with them.

"Term of this option 12 days. H. C. MCCRACKEN.

"Witness: G. H. GOSSETT."

Under this contract, the property was advertised for sale at public auction, on 4 October, 1921.

Defendant alleges that plaintiffs changed the term of the option or contract from ten days to twelve days, without his knowledge or consent, and upon discovering this fact he notified the plaintiffs that he would not stand for the change, or execute deeds if the property were sold on the day as advertised. Plaintiffs denied any wrongful change of the contract, but called in the sale, because of the defendant's attitude, and instituted this action for commissions.

On the measure of damages the trial court instructed the jury as follows:

"If the plaintiffs have satisfied you that there was a contract and the defendant breached it in the particulars in which the court has recited

to you, and that there was a damage running to the plaintiffs by reason of it, then it is for you to say what the amount of the damage is, taking as a basis 119 acres of land; and it has been testified to you it was worth so much money and would have sold for so much, and if he could have got that amount at the time and sold it, that would have been the amount of money he would have received."

From a verdict and judgment in favor of plaintiffs for $535.50 the defendant appeals, assigning errors.

Morgan & Ward for plaintiffs.
John M. Queen and Alley & Alley for defendant.

STACY, J., after stating the case: Plaintiffs have misconceived their remedy, and the case has been tried on an erroneous theory. Conceding, as plaintiffs contend, that the change in the contract from ten days to twelve days was made with the defendant's approval and consent, still there was no sale of the property prior to revocation of the power to sell, and, consequently, there could be no recovery of commissions. Plaintiffs' right of action, if such they have, is to recover damages for an alleged breach of the contract. The commissions, called for in the agreement, are dependent entirely upon an execution of the contract and a sale of the property.

The instrument signed by the defendant was not an irrevocable power of agency, and it appears from all the evidence that the defendant revoked the power before the sale, even conceding that the contract had not been avoided by an unauthorized change in its terms. *Martin v. Holly,* 104 N. C., 36. It contains no stipulation against revocation, and it is not such a power, "coupled with an interest," as to make it irrevocable. *Atlantic Coast Realty Co. v. Townsend,* 98 S. E. (Va.), 684. The interest, coupled with a power, which will render the power irrevocable, must be an interest in the thing itself. *Missouri v. Walker,* 125 U. S., 339; 31 L. Ed., 769. As said by *Marshall, C. J.,* in *Hunt v. Rousmanier,* 8 Wheat., 174:

"The power must be engrafted on an estate in the thing. The words themselves seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it."

The general rule is stated in 21 R. C. L., 810, as follows: "There seems to be no doubt that a power coupled with an interest cannot be revoked, but the interest required is an interest in the subject of the power, and not an interest in that which is to be produced by the exercise of the power."

The plaintiffs would be entitled to recover as damages for a breach of the contract all expenses incurred by them prior to revocation of the power to sell, and a reasonable compensation for any labor performed and services rendered which were fairly within the contemplation of the parties at the time of the making of the contract. *Advertising Co. v. Warehouse Co.,* 186 N. C., 197; *Olive v. Kearsley,* 183 N. C., p. 198; *Hagood v. Holland,* 181 N. C., p. 64; *Brewington v. Loughran,* 183 N. C., 558. But commissions, as such, are recoverable on the theory of a completed contract. This is not our case. Of course, if the plaintiffs, prior to revocation, had succeeded in making a bona fide sale of the property in accordance with the terms of the contract, they would be entitled to have estimated in the assessment of damages any loss of profits actually sustained by reason of the defendant's failure to perform the contract on his part. *Olive v. Kearsley, supra,* and cases there cited.

The instant case is so nearly parallel to the case of *Real Estate Co. v. Sasser,* 179 N. C., 497, and the principles of law applicable are so thoroughly discussed in that case, with full citation of authorities, that we deem it unnecessary to do more than refer to the decision in the *Sasser case* as determinative of the rights of the parties here.

Our attention has been called to a number of apparently contrary decisions in other jurisdictions, but we think the position here taken accords with the juster rule. It is in keeping with our former adjudications.

The cause will be remanded for another hearing.

New trial.

CHARLES LINDSEY v. SUNCREST LUMBER COMPANY, MACK HENSLEY, AND LAT McCURRY.

(Filed 24 January, 1925.)

Evidence—Nonsuit—Statutes—Questions for Jury.

A judgment as of nonsuit upon the evidence (C. S., 567) should not be rendered when construed in the light most favorable to the plaintiff, giving him the benefit of every reasonable intendment and every reasonable inference therefrom, it is sufficient in law to be submitted to the jury upon the controverted questions.

LINDSEY *v.* LUMBER CO.

APPEAL by plaintiff from *Ray, J.,* at September Term, 1924, of HAYWOOD.

This is a civil action, tried at September Term, 1924, of the Superior Court of Haywood County, before his Honor, J. Bis Ray, and a jury. At the close of plaintiff's testimony the defendant moved for judgment as of nonsuit, which was allowed as to the defendants Mack Hensley and Lat McCurry, and overruled as to defendant Suncrest Lumber Company, to which the defendant excepted. At the close of all the testimony, defendant's motion for nonsuit was renewed, and allowed by the court, to which plaintiff excepted, assigned error, and appealed to the Supreme Court.

Morgan & Ward for plaintiff.
Alley & Alley for defendants.

CLARKSON, J. Defendants made a motion for judgment as in case of nonsuit, at the close of plaintiff's evidence and at the close of all the evidence. C. S., 567. The court below allowed the motion as to defendants Mack Hensley and Lat McCurry at the close of plaintiff's evidence, and as to the Suncrest Lumber Company at the close of all the evidence, and in this we think there was error.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is 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., 6; *Oil Co. v. Hunt,* 187 N. C., 157; *Hanes v. Utilities Co.,* 188 N. C., 465.

In *Hancock v. Southgate,* 186 N. C., p. 282, we said: "Where there is *any* evidence to support plaintiff's claim, it is the duty of a judge to submit it to the jury, and the weight of such evidence is for the jury to determine."

"The credibility of witnesses, the weight and probative value of evidence are to be determined by the jury, and not by the judge. However, many decisions of this Court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding." *B. & O. R. R. Co. v. Groeger,* U. S. Supreme Court (filed 5 January, 1925).

From a critical examination of the evidence, we are of the opinion that this cause should have been submitted to a jury.

As the case goes back for a jury trial, we think it unnecessary to discuss the evidence.

For reasons given, the judgment is

Reversed.

FLORENCE L. HINNANT v. TIDEWATER POWER COMPANY.

(Filed 31 January, 1925.)

1. Actions — Husband and Wife — Consortium — Death — Survival of Action—Statutes.

The death of W. T. H. was caused by the negligence of the defendant, and his personal representative brought suit and recovered damages for the intestate's wrongful death. Thereafter, F. L. H., wife of W. T. H., brought her individual action against the defendant to recover damages. The trial judge instructed the jury that damages might be awarded her as a fair compensation for her mental anguish and loss of consortium: *Held* to be error.

STACY, J., did not sit.

APPEAL by defendant from *Calvert, J.*, at April Term, 1924, of NEW HANOVER.

E. K. Bryan for plaintiff.
Rountree & Carr for defendant.

ADAMS, J. The defendant is a corporation operating an electric railroad between the city of Wilmington and Wrightsville Beach. On 25 August, 1920, the plaintiff's husband was one of its employees, serving in the capacity of motorman, and at 6:30, forenoon, in a collision of two of the defendant's cars on the trestle between Wrightsville Station and Wrightsville Beach, he suffered personal injuries which resulted in his death at 3 o'clock the next morning. Thereafter his personal representative brought suit against the defendant and recovered a judgment for damages, which has been paid. C. S., 160, 3465, 3466, 3467, 3468; 187 N. C., 288.

While that suit was pending, the plaintiff instituted the present action. She filed a complaint, minutely stating the defendant's alleged acts of negligence, the nature of her husband's injuries, the circumstances attending his death, and setting forth her individual grievance, as follows: "By reason of the negligence hereinbefore complained of, which resulted in the death of the plaintiff's husband, W. T. Hinnant, the plaintiff was caused to suffer great and serious nervous shock, seriously and permanently impairing and weakening her nervous system, causing her to suffer great pain and mental anguish over the loss of a devoted and true husband, and seeing him broken, mashed and bruised and suffering, and causing the plaintiff to have to devote her entire time in nursing, caring for, supporting, looking after, and administering to her three children, and causing her to have to maintain herself and family,

as the said W. T. Hinnant had no personal estate, and depriving the plaintiff of her husband's support and maintenance of herself and family, and of his society, love and affection, his counsel and advice, his tender ministration in sickness, and the many comforts and pleasures which the marital relationship brings to those who are congenial with each other, to the great damage and injury of the plaintiff," etc.

After the collision her husband was taken to the James Walker Hospital in Wilmington for treatment. She saw him there about midday, late in the afternoon and again at 9 o'clock in the evening. At the trial she described his condition, her sensation, and the circumstances under which she had been admitted to the hospital. Other witnesses also were examined.

Several exceptions were entered of record, but for the present purpose it is necessary to consider only one. On the question of damages the presiding judge instructed the jury as follows: "You will allow only such amount, if any, as you may find from the evidence, and by the greater weight of it, will be fair compensation for mental anguish and for loss of consortium—that is, the society and companionship of her husband, which she may have suffered from the time of the injury to the time of his death." The defendant excepted, not only to this instruction, but to the refusal of the court to tell the jury that the plaintiff was not entitled to damages for mental anguish or loss of consortium. The appeal presents the question whether these exceptions should be sustained.

In *Baker v. Bolton,* 1 Camp., 493, *Lord Ellenborough* said: "In a civil court, the death of a human being could not be complained of as an injury." Whatever the foundation on which this rule is made to rest—whether on the ground that a personal right of action dies with the person, or that the value of a human life may not become the subject of judicial computation, or that the relation of the parties is terminated by death—it is true, as stated in *Insurance Company v. Brame,* 95 U. S., 754, 24 Law Ed., 580: "The authorities are so numerous and so uniform to the proposition that, by the common law, no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well considered decision to the contrary is to be found." Hilliard on Torts, 87, sec. 10; *Hatch v. R. R.,* 183 N. C., 617; *Mitchell v. Talley,* 182 N. C., 683; *Hood v. Telegraph Co.,* 162 N. C., 70; *Broadnax v. Broadnax,* 160 N. C., 432; *Bolick v. R. R.,* 138 N. C., 370; *Killian v. R. R.,* 128 N. C., 261. In accordance with this principle, it has been held that a widow has no individual right of action for the wrongful death of her

husband, and that a father has none for the wrongful death of his son. *Howell v. Comrs.,* 121 N. C., 363; *Killian v. R. R., supra; Hope v. Peterson,* 172 N. C., 869. But the doctrine that no civil action could be maintained at common law for causing the death of a human being does not imply that the act which causes the death may not, under some circumstances, give a right of action. It may, but it must be a right not springing from the death itself, as, for example, a suit by an employer or by a father against a wrongdoer who deprives the former of his employee's services and the latter of his son's. "Now, the same act," said *Judge Cooley,* "which deprives a master of the services of his laborer, or a father of those of his child, may result in the death of the servant or child. In these cases the common law gave a remedy for the loss, but only for the time intermediate the injury and the death." 1 Cooley on Torts, 547. Of course, under Lord Campbell's Act, and statutes enacted in pursuance thereof, the common law has been modified. Our statute provides that when the death of a person is caused by the wrongful act, neglect, or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and the personal representative of such person, and the successors of such corporation, shall be liable to an action for damages. C. S., 160. It is by virtue of this provision that the administrator of the plaintiff's husband recovered damages for the intestate's wrongful death.

But this action is prosecuted by the plaintiff in her alleged individual right, and involves the clear-cut question whether, by reason of the injury inflicted upon her husband, she is entitled to damages for loss of consortium or mental anguish suffered by her during the period intermediate the injury and the death.

First, as to consortium. With respect to relative rights under the old English law, injuries that might be offered to a person, considered as a husband, were abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. In the first two instances the wrongful act destroyed the foundation of the marriage relation and included a direct and primary injury to the husband, for which he had a cause of action. 3 Bl., 139. So in part as to the wife under modern conditions. Whatever her former status may have been, the doctrine of marital equality now clothes her substantially with similar relative rights, from which it follows that for a direct and intentional invasion of the right of consortium, such as criminal conversation, alienation of affections, or the inhibited sale of narcotic drugs, an action now lies in favor of the husband or the wife.

Holleman v. Harward, 119 N. C., 150; *Brown v. Brown,* 124 N. C., 19; *Cottle v. Johnson,* 179 N. C., 426.

In reference to the third class of injuries, Blackstone says: "The third injury is that of beating a man's wife, or otherwise ill-using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages by action of trespass *vi et armis,* which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill-usage, *per quod consortium amisit;* in which he shall recover a satisfaction in damages."

This "separate remedy" for the wife's ill-usage, *per quod consortium amisit,* was the means by which the husband sought to recover damages for the loss of consortium arising from personal injury wrongfully inflicted on the wife. In its original application the term "consortium" was not confined to society, companionship, and conjugal affection. Service was a prominent, if not the predominant, factor; not so much the service which resulted in the performance of labor or the earning of wages as that which contributed aid and assistance in all the relations of domestic life. In *Marri v. Railroad,* 84 Conn., 9, in which there is a clear and comprehensive discussion of the question, it is said: "The law's conception of the claim which the husband had upon the wife, and of his right growing out of the marital relation which entered into the meaning of the word consortium to express that right as the subject of invasion by wrongdoing, was thus one which embraced the right to service as a distinct factor, and there was no attempt to disassociate the right to society, companionship and affection from it. All these rights were bound together in social and legal contemplation, and they were bound together in the law's expression of them. In some cases, as where the wrong was criminal conversation, the loss of conjugal society and affection might stand out and be emphasized as the preëminent and possibly sole basis of recovery. In others, as in actions growing out of personal injuries, the loss of service would present itself as the predominant factor. The law has, however, never been solicitous to distinguish between these different elements of damage, or to separate them, and there will be found few cases, indeed, and, we think, no one of the earlier ones, in which the husband's loss was regarded as one into which the element of service did not enter. The pleadings in the early cases, and the language of the opinions in them, clearly show that loss of services, as well as society and affection, were included in the legal meaning of

the loss of consortium. 1 Chitty on Pleading, 49; 2 *id.*, 306; *Guy v. Lusy,* 2 Rol. R., 51; *Russell v. Corne,* 2 Ld. Raym., 1031; *Guy v. Livesey,* 2 Cro. Jac., 501; *Hyde v. Scyffor,* 2 Cro. Jac., 538." And, further: "Blackstone's third class includes only cases in which personal injuries actionable in trespass are inflicted upon the wife. The situation presented in such cases, as bearing upon an injury to the relative rights of a husband, is very different from that which results from a wrong falling within one of the other two classes. The former are not only not destructive of the marital relation, but they have no tendency to even impair it. They are not calculated to change the feelings of the parties toward each other, to diminish their love and affection, to lessen the sweetness of their companionship, or to weaken the desire to do all that is incumbent upon the parties to a marital union. Their result is to impair physical capacity, and, in so far as the husband is concerned, to diminish the ability of the wife to render to and bestow upon him that aid and help, and those ministrations which, in health, she would be able to render and bestow. The disposition of mind remains unchanged, but the injuries received set limitations upon the ability to perform. The consequences to the husband are only those which flow from an impairment of physical capacity in the wife, and in no manner from a change of the mental and moral attitude, which means a destruction of the marital relation in all respects save form. Since Blackstone's day, there has been an extension of the common-law right of a husband to recover for loss of consortium to cases in which the personal injury sustained by the wife was the result of negligence, so that it is generally held that it makes no difference whether the injury is intentionally or negligently inflicted. 1 Cooley on Torts (3 ed.), 469, and cases cited in note."

In the opinion just cited, the conclusion is that the cases in which recovery by the husband for loss of consortium, resulting from personal injury to the wife has been approved, disclose that the loss of service and of the capacity for service, resulting from diminished or destroyed ability to serve in useful ways, has been the real basis of recovery, and that the contention that a husband could recover merely because conjugal affection, society, or companionship had been rendered less agreeable or satisfactory to him by reason of injury to his wife, should not be sustained.

At common law, the husband had a right to the labor and service of the wife, and in a suit for damages which were personal to him for an injury to his wife he was permitted to recover for the loss of her labor and services, as well as the expenses of her care and cure. *Kelly v. Railroad,* 168 Mass., 308; *Feneff v. R. R. Co.,* 203 Mass., 278. It was no

doubt upon this theory that in *Kimberley v. Howland,* 143 N. C., 399, this Court sustained the husband's recovery of damages for injury to his wife. In that case there was evidence as to the loss of the services of the wife; also that her injury was of such a character as to deprive the husband of her services, society, aid, and comfort. We do not understand the decision to be authority for the position that the husband had the legal right, without regard to the loss of his wife's services, to recover remote and consequential damages arising from her personal injury.

However, since this decision was rendered (1906), statutes have been enacted which materially modify the wife's legal status. She is now authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried. Pub. Laws 1911, ch. 109; C. S., 2507. Likewise her earnings derived from any contract for her personal service, and any damages for personal injury or other tort sustained by her, may be recovered in her individual suit; and such earnings or recovery shall be her sole and separate property. Pub. Laws 1913, ch. 13; C. S., 2513. By virtue of these statutes, the husband is deprived of such rights as he may have had at common law in the special benefits thus conferred upon the wife. *Shore v. Holt,* 185 N. C., 312; *Dorsett v. Dorsett,* 183 N. C., 354; *Croom v. Lumber Co.,* 182 N. C., 217; *Kirkpatrick v. Crutchfield,* 178 N. C., 348; *Patterson v. Franklin,* 168 N. C., 75; *Price v. Electric Co.,* 160 N. C., 450.

It may be observed in this connection that the facts disclosed in *Bailey v. Long,* 172 N. C., 661, are distinguishable from those in the case at bar. The foundation of liability in *Bailey's case* was the contractual relation existing between the plaintiff and the defendant; the action was not prosecuted by a stranger or a third party. Upon the second appeal (175 N. C., 687) the sole question was whether there was any evidence of negligence—whether the defendant had negligently failed "to attend and care for the plaintiff's wife in a proper and skillful manner," as he had contracted to do. This case is not decisive of the question now presented.

Whatever the rights of the husband may have been, the wife could not maintain an action at common law for the loss of consortium; and the prevailing opinion is that for indirect, remote, or consequential loss she cannot maintain such action since her emancipation from the former disabilities of married women. There is a lucid discussion of the subject in *Feneff v. R. R. Co., supra,* from which we quote: "The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue, this is now settled in most courts

by a great weight of authority. *Nolin v. Pearson,* 191 Mass., 283, and cases cited. It is now generally held, in accordance with the decision in *Nolin v. Pearson,* that, for a direct and intentional invasion of a wife's right of consortium by another woman, through the alienation of the husband's affections and criminal conversation with him, an action may be maintained, as a similar action may be maintained by a husband for a similar wrong inflicted through adultery with his wife. Formerly a wife could not maintain such an action, because her suit could only be brought by her husband, with whom she must join. The husband's own misconduct would ordinarily be a sufficient reason to prevent his bringing such an action, if, indeed, it would not bar him, in most cases, from maintaining an action against a joint wrongdoer. The change of the statutes in this Commonwealth, and similar changes in most other jurisdictions, have given wives the same right as husbands to sue an offender for a wrong of this kind.

"The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury. The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. See cases cited in *Kelly v. New York, New Haven & Hartford Railroad, ubi supra.* There was not an allowance to the wife for her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful.

"Where there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others, whereby they will be

detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. It may be conceivable that one may have a contractual right to the labor or services of another, continuing after the time of his injury, such that, if his ability is impaired, the contractor will be directly damaged. If there may be such a case, it is unnecessary to consider whether the contractor with such a right should have his action for damages, and receive his proper share of the amount allowable for the impairment of the other's earning powers, and the damages of the other be diminished accordingly. It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action."

Substantially the same principle is upheld in the following cases: *Bolger v. Railway,* 205 Mass., 420; *Whitcomb v. Railroad,* 215 Mass., 440; *Gearing v. Berkson,* 223 Mass., 257; *Blair v. Seitner Dry Goods Co.,* 184 Mich., 304; *Brown v. Kistleman,* 177 Ind., 692; *Smith v. Building Co.,* 93 Ohio St., 101; *Marri v. Railroad, supra; Emerson v. Taylor* (Md.), 104 At., 538; *Tobiassen v. Polley* (N. J.), 114 At., 153; *Bernhardt v. Perry* (Mo.), 13 A. L. R., 1320; *Kosciolek v. Power Co.* (Or.), 160 Pac., 132. See, also, 13 R. C. L., 1445, sec. 495; note to *Hipp v. Dupont,* 18 A. L. R., 882; note to *Smith v. Building Co., supra,* 63 L. R. A. (1916-E), 103; *Neiberg v. Cohen* (Vt.), 55 L. R. A. (N. S.), 483.

In 30 C. J., 973, sec. 693 (3), it is suggested that the only case contravening this principle is *Hipp v. Dupont,* 182 N. C., 9. It becomes necessary, therefore, to determine the scope of this decision.

The record shows that W. B. Hipp, the plaintiff's husband, had brought suit in Virginia to recover damages for personal injuries alleged to have been caused by the defendants' negligence, and that judgment had been rendered against him. Afterwards the plaintiff instituted her action against the defendants in this State, not for injuries to her husband, but to herself, which she alleged to be (1) expenses paid by her, made necessary by her husband's injuries; (2) services performed in nursing and caring for him; (3) loss of support and maintenance; (5) loss of consortium; (6) mental anguish. A formal demurrer was filed, on the ground that the complaint did not state a cause of action. The demurrer was overruled, two of the justices evidently dissenting in part, because they concurred only in the result.

It is clear, in our opinion, that the complaint stated a cause of action, and that the demurrer was properly overruled; for, as is said in the opinion, the plaintiff had a cause of action for injuries which were personal to herself and not the remote consequences of the defendants' negligence. But the authorities cited in the opinion do not uphold the contention that the loss of consortium, under the facts disclosed in *Hipp's case,* or in the case at bar, constitutes a cause of action on behalf of the wife. *Holleman v. Harward, Flandermeyer v. Cooper,* and *Jaynes v. Jaynes,* therein cited, are based on the principle of a direct and intentional invasion of the marital relation, and in practically all jurisdictions actions of this character are recognized, and the excerpt from *Bernhardt v. Perry* occurs in a dissenting opinion and not in the opinion of the Court.

After diligent research, we have failed to find a single decision (apart from the intimation in *Hipp v. Dupont, supra*) which approves the wife's right to recover damages for the loss of consortium, under the circumstances appearing in the instant case; and to sanction such right of recovery would be tantamount to the recognition of a doctrine utterly at variance with the most enlightened judicial opinion prevailing in other jurisdictions.

Upon the facts appearing, if the plaintiff has no cause of action for loss of consortium, she has none for mental anguish. Between her and the defendant there existed no mutual relation, contractual or other, and upon her the defendant inflicted no physical injury. The question of liability for fright, followed or unaccompanied by physical injury, does not arise. *Kimberly v. Howland, supra.* The question is whether the plaintiff may recover damages for the mental anguish she experienced from the sight and knowledge of her husband's suffering when she has no other cause of action. It may be admitted that mental anguish, suffered in connection with a wrong which, apart from such mental pain, constitutes a cause of action, may be a proper element of compensatory damages. *Britt v. R. R.,* 148 N. C., 37; *Watkins v. Mfg. Co.,* 131 N. C., 536. But the general rule is that mental suffering, unrelated to any other cause of action, is not alone a sufficient basis for the recovery of substantial damages. To this rule there are exceptions, of course, as, for example, actions for breach of promise of marriage (*Allen v. Baker,* 86 N. C., 92), or actions growing out of the failure properly to transmit and deliver telegraphic messages not of a pecuniary nature (*Young v. Tel. Co.,* 107 N. C., 370, and other cases), and similar instances in which mental suffering is recognized as the ordinary and proximate consequence of the wrong complained of. See 17 C. J., 828, sec. 151 *et seq.,* and cases cited.

But in these cases the relation existing between the offender and the complaining party was proximate, not remote. This distinction is crucial. "In the law, mental anguish is restricted, as a rule, to such mental pain or suffering as arises from an injury or wrong to the person himself, as distinguished from that form of mental suffering which is the accompaniment of sympathy or sorrow for another's suffering, or which arises from a contemplation of wrongs committed on the person of another." 8 R. C. L., 515, sec. 73, and cases cited.

In view of the decision in *Hipp v. Dupont, supra,* the instruction complained of was not devoid of apparent sanction; but, after careful examination of the authorities, we are satisfied that the plaintiff is not entitled to damages for mental anguish or loss of consortium, upon the facts developed in the record, and that the defendant's prayer to this effect should have been given. Any intimation to the contrary in *Hipp v. Dupont* is disapproved.

In declining the defendant's prayer, and in giving the instruction excepted to there was

Error.

STACY, J., did not sit.

J. B. DAVIS v. M. R. LONG.

(Filed 31 January, 1925.)

1. Negligence—Automobiles — Statutes — Speeding Regulations—Crossings—Evidence—Nonsuit.

In an action to recover damages of the defendant, caused by a collision of two automobiles at an intersecting street of a town, by the defendant's negligence: *Held,* a motion as of nonsuit was properly denied, upon evidence tending to show that the defendant was traveling at the time at a speed excessive of that allowed by C. S., 2617, while plaintiff was using the care required of him under the circumstances. C. S., 567.

2. Witness—Character—Cross-Examination.

Upon cross-examination, a witness for a party as to character, in an action to recover damages in a negligence case, cannot be directly questioned as to unrelated acts of the defendant to that complained of, though upon his own volition he may answer as to general character, and then qualify his former evidence on the subject.

3. Courts — Improper Remarks — Statutes—Appeal and Error—Negligence—Evidence—Automobiles.

In an action to recover damages for a negligent injury alleged to have been caused by a collision between the automobile driven by the plaintiff and that driven by the defendant, remarks by the trial judge in his instruction to the jury as to the danger of automobiles, apply equally to

the plaintiff and defendant, and may not be held for prejudicial error to the defendant, against whom a verdict has been rendered, as an expression of opinion upon the evidence prohibited by our statute. C. S., 564.

4. Negligence—Statutes—Automobiles — Speed Regulations—Negligence per se — Proximate Cause — Contributory Negligence — Burden of Proof.

In an action to recover damages for the negligence of the defendant in causing a collision with plaintiff's automobile at a street intersection, and the only question arising from the evidence is whether the defendant was running at a speed prohibited by C. S., 2617, the violation of the statute is negligence *per se*, leaving only the question of whether this negligence was, under the circumstances, the proximate cause of the injury complained of, the burden of the issue as to plaintiff's contributory negligence being upon the defendant.

5. Instructions—Evidence—Issues—Negligence—Automobiles—Contributory Negligence.

Where the charge, construed as a whole upon its related parts, is correct, it will not be held for error that it was incomplete in its parts, taken disjointedly or unconnectedly; and where the facts to be found are simple and readily understood by jurors of the average intelligence, in relation to correct instructions of the law given, it will not be held for error that the court failed to instruct the jury more particularly as to certain phases of the evidence, especially when no special requests thereto have been aptly tendered by the party complaining.

STACY and CONNOR, JJ., dissenting.

CIVIL ACTION, tried before *Brown, J.*, and a jury, at Special April Term, 1924, of PERSON.

The plaintiff brought this action against the defendant to recover damages he sustained in an automobile collision.

The plaintiff contends that on Sunday evening, 4 March, 1923, about 5:30 o'clock, he was returning home in a Ford automobile, with his two little boys, having taken his wife to her sister's; that he was driving his car on the right-hand side of Main Street, in Roxboro, going south; that just before he got to New Street, the turning place to go to his home, a fellow ran up behind him and blew his horn, and did so again; that he got to the place to make the turn at New Street, and dropped his hand out and looked in front, and defendant's car was approaching, about 100 yards away; that he threw his left hand out on the side he was turning, to make the turn, and viewed the street he had to make the turn in, and threw his eyes around to look at the man behind, and when he turned around again plaintiff's car was in 6 or 8 feet from him. He testified: "If that car had been shot out of a rifle it would not have looked like it was coming any faster into my car." That he was running very slow, and his left-hand front wheel was in a foot or a foot and a half of the curbing or gutter when defendant's car hit him. His

car was about 15 yards from New Street when he saw defendant up the street. Defendant's car was going at least 45 miles an hour.

M. R. Long, the defendant, contended that he and his wife and two children, Mr. and Mrs. Boatwright and child, and Mr. Watts Norton, were out riding for pleasure. That he was coming into Roxboro and going north and saw the plaintiff in his auto coming at a very reasonable rate in the opposite direction, on the right-hand side of the street. That he had a plain and unobstructed view of this little alley (New Street). He saw no one coming out and had no reason to presume that this car of plaintiff's would turn. He thought it was going to continue in the same direction in which it was going. He testified "When I got in about 30 feet of the car, it suddenly swerved across in front of me and I had very little time to do anything." He jammed on the brakes as quickly as he could and did everything to avoid the collision. He did not see plaintiff give any signal, he could not say how fast he was going, somewhere between 15 or 20 miles an hour. Plaintiff was looking behind and did not know where he was going. Plaintiff did not come up and make a turn as you are supposed to do at a street intersection. Defendant was driving a Packard car and with the passengers weighed about 6,000 pounds.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and found in favor of plaintiff. Judgment was rendered in favor of plaintiff. Defendant made exceptions, assigned numerous errors and appealed to the Supreme Court.

C. A. Hall, Pou & Pou, and J. W. Bailey for plaintiff.

Luther M. Carlton, Wm. P. Bynum, F. P. Hobgood, Jr., and Sidney S. Alderman for defendant.

CLARKSON, J. Defendant made a motion for judgment as in case of nonsuit at the close of plaintiff's evidence and at the close of all the evidence. C. S., 567. The court below refused these motions and in this we think there was no error.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is 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., 6; *Oil Co. v. Hunt,* 187 N. C., 157; *Hanes v. Utilities Co.,* 188 N. C., 465.

In the progress of the trial the court below permitted a witness, Louis Daniel, to testify concerning the reputation of defendant Long, that his character was good, but he had the reputation of being a fast driver. The court below having excluded the question as to defendant's reputation for fast driving, defendant duly excepted and assigned this as error. We do not think this assignment of error can be sustained.

In *Edwards v. Price,* 162 N. C., p. 244, *Clark, C. J.,* gives the rule as follows: "The party himself, when he goes upon the witness stand, can be asked questions as to particular acts, impeaching his character, but as to other witnesses it is only competent to ask the witness if he 'knows the general character of the party.' If he answers 'No,' he must be stood aside. If he answers 'Yes,' then the witness can, of his own accord, qualify his testimony as to what extent the character of the party attacked is good or bad. The other side, on cross-examination, can ask as to the general character of the party for particular vices or virtues. But it is not permissible either to show distinct acts of a collateral nature or a general reputation for having committed such specified acts. McKelway Ev., secs. 123, 125; 1 Gr. Ev., secs. 461-b."

A witness, Babe Long, testified for plaintiff: "I live on farm in this county. Know the defendant, Matt Long, and Mr. Davis. Mr. Long's character and reputation is good."

"Q. What is his reputation for driving?"

Objection by defendant. In sustaining defendant's objection the court again stated that it was not competent to ask the witness about defendant's reputation concerning a particular subject, but that witness could say, his character was good or bad, or could qualify it. Witness then said, "He is a fast driver." And to this answer there was no objection and no motion made to strike it out.

"I have known Mr. Davis all of his life and his character is good."

With no objection by defendant to Babe Long's testimony or to practically the same evidence given by Louis Daniel, we can see no prejudicial error if the testimony of Daniel had been error.

Exceptions and assignments of error were made to the following remarks of the court below when charging the jury: "It was said to you by one of the counsel, an automobile is a recent—comparatively recent invention, and it seems as if it had taken possession of the whole country. I doubt very much whether it has been a good invention or not. My personal opinion is that the country would be better off if it had never existed, but that hasn't anything to do with this case. . . . In fact there are a great many who think that an automobile is more dangerous than a railroad engine, because a railroad engine goes on a track and people can see the track and they know where they are when they are on a railroad track, but an automobile comes along with a very little noise, with great rapidity, and it may kill a man or seriously injure him almost before he knows it."

The remarks of the court below in the charge was a matter of common knowledge and a general statement of the experience of men in general. The remarks could not be prejudicial. The reference was to automobiles in general and applied to both parties, who owned them. We do not

think the remarks come within the condemnation of C. S., 564, that no judge "shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." As said by *Nash, C. J.*, in *Nash v. Morton,* 48 N. C., p. 6: "It is extremely difficult, very often, to say where duty stops and wrong begins." We do not construe the remarks made as wrong or reversible error.

The other exceptions and assignments of error are as follows: "Because the court below charged the jury: 'Now, it was the defendant's duty, Mr. Long's duty, when he was approaching this intersecting street to slow down his machine to ten miles an hour.' 'Now, it was the defendant's duty when he approached the limits of the town and approached this intersecting New Street to keep a close lookout, to slow down his car and not run faster than ten miles an hour, and if he failed to do that, then he is guilty of negligence.' Because his Honor charged the jury: 'And you will answer the second issue "No."' Because his Honor in his charge failed to define negligence and contributory negligence."

These assignments of error bring us down to the main controversy in the case. Taken alone they may be subject to criticism, but the charge must be considered and construed as a whole and not disjointedly. *Mangum v. R. R.,* 188 N. C., p. 701.

The evidence succinctly, on the part of plaintiff, was that he was going south in a Ford auto on Main Street; that he heard a horn blow behind him and looked back and then looked in front and saw defendant 100 yards away. He put his hand out on the left side of the car the way he was turning and started into New Street and was struck by defendant, whose car was coming like a "shot out of a rifle." On the other hand, the defendant's evidence was that defendant had no reason to presume that plaintiff would turn into "this little alley" (New Street), but would continue in the direction he was going. He saw no hand thrown out to give anybody warning, and when he was in 30 feet of defendant's car the plaintiff suddenly swerved across in front of him and he did his utmost to avoid the collision and put on brakes. Plaintiff was looking behind him and did not know where he was going, and did not make the usual intersection turn. Defendant was driving a Packard car and with passengers weighed about 6,000 pounds. Defendant admitted he was going about 15 or 20 miles an hour. These statements show the conflict between the parties. The truth of the matter was for the jury and not this Court. They have found the usual three issues for plaintiff.

The latter part of C. S., 2616, is as follows: "Upon approaching an intersecting highway, a bridge, dam, sharp curve, or deep descent, and

also in traversing such intersecting highway, bridge, dam, curve, or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed ten miles an hour, having regard to the traffic then on such highway and the safety of the public."

The latter part of C. S., 2617, is as follows: "Any person so operating a motor vehicle shall, at the intersection of a public highway, keep to the right of the intersection of the center of such highway when turning to the right and pass to the right of such intersection when turning to the left, and shall signal with the outstretched hand the direction in which turn is to be made."

The testimony of plaintiff, taken to be true, was: When he came to the intersection of Main and New streets to go into New Street, he made the turn at the place required by the statute and signalled with his outstretched hand. Defendant was 100 yards away. Plaintiff, from his testimony, was complying with the law of the road. Defendant, from his testimony, was not within the speed limit required at intersections. He did not have his auto under control and the speed exceeded 10 miles an hour. The violation of the statute was negligence *per se.*

In *Newton v. Texas Co.,* 180 N. C., p. 565, *Walker, J.,* says: "As the violation of a statute, or an ordinance, is negligence *per se,* or rather, to speak more accurately, it is itself a distinct wrong in law, and all that is needed to make it an actionable wrong is the essential element of proximate cause, for 'wrong and damage' constitute a good cause of action if there be a causal connection between them. That the violation of a statute, or ordinance of a city or town, is negligence *per se,* or a distinct wrong in law, is the rule established by the more recent cases. *Leathers v. Tobacco Co.,* 144 N. C., 330; *Starnes v. Mfg. Co.,* 147 N. C., 556; *Ledbetter v. English,* 166 N. C., 130; *McNeill v. R. R.,* 167 N. C., 390; *Ridge v. High Point,* 176 N. C., 424. We so held in *Stone v. Texas Co.,* at this term." *Stultz v. Thomas,* 182 N. C., 473; *Graham v. Charlotte,* 186 N. C., 666.

A statutory duty was imposed on defendant. He failed to do what the law required of him. This was negligence *per se,* and it was a question for the jury to say whether or not such negligence was the proximate cause of the injury to plaintiff.

On the second issue as to contributory negligence of plaintiff, the burden of proof rests with defendant. *Hall v. Chair Co.,* 186 N. C., 469; *Moore v. Iron Works,* 183 N. C., 438; *Vann v. R. R.,* 182 N. C., 567. From the defendant's testimony, taken to be true, without any warning plaintiff ran his automobile in front of defendant's automobile when 30 feet from him. If this version be true, the burden of proof being on defendant, the jury would have been warranted in finding the plaintiff guilty of contributory negligence, and, if so, he could not

recover. We think this aspect was fully presented to the jury in the charge of the court.

With the facts as stated and the law as herein set forth, the learned Judge who tried this case—an honored member of this Court for years—charged the jury as follows:

"Now, it was the defendant's duty, Mr. Long's duty, when he was approaching this intersecting street to slow down his machine to 10 miles an hour. It was his duty to keep a lookout ahead of him for any automobile that might come out of that intersecting street. That is the reason that law was made. Now, what is an intersecting street? It is not necessarily one that crosses another street. It isn't a cross street necessarily. It seems from the evidence in this case that New Street enters into South Main Street, and therefore it is an intersecting street as decided by the Supreme Court in the case of *Manly v. Abernathy,* 167 N. C., p. 220, where the Supreme Court quotes the statute and says: 'That the public laws providing among other things, that a person operating a motor vehicle, when approaching an intersecting highway or traveling it, shall have the car under control and operate it at a speed not exceeding ten miles an hour, having regard to the traffic then on the highway and the safety of the public,' and this decision goes on to say that an intersecting street is one which enters into another street, but not necessarily crosses it. The decision says: 'It is held that the 'intersecting streets or highways' includes all space made by the junction of frequented streets of the town, though one of the streets enters the other without crossing or going beyond it.' Then my old friend and colleague, *Justice Walker,* who was on the Supreme Court Bench with me for many years, goes on to say in this case: 'Those who handle these machines, which are highly dangerous if driven rapidly, especially along a crowded thoroughfare and more especially when turning at the angle of two intersecting streets or roads, should strictly obey the law and exercise that degree of care generally which is commensurate with the great hazard produced by a failure to do so. They should hold their cars well in hand and give timely signals at points where people should reasonably be expected to be and where they have the right to be.'

"Now, it was the defendant's duty when he approached the limits of the town and approached this intersecting New Street to keep a close lookout, to slow down his car and not run faster than ten miles an hour, and if he failed to do that, then he is guilty of negligence but whether he is liable depends on whether that negligence caused the injury.

"Negligence in order to be actionable must be the proximate cause of an injury. Now, proximate cause means the nearest cause. It means, as the law writers say, the *causa causans* without which the injury would not have occurred."

The learned judge then set forth plaintiff's contentions based on the facts herein stated, and said: "Now, if you take that view of the evidence, you will find for plaintiff. The burden of proof, of course, is on the plaintiff to satisfy you by a preponderance of the evidence. He isn't obliged to satisfy you beyond a reasonable doubt, because that rule of law does not apply in civil suits generally, but he must satisfy you by a preponderance of the evidence that those facts are true, and if you are so satisfied, you will answer that issue 'Yes,' and you will answer the second issue 'No.'"

The court then gave defendant's version, and charged the jury on that aspect: "The defendant says that he isn't guilty of any negligence. He says that when he approached the city limits and approached this intersecting New Street, that he had his car well in hand and that he was driving within the speed regulation. He had his wife in there and his little daughter, and two gentlemen, and the two men testified, I believe, that the rate of speed he was driving was not fast. The law says when he approached this intersecting street he must not drive over ten miles an hour and he must have his car well in hand. The defendant says that the cause of this injury was negligence of the plaintiff. The defendant says that plaintiff was looking behind, instead of in front, and that the plaintiff turned his car negligently to the left, right in front of the defendant's automobile, and that he could not prevent the injury. Now, if you find those facts to be true, then you will answer that second issue 'Yes,' that the plaintiff by his own negligence contributed to his injury."

To the charge on the third issue as to damages, there was no exception.

In *Salmon v. Wilson,* 227 Ill. App., 286, in many respects similar to the case at bar, the court said: "It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection. Under the state of facts in this case plaintiff might reasonably have presumed that defendant would not exceed the speed limits fixed by statute, and that he would be able to cross the intersection before defendant's car reached it." Berry Automobiles, 4 ed. (1924), p. 841.

We think the rule laid down in *S. v. Beard,* 124 N. C., p. 813, applicable here: "It is true that the object of the charge is to state the law of the case to the jury, and to aid them in applying the facts to the law; but the manner in which this is done must be left, to a very great extent, to the good sense and sound judgment of the judge who tries the case."

In *Simmons v. Davenport,* 140 N. C., p. 410, *Walker, J.,* said: "In the absence of any such request, we cannot say that it was reversible error for the court to have charged in the general terms employed by it, especially in a case like this one, which involves so little complication that a jury could not well have misunderstood the legal aspect of the matter. If a party desires fuller or more specific instructions, he must ask for them and not wait until the verdict has gone against him and then, for the first time, complain of the charge. *Kendrick v. Dellinger,* 117 N. C., 491; *McKinnon v. Morrison,* 104 N. C., 354; *S. v. Debnam,* 98 N. C., 712; Clark's Code (3 ed.), pp. 535 and 536." *S. v. O'Neal,* 187 N. C., p. 24.

The case is not complicated as to the law or facts. The jurors are presumed to be men of "good moral character and sufficient intelligence." They could easily understand the law as applied to the facts. The jury has found all the issues in favor of plaintiff, and we find

No error.

STACY and CONNOR, JJ., dissent.

MAUD CRAIG v. SUNCREST LUMBER COMPANY ET AL.

(Filed 31 January, 1925.)

Negligence—Wrongful Death—Survival of Actions—Parties—Statutes—Husband and Wife—Actions.

While the common law not permitting the recovery of damages for an injury inflicted, resulting in death, has now been changed by statute, allowing the cause of action to survive (C. S., 160), the statute requires that the action be brought by the personal representative of the deceased; and while a cause of action may, under certain circumstances, be open to the widow, as where she has independently suffered loss during the period between the injury to and the death of her husband, it cannot be upheld where the injury inflicted and the death are instantaneous. As to her recovery for loss of her husband's society, support and consortium, see *Hinnant v. Power Co., ante,* 120.

APPEAL by plaintiff from *Ray, J.,* at September Term, 1924, of HAYWOOD.

Morgan & Ward and W. J. Hannah for plaintiff.
Alley & Alley for defendants.

ADAMS, J. The plaintiff, who is the widow of George Craig, alleges that her husband was an employee of the defendant company, perform-

ing the duties of an engineer on its logging train, and that on 11 April, 1922, he was instantly killed by the negligence of the defendants. Thereafter she qualified as his personal representative and brought suit against the defendants in which she recovered judgment for $12,000. 185 N. C., 560. The present action is prosecuted in her individual capacity. She alleges that by reason of her husband's death she has suffered, now suffers, and will continue to suffer, grief and pain both of body and of mind, as well as the loss of the society, companionship, support, and consortium of her husband.

The defendants demurred to the complaint on the ground that it does not state a cause of action in that in appears upon its face that the deceased was killed instantaneously, and that the action cannot be maintained by the plaintiff in her individual right. The demurrer was sustained and the plaintiff appealed.

At common law a civil action was not permissible for an injury resulting in death. *Baker v. Bolton,* 1 Camp., 493; *Ins. Co. v. Brame,* 95 U. S., 754, 24 Law Ed., 580; *Mitchell v. Talley,* 182 N. C., 683. Under Lord Campbell's Act (C. S., sec. 160) the suit must be brought by the personal representative, and cannot be prosecuted by the widow of the deceased. *Howell v. Comrs.,* 121 N. C., 363. Conditions may exist under which an action may be brought for loss suffered during the period between the injury and the death, but this principle does not apply when the death is instantaneous. *Killian v. R. R.,* 128 N. C., 261; *Croom v. Murphy,* 179 N. C., 393. Upon the allegations in the complaint the plaintiff is not entitled to recover for loss of her husband's society, support, and consortium. This question is discussed and determined in *Hinnant v. Power Co., ante,* 120.

The demurrer was properly sustained and the judgment is

Affirmed.

ADAM LOCKHART AND U. B. BLALOCK, RECEIVERS OF SOUTHERN SAVINGS BANK, AND JOHN W. GULLEDGE, TRUSTEE, v. GEORGE R. PARKER, EXECUTOR OF MRS. M. E. PARKER, AND W. L. MARSHALL, ADMINISTRATOR D. B. N., C. T. A., OF JOHN T. PATRICK, AND F. H. HIGHTOWER, RECEIVER OF DIXIE DEVELOPMENT COMPANY.

(Filed 31 January, 1925.)

Deeds and Conveyances — Personal Covenants — Warranties—Breach—Covenants Running with Land.

Where, in his deed to lands, the grantor, for himself and heirs, covenants with the grantee, a corporation, its successors and assigns, that he is seized in fee simple of the lands, with right to convey the fee simple free, clear of encumbrance, with warranty to defend the said title against

lawful claims: *Held*, the covenant and warranty do not run with the land, but are personal to the grantee, and action thereon may be brought by him upon the delivery of the deed when there is a mortgage then existing against the title; and when the grantee has, in like deed of covenant and warranty, conveyed the title to another, such other person may not maintain an action against the original covenantor or warrantor for damages arising from the breach of his covenant and warranty.

APPEAL by plaintiffs from judgment rendered by *Lane, J.*, at September Term, 1924, of ANSON.

The facts alleged in the complaint, pertinent to appellant's assignment of error, are as follows:

1. On 27 October, 1911, John T. Patrick, in consideration of the sum of $12,500, conveyed by deed a tract of land described therein to the Dixie Development Company, a corporation, in fee simple; in said deed John T. Patrick, for himself, his heirs, executors and administrators, covenanted to and with the Dixie Development Company, its successors and assigns, "that he was seized of the above-described tract of land in fee simple, and had the right to convey the same in fee simple; that the same was free and clear of any and all encumbrances, and that he would forever warrant and defend the title to the same against the lawful claims of all persons whomsoever."

2. On 3 February, 1913, the Dixie Development Company, for the purpose of securing payment of its note for $5,000, due on or before 1 January, 1914, payable to the order of the Southern Savings Bank, conveyed by deed of trust the said tract of land to John W. Gulledge, trustee; in said deed of trust the Dixie Development Company covenanted to and with John W. Gulledge, trustee, his successors and assigns that "it was the owner of and was seized of said premises in fee, and that it had the right to convey the same in fee simple; that the same was free and clear from any and all encumbrances, and that it would forever warrant and defend the title to the same against the lawful claims of all persons whomsoever."

3. At the date of the deed from John T. Patrick to the Dixie Development Company, to wit, 27 October, 1911, there was outstanding a mortgage on said land, executed by John T. Patrick to John R. Little and H. W. Little, dated 25 September, 1909, duly recorded in the office of the register of deeds of Anson County; none of the notes secured in said mortgage was due on said date.

4. On 8 February, 1915, an action was begun in the Superior Court of Anson County by L. L. Little, executor of John R. Little and H. W. Little against John T. Patrick and F. M. Hightower, receiver of the Dixie Development Company, for the foreclosure of the mortgage executed by John T. Patrick to John R. Little and H. W. Little, default having been made in the payment of the first note secured therein, the

said note having become due on 1 November, 1913; the said land was sold under a decree rendered in said action, and Mrs. M. E. Parker was the last and highest bidder for said land at said sale; said sale, having been confirmed by a decree of court, the commissioners appointed therein conveyed the said land to Mrs. M. E. Parker; the sum bid for said land, to wit, $7,400, was exhausted by the payment of the notes and interest therein, secured in said mortgage, and the costs of the action, leaving no surplus.

5. John T. Patrick, who executed the mortgage to John R. Little and H. W. Little, and who conveyed the said land to the Dixie Development Company, was living at the date of the sale and conveyance of the same, under the decree of foreclosure, to Mrs. M. E. Parker. He furnished the purchase money, the amount of her bid, and was the real purchaser of said land. Mrs. M. E. Parker, the bidder to whom the land was conveyed, furnished no part of said sum.

6. Plaintiffs, Adam Lockhart and U. B. Blalock, are the receivers of the Southern Savings Bank, and as such receivers are now the owners of the note for $5,000, executed by the Dixie Development Company, payable to the order of the Southern Savings Bank and secured in the deed of trust to John W. Gulledge, trustee. Interest has been paid on said note to 1 January, 1915, and said note, with interest from said date, is now due and unpaid.

7. John T. Patrick has died since the institution of this action, and W. L. Marshall has been duly appointed and is now his duly qualified administrator *d. b. n., c. t. a.* Mrs. M. E. Parker is now dead, and George R. Parker is her duly qualified executor. F. M. Hightower is the duly appointed and duly qualified receiver of the Dixie Development Company. The land described in said deeds and deed of trust was at the dates of the same respectively, and is now, worth more than $5,000.

8. The covenants and warranties in said deed from John T. Patrick to the Dixie Development Company, and in the deed of trust from Dixie Development Company to John W. Gulledge, trustee, were false, and the Southern Savings Bank has been damaged by and on account of said false covenants and warranties in the sum of $5,000, with interest from 1 January, 1915.

Plaintiffs demand judgment that they recover of F. M. Hightower, receiver of Dixie Development Company, and W. L. Marshall, administrator of John T. Patrick, the sum of $5,000, with interest from 1 January, 1915, for costs and for such other and further relief as to the court may seem proper.

Defendants George R. Parker, executor, and W. L. Marshall, administrator, demurred *ore tenus* to the complaint and moved that the action

be dismissed as to them, for that no cause of action is set out in the complaint against them or either of them. Demurrer was sustained and action dismissed as to them. Plaintiffs excepted and appealed to the Supreme Court. The action was continued as to defendant F. M. Hightower, receiver of Dixie Development Company, with leave to file answer.

Fred J. Coxe and H. P. Taylor for plaintiffs.

McLendon & Covington, and Robinson, Caudle & Pruette for defendants.

CONNOR, J. Plaintiffs seek to recover of F. M. Hightower, receiver of Dixie Development Company, damages, which they allege they have sustained as a result of (1) a breach of a covenant against encumbrances, and (2) a breach of a covenant of general warranty against the lawful claims of all persons whomsoever, both said covenants being included in a deed by which Dixie Development Company conveyed the land described therein to plaintiff John W. Gulledge, trustee, to secure a note now owned by his coplaintiffs, receivers of Southern Savings Bank. Defendant F. M. Hightower, receiver, has not answered the complaint of plaintiffs. The action was continued as to him with leave to file an answer.

Plaintiffs further seek to recover of W. L. Marshall, administrator of John T. Patrick, who conveyed the said land to their grantor, Dixie Development Company, damages (1) for a breach of covenant against encumbrances and (2) for a breach of general warranty against the lawful claims of all persons, both of said covenants being included in his deed to said Dixie Development Company. Defendant W. L. Marshall, administrator, demurred *ore tenus* to the allegation of the complaint upon which plaintiffs seek to recover judgment against him. These allegations are therefore to be taken as true. *Hayman v. Davis,* 182 N. C., 563. Plaintiffs, by their exception to the judgment sustaining the demurrer, present to this Court for review, as a matter of law, the question whether a cause of action in favor of plaintiffs and against defendants is set out in the complaint.

1. It is admitted that at the date of the execution of the deed from John T. Patrick to Dixie Development Company there was a mortgage outstanding on the land conveyed by said deed, executed by John T. Patrick to John R. Little and H. W. Little, and duly recorded. This mortgage was an encumbrance on the land, and its existence was a breach of the covenant in the deed against encumbrances. A cause of action arose at once for damages for the breach of this covenant, in favor of Dixie Development Company, covenantee, and against John T. Patrick, the covenantor. Did this covenant or the cause of action aris-

ing from its breach pass to plaintiffs by and under the deed from Dixie Development Company to John W. Gulledge, trustee?

Professor Mordecai, in his Law Lectures, Vol. II, 2 ed., ch. 24, page 851, says: "The various covenants usually inserted in deeds in modern times are six in number, to wit: (1) Covenant of seizin; (2) of right to convey; (3) against encumbrances (these do not run with the land); (4) warranty, which may be either general or special; (5) quiet enjoyment, and (6) further assurance (these do run with the land). 'Running with the land' means that the covenant passes to and may be sued upon by all persons to whom the land is subsequently conveyed. A covenant that does not run with the land is one that does not pass to a subsequent purchaser of the land, but, if broken, can be sued upon, only by the person with whom the covenant is made, or his personal representative, if he be dead." Again on page 859 he says: "Covenants (1), (2) and (3) are personal covenants and do not run with the land or pass to the grantee of the land, for, if not true, there is a breach of them, as soon as the deed is executed and they become choses in action, which are not technically assignable." The distinction here stated, so clearly and so accurately, between covenants which do and which do not "run with the land," and are, or are not assignable, is fully supported by the decisions of the courts and by approved text-writers. See opinion of *Justice Adams* in *Cover v. McAden,* 183 N. C., 642; Rawle on Covenant for Title, ch. 10, sec. 202. Rawle says, "A strong current of American authority has set in favor of the position that the covenants of seizin, for right to convey, and perhaps against encumbrances are what are called covenants *in præsenti*—if broken at all, their breach occurs at the moment of their creation. The covenant is, that a particular state of things exists *at that time,* and if this be not true, the delivery of the deed which contains such a covenant causes an instant breach; these covenants are then, it is held, turned into a mere right of action, which is not assignable at law, which can be taken advantage of only by the covenantee, or his personal representative, and cannot pass to an heir, a devisee, or a subsequent purchaser."

Professor Mordecai makes the following comment upon the distinction, which he says is well established between those covenants which do and those which do not run with the land. "As all choses in action founded on contract are assignable by the laws of North Carolina (Rev., sec. 400; C. S., 446), and as the only reason assigned for the rule that those covenants which are *in præsenti* and therefore broken, if at all, immediately upon the execution of the deed, cannot be sued on by the assignee, is that a chose in action is not assignable at the common law, I see no reason why under our law those covenants do not run with the land, as well as covenants of warranty and quiet enjoyment." The

source of this comment makes it worthy of consideration, but the rule is so well established by the weight of authority that we adhere to it. The author of the article on "Covenants" in Corpus Juris, after full and exhaustive examination of the decisions of the courts, in 15 C. J., 1247, says: "The covenant against encumbrances is generally regarded as a covenant *in præsenti,* broken, if at all, as soon as made, and hence does not run with the land." "The preponderance of authority establishes the proposition that covenants against incumbrances are merely personal and do not run with the land." 7 R. C. L., 1135.

There is no error in judgment sustaining the demurrer to the cause of action founded upon the covenant against incumbrances contained in the deed from John T. Patrick to the Dixie Development Company, grantor of plaintiff.

2. It is admitted that after the execution of the deed of trust by the Dixie Development Company to John W. Gulledge, trustee, the land conveyed therein was sold under a decree in an action to foreclose a mortgage executed by John T. Patrick, grantor of Dixie Development Company, outstanding at date of his deed, and that said sale having been confirmed, the land was conveyed by commissioners to Mrs. M. E. Parker, testatrix of defendant George R. Parker. There was a covenant in the deed from John T. Patrick to Dixie Development Company against the lawful claims of all persons to said land. This covenant ran with the land, and for a breach of it a subsequent grantee can maintain an action for damages against John T. Patrick or his personal representatives. *Wiggins v. Pender,* 132 N. C., 628. But neither the immediate grantee nor a subsequent grantee can recover on the covenant, unless there has been an eviction under a lawful claim.

"The foreclosure of a mortgage, followed by an eviction, is a breach of a covenant of warranty, and eviction under foreclosure of a mortgage existing on property at time it is conveyed with a covenant of general warranty gives a remote grantee a right of action on the covenant, notwithstanding there were other covenants in the deed which would have given the immediate grantee a right of action because of the encumbrance as soon as the deed was executed." 7 R. C. L., 1152; *Williams v. O'Donnell,* 225 Pa. St., 321; 26 L. R. A., N. S., 1094.

"A covenant of warranty is prospective in its nature, and is broken only by an eviction under a paramount title existing at the time of the conveyance, or what in contemplation of law is equivalent to an eviction." *Morgan v. Haley,* 107 Va., 331; 122 A. S. R., 846, and note.

"To constitute a breach of warranty there must be an ouster or a disturbance of the possession and a judgment against a grantee is not sufficient." *Ravenal v. Ingram,* 131 N. C., 549.

Plaintiffs do not allege that Mrs. M. E. Parker, to whom the land was conveyed under the decree of foreclosure, has evicted plaintiffs or

in any manner disturbed plaintiffs' possession or right to the possession of said land. It is not alleged that Mrs. Parker has made any demand upon or asserted any claim adverse to plaintiffs with respect to the title or possession of said land. It is alleged and admitted by the demurrer that Mrs. Parker bought the land as trustee of John T. Patrick, the original covenantor, and that said Patrick was the real purchaser of said land. Plaintiffs not having been evicted from said land, actually or constructively, cannot maintain an action for breach of covenant of general warranty.

There is no error in judgment sustaining the demurrer to the cause of action founded upon the covenant of general warranty contained in the deed from John T. Patrick to Dixie Development Company, grantor of plaintiffs.

3. Plaintiffs do not seek to recover judgment against George R. Parker, executor of Mrs. M. E. Parker, upon any allegation that she was personally liable to them. Recovery of judgment against him is dependent upon recovery of judgment against the personal representative of John T. Patrick, for breach of his covenant of warranty. Having failed to state a cause of action against W. L. Marshall, administrator of John T. Patrick, it must follow that no cause of action is set out in the complaint against defendant George R. Parker, executor of Mrs. M. E. Parker. There was no error in sustaining his demurrer.

The demurrer to the original complaint was sustained by Judge Stack. Leave was granted to plaintiffs to make John W. Gulledge, trustee, a party plaintiff. This was subsequently done, and the amended complaint thereafter filed. It is immaterial, in the view we take of the question presented by this appeal, whether plaintiffs were estopped by the judgment of Judge Stack or not. No cause of action is set up in the complaint in favor of plaintiffs and the defendants W. L. Marshall, administrator of John T. Patrick, or George R. Parker, executor of Mrs. M. E. Parker.

The judgment is

Affirmed.

MRS. AURA C. HOLTON v. TOWN OF MOCKSVILLE.

(Filed 31 January, 1925.)

1. Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Burden of Proof.

Upon the question as to whether assessments had been lawfully made by a town against the plaintiff's land abutting upon a street, improved, for the purpose of the improvement, the burden is upon the defendant town to show the affirmative of the issue.

2. Municipal Corporations—Cities and Towns—Streets—Improvements—Assessments—Evidence—Statutes—Records.

Where the plaintiff contends in her action that assessments had not been made, in pursuance to a statute, upon her land abutting on a street, improved, it is competent for the defendant town to show, as a part of its public records affecting the question, the typewritten resolution, regularly adopted at a meeting of its commissioners, authorizing the assessment, among the other necessary requirements of the statute.

3. Same—Maps.

Under the provisions of C. S., 2711, it is required that, in proceedings by a town to assess the owners of lots abutting upon streets improved, that an assessment roll be made, showing the names of the owners of the lots, amounts assessed against each, with a brief description of the lots, etc.: *Held*, competent to introduce a map made by the city engineer, duly approved by the city commissioners, as evidence that this statutory requirement had been complied with.

4. Evidence—Nonsuit—Municipal Corporations—Streets—Assessments—Statutes.

In a suit to restrain the collection of an assessment by the town on plaintiff's land abutting on a street, for the purpose of improvement thereon, plaintiff's motion, at the close of defendant's evidence, for judgment upon her exception, is in effect a motion for judgment as of nonsuit upon the evidence, under the provisions of our statute (C. S., 567), and will be denied when there is sufficient legal evidence to sustain the assessment.

5. Municipal Corporations—Cities and Towns—Streets—Improvements—Assessments—Constitutional Laws.

While a compliance with a statute requiring a petition from the owners of lots abutting a street to be improved by assessment of a part against the owners, is material and imperative, the Legislature has the power to provide by local statute that such assessments be validly made, without the necessity of such position; and a curative statute, validating previous assessments, made without compliance with a like provision, is not objectionable as inhibited by our Constitution, Art. VIII, sec. 4, requiring general laws for the improvement of cities, or under the provisions of our Constitution prohibiting the passage of retroactive laws, etc.

6. Same—Special Benefits.

The owner of lands along a street improved by a town receives special benefits to his lots by reason of the improvements, and for such benefits his property may be assessed equally with those of other owners thereon; and he may not complain that his property is subject to taxation for a bond issue for the general street improvements of the town, when the statute under which the special assessments are made provides that such assessments be used as a payment upon the bonds, thus giving him a benefit therein.

APPEAL by plaintiff from judgment rendered by *Webb, J.*, at May Term, 1924, of DAVIE.

Plaintiff, by exceptions filed, attacks the validity of assessments levied by defendant upon two lots of land fronting on Depot Street and situate within the corporate limits of the town of Mocksville. These assessments were levied for street and sidewalk improvements made by defendant pursuant to a resolution adopted by the board of commissioners of said town at a meeting held on 12 January, 1920. The issues submitted to the jury, with answers thereto, were as follows:

"1. What amount is the town of Mocksville entitled to recover of plaintiff, Mrs. Aura C. Holton, by reason of assessment on lot No. 12, as shown on the assessment roll introduced in this case? Answer: $511.50.

2. What amount is the town of Mocksville entitled to recover of plaintiff, Mrs. Aura C. Holton, by reason of assessment on lot No. 10, as shown on the assessment roll introduced in this case? Answer: $277.50."

Upon this verdict judgment was rendered declaring that the amounts were proper charges or assessments upon the two lots, and that defendant has liens on said lots respectively for the said sums as provided by law. Plaintiff's prayer for a restraining order was denied and defendant was authorized to collect said sums as provided in the resolution under which the improvements were made. From this judgment plaintiff appealed. Assignments of error appear in the opinion.

E. L. Gaither, Holton & Holton, Thomas N. Chaffin, and A. T. Grant, Jr., for plaintiff.

Jacob Stewart and Plummer Stewart for defendant.

CONNOR, J. Upon completion of the improvements authorized and directed to be made on Depot Street in the town of Mocksville on the ..... day of February, 1922, the total cost of said improvements was computed and ascertained by the board of commissioners of the town of Mocksville. Thereupon an assessment roll was made by the said board on which was entered the names of the persons assessed as owners of lots fronting on said street and the amounts assessed against such owners respectively. The location of these lots on said street, with their property lines and frontage in lineal feet, respectively, was shown on the map prepared by the city engineer, under whose supervision the improvements were made. The amounts assessed against the lots were determined by a calculation based upon the total cost of said improvements, less one-half, charged to the town of Mocksville, the remaining one-half being apportioned to the respective lots abutting on said improved street, in accordance with the frontage of each lot in lineal feet. The assessment in accordance with this calculation upon lot No. 10 was $277.50, and upon lot No. 12, $511.50. Plaintiff is designated on the map or assessment roll as the owner of these lots. This assessment

roll was filed in the office of the board of commissioners of the town and remained there subject to inspection by all persons interested. On 6 November, 1923, at a meeting of the board, a resolution was adopted directing that notice be published in the *Mocksville Enterprise,* a newspaper, as required by law, that a meeting of the board would be held on 18 January, 1924, when and where any objections to the said assessments would be heard. This notice was published. On 18 January, 1924, the meeting was held and plaintiff appeared by her attorney. Other persons interested in the assessments appeared, some in person and some by attorneys. No objections having been made to the assessments as they appeared on the assessment roll, the same was approved and confirmed by the board in a resolution adopted and recorded upon the minutes of the said meeting. Notice was thereafter published by the city tax collector informing all persons interested that the assessment roll for the improvements on Depot Street has been confirmed and that the amounts assessed were due and collectible as stated in said notice.

On 28 January, 1924, plaintiff, through her attorney, caused notice to be served on defendant that she was dissatisfied with the amount charged or assessed against her property on Depot Street; that she excepted to said assessment and appealed therefrom to the Superior Court of Davie County. Plaintiff thereafter filed exceptions setting forth specifically the grounds upon which she attacked the validity of the assessments.

Upon the issues submitted to the jury, to which no exception appears in the statement of the case on appeal, the burden was upon the defendant, who contended that they should be answered in the affirmative. His Honor properly held that defendant should first offer evidence sufficient to sustain its contention that assessments had been lawfully and properly made upon the lots owned by plaintiff and that the amounts assessed were correct.

Plaintiff objected to the introduction of a typewritten paper purporting to be a resolution adopted at a meeting of the board of commissioners held on 12 June, 1920, authorizing and directing that Depot Street from the eastern boundary of the Public Square to the depot of the Southern Railway Company in said town and the two sidewalks thereon be graded and paved in accordance with specifications set out in the resolution, and that the cost of such improvement be paid, one-half by the town and one-half by the owners of lots fronting or abutting on said street according to the extent of the respective frontage of the said lots by an equal rate per foot of such frontage. The competency of this evidence does not depend upon whether or not a petition had been filed by owners of property to be affected by the improvements. Whether

or not the cost of improvements made pursuant to a resolution passed without a petition as required by C. S., 2706 can be assessed upon lots affected by the improvement was not presented to the Court by this objection. The resolution may be competent evidence, although not sufficient of itself to support in law an assessment. There was evidence that the paper-writing offered was prepared by the town attorney in accordance with instructions of the board of commissioners and filed with the town records. It was subsequently entered upon the minutes of the town, and at the date of the trial was produced as a part of the public records of the town. The objection to the introduction of this paper-writing was properly overruled and the assignment of error based on plaintiff's exception to said ruling is not sustained.

Plaintiff objected to the paper-writing offered in evidence by defendant as the assessment roll required by the statute. It is provided in the statute (C. S., 2711) that the assessment roll shall show the names of the persons whose lots are assessed, the amounts assessed against each lot and a brief description of the lots or parcels of land assessed. The paper-writing offered by the defendant is a map, prepared by the city engineer, of the street running from the station of the Southern Railway Company to the Public Square, showing thereon the lots abutting on said street, on both sides; the property lines of each lot with the frontage in lineal feet and the name of the owner, together with the amount assessed. Each lot is assessed at the rate of $3.75 per lineal foot. This map contains all the information required by the statute and is a substantial compliance with its requirements. The objection was overruled. The assignment of error based upon the exception to this ruling is not sustained.

At the conclusion of the evidence offered by defendant, plaintiff moved for judgment upon her exceptions and for judgment permanently restraining defendant from collecting said assessments. This motion was in effect a motion for judgment as of nonsuit under C. S., 567. It presents to the Court the question whether upon all the evidence the plaintiff's lots had been lawfully assessed and whether or not the amounts levied against them were valid liens. The motion was denied. Plaintiff excepted and assigns as error the refusal of the court to grant the motion.

Plaintiff contends that the assessment was without authority of law because there was no petition signed by the owners of lots abutting on the street directed to be improved by the resolution passed on 12 June, 1920. No petition, as required by C. S., 2706, was offered in evidence by defendant. This is a fatal defect, and nothing else appearing, would invalidate assessments made under the proceedings, beginning with the resolution of 12 June, 1920, and ending with the resolution of 18 Janu-

ary, 1924. *Tarboro v. Forbes,* 185 N. C., 59. In the learned opinion filed in this case by *Justice Adams* for the Court, it is said: "While a slight informality of procedure or a failure to observe a provision which is merely directory will not generally affect the validity of an assessment, it is nevertheless true that any substantial and material departure from the essential requirements of the law under which the improvement is made, will render an assessment therefor invalid. The proceeding discloses a material defect in that the signers of the petition, although a majority in number of owners, do not represent a majority of all the lineal feet of frontage of the lands abutting upon the improved avenue as required by statute."

If a proceeding is invalid to support special assessments because the petition filed was defective, of course it follows that the proceeding is invalid for that purpose where no petition whatever is filed as required by statute.

Defendant offered in evidence chapter 86, Private Laws 1923, entitled "An act relating to the financing of street and sidewalk improvements in the town of Mocksville." This act provides that "the said board of commissioners (of the town of Mocksville) shall have power to levy special assessments as herein provided (*i. e.,* without petition as required by C. S., 2706) for or on account of street and sidewalk improvements now in progress or completed within two years prior to the ratification of this act. All proceedings heretofore taken by the board of commissioners of said town for the levying of special assessments are hereby legalized and validated." This act was ratified on 23 February, 1923. The improvements for the payment of which the assessments involved in this action were made, were completed in February, 1922. This act is sufficient in its terms to cure the defect in the proceeding and to legalize and validate the assessment. Plaintiff, however, attacks the constitutionality of the act, contending that by section 4 of Article VIII of the Constitution of North Carolina, the General Assembly was without power to enact it, and that the act is void because retroactive and retrospective.

Section 4 of Article VIII of the Constitution imposes upon the General Assembly the duty to provide by general laws for the improvement of cities, towns and incorporated villages. It does not, however, forbid altering or amending charters of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. We find nothing in section 4, Article VIII of the Constitution rendering this act unconstitutional, nor does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate. *Kornegay v. Goldsboro,* 180 N. C., 441.

Nor can the act be successfully attacked because it is retroactive or retrospective. The General Assembly having the power in the first instance to confer upon the authorities of a municipal corporation power to improve its streets and sidewalks and to assess the owners of abutting property with a part of the cost of such improvements without a petition, has the power to validate proceedings for the improvement of streets and sidewalks which were begun and which have been concluded without an initial petition. This power has been recognized and its exercise approved as within the constitutional authority of the General Assembly by this Court. *Belo v. Comrs.*, 76 N. C., 489; *Wharton v. Greensboro*, 149 N. C., 62; *Anderson v. Wilkins*, 142 N. C., 154; *Edwards v. Comrs.*, 183 N. C., 58; *Board of Education v. Board of Comrs., ibid.*, 300. The assignment of error based upon the exception to the refusal of the court to render judgment as of nonsuit is not sustained.

Plaintiff complains that the town of Mocksville was authorized by chapter 93 of the Private Laws of 1921 to issue bonds for the improvement of streets within the corporate limits of the said town and that bonds were issued pursuant to this act to defray the expenses incurred in improving Depot Street. It is expressly provided, however, in section 3 of said chapter that in case special assessment shall be levied on account of street or sidewalk improvements paid for in whole or in part by means of the proceeds of the said bonds, said special assessments shall be used to pay said bonds, thus reducing the amount of *ad valorem* taxes required to be levied for that purpose. Plaintiff, having received a special benefit accruing from the improvement of the street on which her lots abut, is required to pay the amount assessed for such special benefit. This requirement is made of all other persons who own lots abutting on said street which are specially benefited by said improvements. Plaintiff and these other lot owners will have the *ad valorem* tax which they are required to pay on account of the issue of the said bonds reduced so that she and they will bear no greater burden than that borne by other property owners in Mocksville, while, having received a benefit which other property owners do not receive, they are required to pay for same. There is no objection on the ground that the amounts assessed are not correct; the only objections are that the assessments were without authority of law. These objections are not sustained. We find

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1925

STATE v. JOE SWINDELL.

(Filed 18 February, 1925.)

Constitutional Law—Carnal Knowledge of Female Child—Punishment—Discretion of Court—Statutes.

Upon conviction of a male person for violating the provisions of C. S., 4209 (Vol. III), for carnally knowing a female child thirteen years of age, who had not previously had sexual intercourse with any person, making the offense a felony: *Held*, a sentence of hard labor at the State's Prison for thirty years is not a cruel or unusual punishment prohibited by our Constitution, Art. I, sec. 14, or an abuse of the sound discretion of the trial judge, given him in such cases by the statute, under the evidence of this case.

APPEAL by defendant from *Sinclair, J.*, at November Term, 1924, of PASQUOTANK.

The material facts are stated in the opinion.

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

T. J. Markham and Aydlett & Simpson for defendant.

CLARKSON, J. The defendant was indicted under C. S., 4209 (Vol. III), which is as follows:

"If any male person shall carnally know or abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court; and any

female person who shall carnally know any male child under the age of sixteen years shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court: *Provided,* that if the offenders shall be married or shall thereafter marry, such marriage shall be a bar to further prosecution."

The charge in the indictment is that the defendant, "with force and arms, at and in the county aforesaid, unlawfully, willfully and feloniously, did carnally know and abuse Margaret (naming her), a female child, over twelve and under sixteen years of age, she never before having had sexual intercourse with any person," etc.

The essentials of the crime in this case are: (1) carnally know or abuse a female child, (2) over twelve and under sixteen years of age, (3) the female child never before having had sexual intercourse with any person.

The first thirteen exceptions and assignments of error by defendant (first abandoned) was to the competency of evidence. We think they are without merit, and cannot be sustained. We would consider them *seriatim,* but we are unable to do so, intelligently, without setting forth the evidence, which is so shocking, indecent and revolting that we think it unnecessary for the just determination of this case.

The exception and assignment of error No. 14 is the only serious one we have to consider: "To the judgment of thirty years *in the State's Prison and hard labor.*"

Constitution of North Carolina, Art. I, sec. 14, is as follows: "Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

The statute under which defendant is indicted says: "He shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court."

This Court, in a unanimous opinion by *Clark, J.,* in *S. v. Rippy,* 127 N. C., p. 517, construes C. S., 4172 (Code, 1096), and chapter 295, Laws 1895 (as amended, is C. S., 4209, *supra,* under which defendant is indicted). The Court, in that case, said: "The only exception in the transcript is that Code, sec. 1096, provides that persons convicted of felonies for which 'no specific punishment is prescribed by statute' shall be imprisoned in the county jail or penitentiary not exceeding two years, and be fined, in the discretion of the court. But the penalty prescribed by chapter 295, Laws 1895, is specific—fully as much so as that laid down in Code, sec. 1096, and is different in kind. The former authorizes fine or imprisonment in the penitentiary, at the discretion of the court. The latter, a fine, in the discretion of the court, and imprisonment in jail or the penitentiary, not exceeding two years," etc. Under the construction given in the *Rippy case,* the discretion of the

court below is limited only to the constitutional prohibition against "cruel or unusual punishment."

It is set forth in the record that "The court stated the contentions of the State and the defendant, and charged the jury according to law. The jury returned a verdict of guilty, as charged in the bill of indictment. Upon the return of the verdict, the defendant's counsel asked the court to be merciful in his judgment, contending that while the jury had said the defendant was guilty, he himself insisted that he was not guilty, and that while he was in jail, on Thursday, 21 August, during the term of Superior Court, and upon the day set for his trial, when the sheriff had gone to the jail, by direction of the court, to bring the defendant to trial, one J. B. Farrior, grandfather of Margaret ....., had followed the sheriff into the jail, the said Farrior being unknown to the jailer, and that he went to the cell in which the defendant was confined, spoke to him, shook hands with him, then drew a pistol and shot him down in his cell, and that for several days his life was despaired of, and he was taken to a hospital; that the ball entered his back, injuring his spinal column, producing paralysis, and that the doctor who attended him testified at the trial that he could not tell whether he would finally recover or not; that the defendant was on crutches at the time of the trial, and defendant's counsel asked the court to take all these matters into consideration. The court replied that it was impossible to tell whether the defendant would finally recover or not, and that this was a matter which the court would have to leave to other authorities, to be decided by future developments. The court sentenced the defendant to the State's Prison at hard labor for a period of thirty years."

In *S. v. Driver*, 78 N. C., p. 429, it was said: "Thus it appears, both by precedent and by the reason of the thing, and by express constitutional provision, that there is a limit to the power of the judge to punish, even when it is expressly left to his discretion. What the precise limit is cannot be prescribed. The Constitution does not fix it, precedents do not fix it, and we cannot fix it, and it ought not to be fixed. It ought to be left to the judge who inflicts it, under the circumstances of each case, and it ought not to be abused, and has not been abused (grossly) in a century, and probably will not be in a century to come, and it ought not to be interfered with," except in case where the abuse is palpable.

There is no exception to the charge of the court. The jury believed the State's evidence, and by their verdict found defendant was guilty, "beyond a reasonable doubt." The facts are found, and on these facts the court below, under the statute, in its discretion, sentenced the defendant. The punishment is severe.

To punish a fellow human being is a fearful responsibility, but, for the well-being of society, for orderly government, for the peace, happiness and security of the commonwealth, this duty cannot be shirked, but must be met in a spirit of sober judgment. In the present case it was in the discretion of the trial court. Is it cruel or unusual, and did the court below abuse its discretion? We cannot so hold. The defendant, a divorced man, twenty-six years of age, his young wife obtaining the divorce, had abandoned his own flesh and blood, his son, and contributed nothing to his support. His own witnesses testified that he was a man of bad character. One of his witnesses testified that his character was "bad for women." He paid a young woman, after his marriage, but while not living with his wife, $100.00 for a child he was accused of being the father of. He said: "That he left New Bern about the time two girls were missing from there, but that he had nothing to do with that; that it was in a local paper about the defendant's riding out with another couple and another woman, and one of the parties held the baby while the defendant and the married woman went in the woods, but that the defendant was not guilty; that it was untrue as against him." He had the implement and weapon of the seducer and debaucher, the rubber with fangs. So bent on destroying his prey that he told Boetcher, after the machine was stuck and he went after another, "he wasn't going to be cheated out of his good time yet." He went back and did the foul deed, and then, after debauching the child, he bragged to Steger that he had gotten this "society stuff." He knew the depth of wrong and degradation. He told Barkley: "Alex, I know I have reached bottom tonight." His words were prophetic. He knew he had gone the limit. From the record, on the trial below, he deliberately committed perjury. The wages of punishment meted to him by the court below was severe, but we cannot, on the evidence, say the court abused its discretion. From the record evidence, Margaret, the young girl, was blameless—trapped and ensnared.

The defendant, a man twenty-six years of age, ensnares a thirteen-year-old girl—innocent and virtuous—and debauches her, under circumstances that would make him guilty at least of such turpitude as amounts in morals to rape. For legal rape the penalty is death.

The record shows that the grandfather of the child shot the defendant while in jail. It was in evidence that the physician could not tell whether the defendant would finally recover or not. The court below had all the facts before it.

Mr. Blackstone (Brown's Blackstone's Commentaries, p. 668) says:

"Object of punishment. Human punishments, in a comprehensive view, are rather calculated to prevent future crimes than to expiate past ones. They tend to the amendment of the offender, or to deprive him

of the power to do future mischief, or to deter others by his example. The prevention of future crimes is thus sought to be effected by amendment, disability or example."

Mr. John H. Wigmore, who wrote the learned treatise on Evidence, has this to say (N. C. Law Review, December, 1924, p. 232, reprinted, with permission of the Illinois Law Review): "The deterrence theory is the kingdom of the criminal law. The crimes contemplated, but not committed, have the same ratio, or greater, to those actually committed that the submerged base of an iceberg bears to the portion visible above the surface; scientists say it is as 6 to 1. The fear of being overtaken by the law's penalties is, next to morality, what keeps most of us from being offenders, in one way or another. For the professional or habitual criminals, who have ceased to care for social opinion, it is the *only* thing. A lax criminal law means greater yielding to the opportunities to crime. This is common knowledge."

Burns, in his "Epistle to a young friend," has this to say:

"The fear o' hell's the hangman's whip
To haud the wretch in order;
But where you feel your honour grip,
Let this aye be your border."

Virtue and honor, to a great extent, is the rock on which society stands; destroy this, and the house is built on sand, soon to crumble.

The evidence shows that the trail of the defendant has been merciless with women. He has wrecked their lives, and at last, in his own language, when he debauched this innocent and virtuous thirteen-year-old girl, "I have reached bottom tonight." This was his judgment of himself shortly after the foul crime he committed. This was the judgment of the court below at the trial.

One of the most pathetic incidents in sacred history—a man who had judged his country for forty years—a man without a blemish. A young lad who served under him was given this message to take to this humane judge: "For I have told him that I will judge his house forever for the iniquity which he knoweth, because his sons made themselves vile, and he restrained them not." 1 Samuel, ch. 3, verse 13.

Though the punishment is great, the protection due to society is greater. The hope is to amend the offender, to deprive him of the opportunity to do future mischief, and, above all, an example to deter others.

On the record we can find

No error.

STATE v. DORSEY RIDEOUT AND ROBERT HEDGEPETH.

(Filed 18 February, 1925.)

1. **Criminal Law—Evidence—Nonsuit—Statutes—Questions for Jury.**

Defendant's motion as of nonsuit in a criminal case, under the statute (C. S., 4643), will be denied if construed in the light most favorable to the State it is legally sufficient to convict, its weight and credibility being for the jury to determine.

2. **Same—Conspiracy—Homicide.**

Where two defendants are tried for a homicide, the evidence is sufficient to convict both equally of the offense as principals if it tends to show they were both engaged in the unlawful operation of a whiskey still and had agreed that they should have a gun at the place to frighten away any one who attempted to interfere with them, which resulted in one of them firing upon and killing a person who had endeavored to stop them with a pistol, the killing being the consequence of a conspiracy to do an unlawful act.

3. **Appeal and Error—Instructions—Record—Presumptions—Prayers for Instructions.**

Where the judge's charge is neither excepted to nor set out in the record on appeal, it will be presumed that it was correctly given upon the evidence in the case; and where exceptions for failure to give certain prayers for instructions are insisted upon, on appeal, the refusal to give them will not be held for error, it being required only that the judge give them in his own language substantially as prayed for.

APPEAL by defendants from judgment rendered by *Cranmer, J.*, at November Term, 1924 of NASH.

Defendants were indicted for the murder of Alex Hedgepeth, on the night of 31 May, 1924, in Nash County. After arraignment of defendants, who each entered a plea of not guilty, the solicitor for the State announced that he would not ask the jury to convict defendants of murder in the first degree, but that he would contend that defendants were guilty of murder in the second degree, or of manslaughter. The jury, having heard the evidence, the arguments of counsel for the defendants, and of the solicitor for the State, and the charge of his Honor, returned a verdict of guilty of manslaughter as to both defendants. From the judgment upon this verdict, that each defendant be confined in the State's Prison for a term of not more than seven and not less than five years, both defendants appealed. Assignments of error, upon which motion for new trial is made, are discussed in the opinion.

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

Thorne & Thorne for defendant Dorsey Rideout.

Harold D. Cooley for defendant Robert Hedgepeth.

CONNOR, J. Evidence offered by the State tends to show facts as follows: Alex Hedgepeth, while standing at the edge of the woods, on the lands of Roy Howell, in Nash County, observing two men at work at a whiskey still, located in said woods, between 9 and 10 o'clock on the night of 31 May, 1924, was wounded on the head by shot fired from a gun. He fell to the ground and died almost immediately. His death was caused by the gunshot wound. The shots which inflicted the fatal wound were fired from the direction of the whiskey still. Only one gun was fired from that direction. Almost simultaneously with the firing of this gun, Alex Hedgepeth fired a gun which he held in his hands as he stood observing the men at the still. Two shots in all were fired, deceased firing one of them, the other coming toward him from the direction of the still. The sound was as if both barrels of a double-barreled gun had been fired at the same time. Deceased was wounded on the left side, near the top of his head.

The whiskey still was located on a branch down in a thick place in the woods. It was surrounded by a heavy growth of large trees, among which was a thick undergrowth of alder bushes. These alder bushes extended from the place where the still was located toward an open space under the trees. From this open space toward the place where Alex Hedgepeth was standing at the time he was killed there were alder bushes and other undergrowth. A large open field extended back of the place where he was standing. On the other side of the woods, across the branch from where deceased was standing, was a public road. It was a starlight night.

Alex Hedgepeth and his nephew, G. A. Nelms, a witness for the State, having received information that a whiskey still was located in the woods on Howell's land, had decided during the late afternoon of 31 May, 1924, to go down to the woods to the still. Before starting to the still, Nelms went to the home of Robert Hedgepeth; he was not at home. Alex Hedgepeth borrowed a gun from one Louis Harper and took this gun and six shells with him. When witness and Alex Hedgepeth got near the woods, it was dark. They saw a light moving about in the woods. They squatted down at the edge of the woods, and soon heard some one, opposite them, whom witness Nelms testified that he recognized as defendant Robert Hedgepeth. Soon thereafter witness heard some one coming right up from near the edge of the woods. This person passed near where witness and Alex Hedgepeth were crouching down. He whistled and was answered by some one in the woods where the light was. He started through the woods toward the light but soon stumbled and fell down. Witness heard a sound as of the rattling of jugs and bottles in a sack. He heard a voice in the woods which witness recognized as the voice of defendant, Dorsey Rideout. Witness had

known Rideout for six or eight weeks. A lantern then came from the woods to the place where the person had fallen down and witness heard voices of persons talking. Witness then saw defendant, Robert Hedgepeth, go back into the woods where the light was. As witness and deceased were squatting at the edge of the woods, witness heard a noise, as of a pot boiling. He and deceased, after a few moments, slipped along toward the light in the woods. They then saw a still in operation. Witness recognized defendant, Dorsey Rideout, who was standing near the still. Witness did not see anything in the hands of defendant, Rideout. Deceased then asked witness for a shell, stating that he was going to shoot at the still. During this time witness and deceased were talking and whispering to each other. In a few minutes they heard a car coming on the road on the other side of the branch. At this time they could see the still by the light in the woods. As the car came up, deceased said to witness: "There come some more; let's get them all. Don't you move until I say 'Hands up,' then keep all the noise you can like there are a dozen coming." The car stopped and deceased slipped away through the woods toward the still. Witness then saw defendant, Rideout, come out to one side of the still, walking toward the open space between deceased and the still. Rideout stopped and stood in this open space. Deceased then said, "Hands up." Witness saw Rideout raise up his hands and then the fire from a gun coming from the woods toward deceased. Deceased fired at the same time. Witness at no time saw a gun in the hands of Rideout who was still standing in the open space at the time the gun was fired from the woods, just exactly in line between deceased and the place from which the shot came. There were alder bushes and undergrowth behind Rideout. When Rideout left the still, witness saw defendant, Robert Hedgepeth, standing on the right of the still. He made a noise as if blowing out a lantern and then walked away from the still. That was just before the shooting. Witness did not see Robert Hedgepeth at the moment the shots were fired, nor could he testify where he was at the time. Witness was positive that Rideout was standing in the open space at the time the shot was fired which wounded Alex Hedgepeth. Immediately after the gun was fired witness saw defendant, Robert Hedgepeth, some distance away from where the gun flashed in the woods. He was going from the still in a direction opposite from the place where deceased was killed and toward his home. Both defendants had left the still as soon as the car came up on the public road and before the shooting.

After Alex Hedgepeth fell to the ground, witness went to the home of his uncle, George Hedgepeth, and there told him what had occurred. He then went to the home of Robert Hedgepeth. Robert Hedgepeth came out of the house. He denied that he knew anything about the

still or the shooting. The next day, however, he admitted part of it and later at the preliminary trial told what he knew about it. Alex Hedgepeth was not an officer at the time he was killed and neither he nor witness had any warrant for the arrest of either of the defendants.

N. A. Nelms, who testified that he was with Alex Hedgepeth just before he was killed, told George Hedgepeth, brother of the deceased, that Rideout killed Alex Hedgepeth. He also testified at the trial, in answer to direct question, that Rideout killed the deceased.

Dorsey Rideout had been employed by Roy Howell as a laborer on his farm for six or seven weeks. He had told Rideout that he had been informed that Rideout had put up a whiskey still on his land and that he must get it away from there. On the night of 31 May, 1924, Howell was called from his house by George Hedgepeth, brother of Alex Hedgepeth. Just at this time Rideout came to Howell's back door, calling him. In consequence of what George Hedgepeth and Rideout told him, Howell went with Hedgepeth and defendant, Rideout, to the place where the whiskey still was located. There they found the body of Alex Hedgepeth and took it to his home. Rideout rendered all the help he could. Robert Hedgepeth, a brother of Alex Hedgepeth, deceased, did not show up that night.

The next day a suit of overalls was found under the barn or crib on the west end of Howell's barnyard. These overalls were identified by the witness, Clinton Hands, as the same worn by Robert Hedgepeth at the still on the night of the homicide. Tracks were discovered leading in the direction of Robert Hedgepeth's house as of a man running from where the overalls were found to the path running east and west from George Hedgepeth's to the public road. A gun was found in the path where these tracks came into it from the direction of the barn. This gun was identified by Clinton Hands as the gun he had loaned to Dorsey Rideout on the night of the homicide. The tracks from the place where the overalls were discovered to the road were in direct line toward the home of Robert Hedgepeth. There were no tracks leading from the place where the gun was found to Roy Howell's house where Rideout lived. A person who had gone to the crib where the overalls were found and then to the path where the gun was found and then to Roy Howell's house would have gone out of his way 58 yards.

Clinton Hands late in the afternoon of 31 May, 1924, loaned to Dorsey Rideout his gun. Clinton Hands went with defendants, Dorsey Rideout and Robert Hedgepeth, to the whiskey still about dark. When they got to the woods, the lantern carried by Rideout was lit. Rideout did not at this time have the gun in his hands. After arriving at the still, Rideout and Hedgepeth agreed to operate the same that night together on shares. Rideout then went to Howell's house to get over-

alls for Hedgepeth. These are the same overalls found the next day under the corner of the crib in Howell's barnyard. Clinton Hands left the still before defendants, Rideout and Hedgepeth, began to operate it. At this time the gun which he had loaned to Rideout was near the still. About ten o'clock that night Rideout went to the home of Clinton Hands and told him that Alex Hedgepeth had been killed near the still. Hands then went with Rideout, George Hedgepeth and Roy Howell to get the body.

On the day after the homicide, a shell was found in the alder bushes back of the open space where defendant, Rideout, was standing at the time Alex Hedgepeth was killed. The alder bushes between the place where the shell was found and the open space in which Rideout was standing were shot away in the direction of the place where Alex Hedgepeth was killed.

At the close of the State's evidence, tending to establish the facts as above stated, both defendants moved for judgment of nonsuit, under C. S., 4643. This motion was denied. Each defendant excepted. Defendant, Rideout, offered evidence, and thereby waived his exception. *S. v. Killian,* 173 N. C., 792. Defendant, Hedgepeth, introduced no evidence, and claims the benefit of his exception, now on his appeal to the Supreme Court.

Applying the well-settled rule, uniformly and consistently enforced by this Court, to the consideration of the evidence offered by the State, upon defendant's motion, we find no error in the refusal of his Honor to allow the motion. "The motion to nonsuit requires that we should ascertain merely whether there is any evidence to sustain the allegations of the indictment. The same rule applies as in civil cases and the evidence must receive the most favorable construction in favor of the State for the purpose of determining its legal sufficiency to convict, leaving its weight to be passed upon by the jury." *S. v. Carlson,* 171 N. C., 818. If there is evidence from which the jury could find as a fact that defendant, Hedgepeth, fired the gun which inflicted the fatal wound upon Alex Hedgepeth, it is sufficient to be submitted to the jury upon the issue between the State and this defendant. The primary question involved in this issue is: Did defendant Hedgepeth fire the gun which caused the death of deceased? The probative force of the evidence, as well as the credibility of the witnesses, was for the jury to determine. There was evidence sufficient to sustain the contention of the State that this question should be answered in the affirmative. This being true, it is unnecessary, upon consideration of this motion, to determine whether or not there was evidence also of a conspiracy between Hedgepeth and Rideout to do an unlawful act, and whether such act was *malum per se* as well as *malum prohibitum* or not. Nor is it material to the

question, involved in the consideration of this motion, to determine, whether, if there was sufficient evidence of such conspiracy, the act of firing the gun, which caused the death of deceased, was so related to or connected with the unlawful act which was the object of the conspiracy as to make the conspirator who did not fire the gun equally guilty with his coconspirator who did fire it, and thus cause the death of the deceased. Upon the evidence, the well-recognized principle, that when two persons are charged with being the cause of the death of a person, but not with conspiracy, the jury should acquit if they have a reasonable doubt as to which one inflicted the injury, is not necessarily applicable to the consideration of this exception by Hedgepeth. *S. v. Goode,* 132 N. C., 982. The exception was not well taken, and the assignment of error is not sustained.

Defendant, Dorsey Rideout, as a witness in his own behalf, testified that he had set up the still in the woods on Roy Howell's land; that a few days before 31 May, 1924, Howell had requested him to move the still off his land and that he had promised to do so; that on 31 May, 1924, he made an agreement with defendant, Robert Hedgepeth, to move the still that night; that Hedgepeth told him during the afternoon that some young men in the neighborhood had discovered the location of the still and intended to go down there and break it up or run him away from it; that Hedgepeth suggested that they borrow a gun from Clinton Hands to scare these young men if they came and interfered with them while at the still; that acting upon this suggestion he borrowed a gun from Clinton Hands and got some shells from Mrs. Roy Howell; that Hedgepeth took the gun and shells when they started to the still and carried them there; that when they reached the still he and Hedgepeth agreed to run off some whiskey before moving the still; at Hedgepeth's request he went back to Roy Howell's and got some overalls which Hedgepeth put on; that they then went to work at the whiskey still; Hedgepeth set the gun down next to the whiskey still and it remained there until the shooting; that witness was standing 8 or 10 feet from the still at the end of a pipe which emptied into a little branch, watching it to see if whiskey came out at the end of the pipe; that while thus engaged he heard some one in an automobile drive up on the west side of the branch and stop; that he heard the sound as if several persons were coming from the automobile into the woods; that at this moment he had a lantern with which he started through the alder bushes, trying to blow it out; that he finally blew the lantern out and placed it about 18 feet from the whiskey still in the alder bushes; that defendant, Hedgepeth, at this time walked away from the still through the bushes in a direction about midway between the line which witness had followed and where the deceased was after-

wards found lying on the ground; that just as Hedgepeth disappeared in the alder bushes, a few feet away, witness heard some one cry out "Hands up" and at this moment saw the flash of a gun from the direction where Alex Hedgepeth stood; that almost at the same time there was an answering flash and noise caused by the firing of a gun from the alder bushes from the direction in which the defendant Hedgepeth had just gone; that in a moment defendant Hedgepeth came running back from that direction and he and Hedgepeth ran together through the woods; that at this time witness did not know that anybody had been hurt; that he then went straight home to Roy Howell's house and later returned with him and George Hedgepeth to the place where the whiskey still was located; that they found Alex Hedgepeth lying on the ground and took him to the house; that witness did not have a gun in his hands at any time that night.

There was other evidence offered by the defendant which, however, is not material. At the close of all the evidence, both defendants renewed their motion for judgment of nonsuit. This motion was denied and each defendant excepted. Defendant, Rideout, however, in his brief abandons his assignment of error based upon this exception. The exceptions of the defendant, Hedgepeth, is not sustained.

In apt time, defendant Rideout requested the court to instruct the jury as follows: "If the jury find from the evidence that the defendants were acting independently of each other at the time of the killing, that is, there was no common design, conspiracy or agreement to kill and the jury cannot actually identify from the evidence or find beyond a reasonable doubt which one of the defendants fired the shot that killed Alex Hedgepeth, that it would be the duty of the jury to render a verdict of not guilty as to both the defendants, even though the jury believed one of the defendants killed the deceased, but could not say from the evidence which one of them did it."

His Honor refused to give this instruction. Both defendants excepted, and assign such refusal as error.

The instruction in so far as it embodies the proposition that in the absence of evidence of a conspiracy, if two persons are indicted for murder or other unlawful and felonious homicide, and the jury find from the evidence, beyond a reasonable doubt, that one of the defendants killed the deceased, but are in doubt, upon all the evidence, as to which of the defendants caused the death of deceased, they should acquit both, is correct. It is fully supported by the authorities. In *S. v. Finley*, 118 N. C., 1162, *Justice Montgomery* says of a prayer for instruction, based upon this proposition, "The prayer in the abstract embraces a sound doctrine of law; but where a conspiracy or an agreement between two or more to do an unlawful act has been proved, and as a

result and consequence thereof a crime is committed, the rule is different and it is altogether an immaterial matter which one of the actors actually commits the deed; they are all principals and all guilty of the offense." In that case there was no evidence, or contention on the part of the State, that the two defendants had entered into a conspiracy or agreement to kill the deceased; there was evidence tending to show and it was contended by the State that defendants had entered into a conspiracy to worry, annoy and tease, to oppress, assault and strike deceased. While engaged in accomplishing the purpose of this conspiracy, the fatal blow was struck by one of the conspirators. The refusal of the court to instruct the jury, as requested by the defendants that "they must find beyond a reasonable doubt, if they should find a conspiracy existed at all, that such conspiracy was to commit the offense charged in the indictment, to wit: murder of the deceased, and that no evidence of a common design, or purpose to tease, worry and have fun out of deceased would be such common design and purpose as would warrant the jury in finding a verdict against Finley in case they found that he did not strike the blow," was sustained, with the comment as above stated. *Regina v. Cox,* 4 C. and P., 583, is cited as authority for the rule, approved by the Court, that if two persons are engaged in the pursuit of an unlawful object the two having the same object in view, and in the pursuit of that common object, one of them does an act which is the cause of death, under such circumstances that it amounts to murder in him, it amounts to murder in the other also." *S. v. Simmons,* 51 N. C., 21; *S. v. Gooch,* 94 N. C., 987; *S. v. Goode,* 132 N. C., 988; *S. v. Kendall,* 143 N. C., 663; *S. v. Powell,* 168 N. C., 134; *S. v. Orr,* 175 N. C., 773.

It is not contended by the State in this case, that defendants, Rideout and Hedgepeth, had entered into a conspiracy or agreement to kill Alex Hedgepeth; it was contended and there was evidence to support the contention, that these defendants had entered into a conspiracy or agreement to operate the whiskey still for the purpose of manufacturing intoxicating liquor, and also to assault and drive away by shooting at them with a gun, any persons who interfered with them; that while both defendants were engaged in the unlawful act of making whiskey, one of them, with the gun and shells which had been provided by both defendants, fired at the deceased, who had called to them "Hands up" and inflicted upon deceased the mortal wound. The error in the instruction requested is that it is predicated upon the absence of evidence of a conspiracy to kill the deceased, and implies that in the absence of a finding by the jury of a conspiracy *to kill,* the act of the defendant who fired the gun, assuming that the jury shall find that one of the defendants did fire it, was independent of his codefendant. Assignment

of error based upon exception to the refusal to give this instruction is not sustained.

Defendant, Rideout, further requested the court to instruct the jury as follows: "If the jury find from the evidence the defendant Rideout was present or very near by at the time of the firing of the shot that killed Alex Hedgepeth, but did not fire such shot himself, and that Rideout gave no aid or encouragement to the person firing such shot, either before or at the time thereof, then he would not be guilty, either as principal or accessory, and the jury should acquit, merely being present when the crime was committed or even standing by and seeing the crime committed and doing nothing to prevent it would not make defendant Rideout guilty of the crime either as principal or accessory."

Defendant Rideout excepted to the court's refusal to give this instruction, and assigns same as error.

This instruction is correct as an abstract proposition of law, and is supported by 29 C. J., 1069; *S. v. Matthews,* 78 N. C., 523; *S. v. Ta-cha-na-tah,* 64 N. C., 614; and *S. v. Hildreth,* 31 N. C., 440 are cited to support the text. Although Rideout gave no aid or encouragement to the person who shot and mortally wounded deceased to fire the gun, either before or at the time the gun was fired, if he had previously entered into a conspiracy with the person who fired the gun to do an unlawful act, and the firing of the gun at Alex Hedgepeth was an act connected with or growing out of the doing of the unlawful act, and done in furtherance of or in consequence of the unlawful act, the jury could not acquit him. If the killing of Alex Hedgepeth was a crime and defendant Rideout was present at the time and place of its commission by preconcert with the perpetrator of the crime, he was a participant in the crime. 29 C. J., 1070, citing *S. v. Jarrell,* 141 N. C., 722, "When the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as encouraging." 1 Wharton Cr. Law, sec. 211. The refusal of the court to give this instruction was not error, and the assignment of the same as error is not sustained.

Defendant Rideout requested the court to instruct the jury as follows: "If the jury find from the evidence that the defendant Rideout borrowed the gun and shells with which Alex Hedgepeth was later killed, but did not fire the shot that killed the deceased, and that at the time he procured the gun, or later before the homicide, he did not share in the criminal intent of the direct actor he would not be guilty and the jury should acquit him."

To the refusal to give this instruction, defendant Rideout excepted and assigns same as error. This assignment cannot be sustained. Upon

the evidence, Rideout's guilt is not to be determined solely by his sharing in the criminal intent of the person who fired the gun. If the firing of the gun at Alex Hedgepeth was an act connected with, related to and in consequence of the unlawful act which Rideout and Hedgepeth had conspired to do, and the firing of the gun was a crime, committed by his coconspirator in furtherance of the unlawful conspiracy, Rideout was, in law, a participant in said crime, and the jury, upon finding these facts from the evidence, could not acquit him.

Defendant Rideout further requested the court to instruct the jury as follows: "If the defendant at the time of or just before the shot was fired that killed deceased were engaged in operating a whiskey still, this fact does not of itself affect the question of the guilt or innocence of the defendants, one way or the other. It is merely a circumstance that may be considered by the jury along with other circumstances in arriving at the truth of the matter and as influencing the motive of the defendants, and the probative value of their testimony."

To the refusal of the court to give this instruction, both defendants excepted. They assign this refusal as error. We cannot so hold. The fact that defendants were engaged in the operation of a whiskey still, in itself an unlawful act, after having jointly prepared themselves to resist interference, by the use of a gun and shells—all as a result of preconcert and conspiracy by defendants—could not be thus limited by the court as a mere circumstance to be considered by the jury as affecting the probative value of their testimony, or the motive with which Alex Hedgepeth was killed. Assuming that only one of defendants shot the deceased, as the evidence tends to show, the fact that both defendants had entered into a conspiracy to do an unlawful act, and were engaged in accomplishing the purpose of the conspiracy, when the act was done by one of them, which caused the death of Alex Hedgepeth, is the very heart of the State's case as against the defendant who was not the direct actor.

Defendant, Hedgepeth, in apt time presented to the court his prayers for instruction; to the refusal of his Honor to give these instructions, defendants excepted.

We do not deem it necessary to state or discuss these prayers *seriatim*. Some of them are given substantially in the excerpt from the judge's charge which appears in the case on appeal. The full charge is not set up and the presumption is that it was correct. The defendants, by their prayers for instructions, presented to the court the proposition that although the jury might find that both defendants had entered into a conspiracy to manufacture intoxicating liquors, an unlawful act, and although they might find that one of the defendants fired the shot which killed Alex Hedgepeth, if they were unable to find beyond a reasonable

doubt which defendant fired the shot, they should acquit both for the reason that the act of shooting the deceased was not, as a matter of law, connected with, related to or in consequence of the unlawful act in which they were engaged by preconcert. Upon the evidence in this case this is not a correct proposition. If the jury found from the evidence, as their verdict indicates they did, that one of the defendants shot Alex Hedgepeth and thereby killed him with a gun and shells which both defendants had carried to the whiskey still with a common purpose, then it was for the jury to determine whether this act was so related to the unlawful act which the defendants had conspired to do as that the conspirator who did not fire the shot was equally as guilty as his co-conspirator who did fire the shot. It is stated in the case on appeal, prepared by defendant's counsel and accepted by the solicitor for the State that "his Honor in his charge to the jury fully and fairly stated the contentions of the State and defendants. He defined the crime of murder in the second degree and manslaughter and charged the jury that they must be satisfied beyond a reasonable doubt that the killing of Alex Hedgepeth was done by the two defendants or by one of them." As the full charge is not included in the case on appeal, we must assume that his Honor stated the contentions of the State and the defendants as to the law as well as to the facts involved in the trial.

Several of the instructions requested contain correct statements of general principles of law but we cannot hold upon the entire record that the failure to give these instructions in the exact language in which they were framed is reversible error.

After a full and careful consideration of the entire record we are of the opinion that the judgment of his Honor should be affirmed. There is

No error.

E. V. WEBB AND DIBRELL BROTHERS, INC., TRADING AS E. V. WEBB & COMPANY v. A. FRIEDBERG AND MAX FRIEDBERG, PARTNERS, TRADING AS A. FRIEDBERG & BRO., AND F. W. BROWN, COMMISSIONER OF COURT, AND MARYLAND CASUALTY COMPANY, INTERVENER.

(Filed 18 February, 1925.)

1. Warehousemen—Receipts—Negotiable Instruments—Statutes.

Whether an individual, partnership or corporation, the warehouse receipts issued for tobacco by a storage warehouse company for profit, formed under our statute, are made negotiable when properly endorsed by the one storing tobacco therein, and passes the title to the transferee, (C. S., secs. 4041, 4042, 4044, 4045, 4046), and it is immaterial whether those operating the warehouse use the same for the storage of their own tobacco with that of others.

2. Same—Attachment.

Where the owner of tobacco stores the same in a warehouse organized under the provisions of our statute, receives a warehouse receipt therefor in conformity with the law, C. S., 4045, 4046, the goods represented by the receipts are not subject to attachment, C. S., 4065, and a specific remedy for creditors of the owner is given against the holders of these receipts, C. S., 4066, and attachment will not lie against the tobacco stored by a creditor of the owner that will impair the rights of one who is a holder of the receipts thus issued.

3. Same—Judgments of Other States — Records — Evidence—Constitutional Law.

Where tobacco was stored in a warehouse here existing under the laws of this State, and in conformity with our statute a negotiable receipt had been issued the owner thereof, and the funds of such owner had been attached in New York in the courts of that State, and a surety or replevin bond given to await the determination of that suit, and that Court upon sufficient evidence had adjudged that the surety is liable and that the owner endorse the receipts to the surety company upon the payment of the money, which the surety company accordingly has paid: *Held*, the duly authenticated record in this Court according to our statutes (C. S., Vol. 2., appendix III) and under the Federal Statutes (U. S. Rev. Stat., 905 *et seq.*), is properly received in our courts as evidence, and given effect under Article IV, section 1, Constitution of the United States.

APPEAL by both plaintiffs and defendants from *Horton, J.*, and a jury, at February Term, 1924, of LENOIR.

Attachment suits were issued by plaintiffs against defendants. This attachment suit was matured by the plaintiffs against the defendants, and a judgment rendered in favor of the plaintiffs. In addition and after rendition of this judgment the Maryland Casualty Company was allowed to intervene, and the trial came on for the purpose of disposing of the claims of the intervener. The court held in the outset that the burden was upon the intervener, to which no exception was taken.

The following issues were submitted to the jury and their answers thereto:

"1. Is the intervener, the Maryland Casualty Company, the owner of the tobacco in controversy by virtue of the transfer of the tobacco warehouse receipts? Answer: 'Yes.'

"2. Is the intervener entitled to lien prior to that of E. V. Webb & Company by virtue of the transfer of E. B. Ficklen Tobacco Company attachment judgment rendered in Pitt County Superior Court? Answer: 'Yes.'

"3. What assets has the intervener received as security in addition to the transfers sued on herein? Answer: '$20,000.'

"4. Is the intervener entitled to be subrogated to the rights of E. B. Ficklen as against the plaintiffs? Answer: 'Yes.'"

Both the intervener and plaintiffs introduced evidence to sustain their respective contentions.

Numerous exceptions of plaintiffs and intervener, Maryland Casualty Company, and assignments of error appear in the record. From the judgment plaintiffs and intervener both appealed to the Supreme Court. Further facts material will be stated in the opinion.

John G. Dawson and Varser, McLean & Stacy for plaintiffs.
Rouse & Rouse for Maryland Casualty Co., intervener.

CLARKSON, J. In the present case the plaintiffs and the intervener, Maryland Casualty Co., both appeal. We will consider the cases together. Although the record is voluminous, there are only a few material facts. There is no serious dispute about the facts on the first, second and fourth issues. From the entire record they will be treated as admitted. The law, for our decision, arising on the evidence, we will consider as it appears to us presented on the entire record.

The facts succinctly are: E. B. Ficklen Tobacco Co., Inc., sued defendants, who are nonresidents of North Carolina, and attached certain tobacco, the actual tobacco 104 hogsheads of leaf tobacco, in certain warehouses in North Carolina, in Ficklen Warehouse, Dodson Warehouse and Kinston Storage Warehouse, and also in New York attached certain cash money and claims against various insurance companies. Both suits are based on the same claim. The plaintiffs made a subsequent attachment to the Ficklen attachment and attached the same actual tobacco in the warehouses in North Carolina, but not the warehouse receipts. E. B. Ficklen Tobacco Co., Inc., obtained judgment in New York against defendants for its debt and also judgment in the attachment case in North Carolina. The intervener, the Maryland Casualty Company, became surety for the defendants in the Ficklen attachment in New York. The warehouse receipts for the tobacco were not attached when the attachments were sued out in North Carolina. The defendants delivered the warehouse receipts to E. B. Ficklen Tobacco Co., Inc., in the early part of June, 1920. E. B. Ficklen Tobacco Co., Inc., sued the intervener, Maryland Casualty Co., in New York, and the New York Court in its judgment compelled E. B. Ficklen Tobacco Co., Inc., under its protest, to assign the warehouse receipts and the North Carolina judgment and attachment to the Maryland Casualty Co., before it was required to pay the amount of the surety bond—$25,000. This judgment of the Court in New York was after plaintiffs' attachments. The Maryland Casualty Company then became interveners in the present case, after plaintiffs had obtained judgment against the defendants, but before the proceeds of the tobacco was applied. It was admitted that

the actual tobacco attached in North Carolina in the suits was sold and the proceeds amounted to $9,470.81 and were in the hands of the commissioner of the court, who is a party to this action.

It was in evidence that the warehouses in which the actual tobacco was attached in North Carolina, were operated by E. B. Ficklen Tobacco Co., Inc., Kinston Storage Warehouse Co., and C. R. Dodson Storage Co., and the customary warehouse receipts were given (C. S., 4042) for the tobacco in the warehouses. It was in evidence that these warehouses were used for the storage of the tobacco in which the concerns has an interest and is used for the storage of tobacco either for the concerns or the customers. The receipts are similar to the Ficklen one, which is as follows:

"The following warehouse receipts issued by E. B. Ficklen Tobacco Company, Inc., Storage House at Greenville, N. C.

26 Hogsheads 05 Nos. 1 to 26 inclusive, lbs. 27,827 ..... $5,565.40
26 Hogsheads 02 Nos. 38 to 63, inclusive, lbs. 28,125 ..... $7,734.38"

and each receipt contains the following printed matter:

"The within described hogshead of tobacco is stored at the warehouse of the E. B. Ficklen Tobacco Co., Inc., Storage House by A. Friedberg & Bro., and will be delivered to the holder of this note on demand and payment of charges. No claim for damages on storage allowed, unless made before delivery. The storage rates are $1.50 for first six months or less, fifteen cents per month thereafter, 25c. outage. The E. B. Ficklen Tobacco Co., Inc., Storage Warehouse, is not responsible for loss or damage by fire."

C. S., ch. 79, entitled "Warehouse Receipts," sec. 4037, defines "Warehouseman" as meaning *"a person lawfully engaged in the* business of storing goods for profit," and "person" includes a corporation or partnership of two or more persons having a "joint or common interest." Sec. 4041. "Warehouse receipts may be issued by any warehouseman." Sec. 4042. What receipt must contain. Sec. 4044 defines nonnegotiable receipts. Sec. 4045 provides how nonnegotiable receipts marked. Sec. 4046 defines negotiable receipts. Sec. 4065 makes goods not subject to attachment or execution when negotiable receipt is issued. Sec. 4066 gives creditors remedy against receipt.

In the case of *E. B. Ficklen Tobacco Co., Inc., v. Friedberg & Bro.,* in the Supreme Court of New York, *Mr. Justice McAvoy,* on 9 February, 1922, rendered the opinion on this warehouse receipt matter as follows: "That the levy made by the sheriff of Lenoir County under the order

of attachment issued by the Superior Court, Lenoir County, State of North Carolina, wherein E. V. Webb & Co., were plaintiffs and A. Friedberg and Max Friedberg copartners, trading as A. Friedberg & Bro., were defendants, was of no legal effect and insufficient to attach the tobacco mentioned and described by the negotiable warehouse receipts hereinafter mentioned by reason of the fact that the said receipts are negotiable receipts and the merchandise described therein cannot be attached or levied upon unless the receipts themselves are attached and levied upon by the sheriff or the said receipts impounded by the court or their negotiation enjoined."

We think that the concerns are warehousemen under all the facts in this case. It matters not if it is a person or partnership. If the concern is engaged in the business and goods are stored for profit, the statute applies. It matters not if the concern stores its own and also the goods of others. The receipt issued terms itself "Warehouse receipt" and shows on the face that the goods are stored for profit; it gives the "storage rates." The receipts and admitted evidence shows that the concerns are warehousemen and the concerns dealt with the public as such.

The burden was admitted in the cause to be on the intervener. We think the New York judgment was properly exemplified and evidence in the cause. C. S., Vol. 2, appendix III, Authentication of Records (U. S. Rev. Stat., 905, 906, 907). It showed that the "warehouse receipts" covered the tobacco in controversy, and they were owned by the Maryland Casualty Co. transferred by E. B. Ficklen Tobacco Co., Inc., and also the E. B. Ficklen Tobacco Co., Inc., attachment in North Carolina, and were held by the Maryland Casualty Company to reimburse it for amount due it of $25,000 ordered to be paid to E. B. Ficklen Tobacco Co., Inc., on its judgments when the warehouse receipts and attachments were transferred. The attached tobacco in North Carolina amounted to $9,470.81, which was in the hands of the commissioner of the court, who is a party to this action. The court below properly instructed the jury to answer the first, second and fourth issues "Yes." The competent evidence and admission in the answers fully warranted this instruction. The main question of fact was on the third issue—"What assets had the intervener received as security in addition to the transfers sued on herein?" The evidence on this issue was conflicting. Without repeating it, we think the evidence bearing on the issue competent and sufficient to sustain the verdict and the issue proper and material from the facts in this case. The jury answered $20,000. On this verdict, the court in its judgment "Ordered, adjudged and decreed that of the fund held by the commissioners in this action from the sale of said tobacco, the said commissioners pay unto the intervener the sum of $5,000 with

interest thereon at the rate of six per cent per annum, from 5 May, 1921, that being the amount so paid by the intervener to the E. B. Ficklen Tobacco Co., Inc., less the amount of $20,000 paid to the intervener by the defendants Friedberg. It is further ordered, adjudged and decreed that the balance of the sum on hand by the commissioners in this action, with accrued interest thereon, be paid unto the plaintiffs herein, and that the costs be paid by plaintiffs as such costs have accrued herein in the trial upon the interplea."

The Maryland Casualty Company, intervener, claimed the entire proceeds of the tobacco sold under the attachments of plaintiffs and in the hands of the commissioner, amounting to $9,470.81, to be applied on the E. B. Ficklen Tobacco Co., Inc., judgment obtained against it in the New York Court for $25,000. As security it had the warehouse receipts on the tobacco in controversy turned over to it under court order by said Ficklen Co., Inc. The jury found it had $20,000 additional assets and the court below, under the findings of the jury, gave intervener $5,000 and interest to be taken out of the fund of $9,470.81 the commissioner had and the balance paid to plaintiffs, thus paying in full intervener's claim of $25,000.

It appears that in New York a summary judgment against the surety cannot be taken in the same action, as is provided in North Carolina. C. S., 3961-2-3.

We have here a judgment of another state, *E. B. Ficklen Tobacco Co., Inc., v. Maryland Casualty Co.,* the intervener in this case, in the Supreme Court of New York County, duly exemplified. This judgment is set forth fully in the record. It gives the findings of fact and conclusions of law and judgment of *John V. McAvoy,* Justice of Supreme Court. This judgment transfers and assigns the warehouse receipts and attachments in North Carolina to the intervener, Maryland Casualty Co., and says that "the said defendant (Maryland Casualty Co.), when receiving said negotiable warehouse receipts shall be and is a bona fide holder of said negotiable warehouse receipts in due course," etc. Under the judgment E. B. Ficklen Tobacco Co., Inc., turned over to the Maryland Casualty Co. the warehouse receipts and assigned the North Carolina attachments and the Maryland Casualty Co. paid E. B. Ficklen Tobacco Co., Inc., $25,000 and intervened in this case.

Article IV, sec. 1, Const. of U. S., is as follows: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." *Hanley v. Donoghue,*

116 U. S., 1; *Thompson v. Whitman,* 18 Wall., 457; *Andrews v. Andrews,* 188 U. S., 14; *Haddock v. Haddock,* 201 U. S., 562; Const. of U. S., Anno., 1923, p. 478 *et seq.*

"By virtue of Const., U. S., and Acts of Congress in pursuance thereof, judgments of other states are put upon the same footing as domestic judgments, they are conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the court." *Marsh v. R. R.,* 151 N. C., 160; *Miller v. Leach,* 95 N. C., 229.

The "warehouse receipts" were under our statute made negotiable. C. S., 4077 *et seq.* The judgment of the New York Court put the title to these negotiable warehouse receipts in the intervener, Maryland Casualty Co., ordered the warehouse receipts turned over by E. B. Ficklen Co., Inc., and the Maryland Casualty Co. to pay the $25,000 judgment. The judgment also transferred Ficklen's North Carolina attachments. This was all done by the litigants.

The plaintiff in its further answer to intervener's complaint, admit this, but claim that the E. B. Ficklen Tobacco Co., Inc., was forced in the action to transfer and assign the warehouse receipts and attachments in North Carolina to Maryland Casualty Co., but it is admitted on the record that E. B. Ficklen Tobacco Co., Inc., did make the transfer and received the $25,000. From the admission of record title was in the intervener. This fact being established, the law is clear.

C. S., 4081 is as follows:

"A person to whom a negotiable receipt has been duly negotiated acquires thereby—

"1. Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

"2. The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him."

We have given a most careful study of the entire record and able briefs of the parties. We think that substantial justice has been done from the facts in this cause and that there is in the record no prejudicial or reversible error in either the appeal of plaintiffs or intervener.

In the judgment of the court below, there is

No error.

STATE v. F. E. DENSON AND J. W. SMITH.

(Filed 18 February, 1925.)

1. Taxation—Automobiles—Chauffeurs—Municipal Corporations—Cities and Towns—Ordinances—Constitutional Law.

Where an ordinance of a town expressly includes nonresidents thereof who conduct a business, practice a profession, or who are employed therein, requiring them to obtain a chauffeur's license for driving their automobiles, it includes within its terms such persons as are employed within the town and live beyond its limits and drive to and from their work, and the tax being imposed upon all of that class alike is not discriminatory, and the ordinance is constitutional.

2. Same—Statutes.

The second proviso of chapter 2, section 29, Public Laws 1921, refers to the privilege of operating a motor vehicle, and the third for regulating, licensing and controlling chauffeurs and drivers; and *held*, the words "any such car" in the third proviso does not restrict the drivers' license to the cars on which the privilege tax is laid; and an ordinance imposing a chauffeur's tax upon those driving cars within the corporate limits of the town is authorized by the statute.

APPEAL by defendants from *Sinclair, J.*, at January Term, 1925, of EDGECOMBE.

The defendants were severally charged with the breach of an ordinance of the city of Rocky Mount providing that it shall be unlawful for any person to drive a motor vehicle upon any street within the corporate limits of the city until said person shall have first obtained a driver's license therefor, and that the word "person" shall include not only every resident, but every nonresident who conducts a business, practices a profession, or is employed in the city, or who shall remain therein for a period of thirty days. The ordinance prescribes the method of applying for the license and the conditions upon which it is to be granted.

A special verdict was returned, which includes this finding: "The defendants are, and were, on or about 12 September, 1924, residents of Nash County, and were employed at the Atlantic Coast Line Railroad shops, which place of employment is within the corporate limits of the city of Rocky Mount, but the defendants' homes were about four miles outside of the corporate limits of the city of Rocky Mount. They usually drive their automobiles to and from their work; and on or about 12 September, 1924, at the time of their arrest, they were operating their automobiles upon the streets of the said city, and they had not been examined nor obtained the driver's license as required by the aforesaid ordinance."

Upon his Honor's construction of the statute, the jury returned a verdict of guilty; and from the judgment each of the defendants appealed, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash and Thorp & Thorp for the State.

H. D. Cooley and J. A. Edgerton for defendants.

ADAMS, J. The ordinance affects three classes of persons: (1) residents; (2) nonresidents who conduct a business, practice a profession, or are employed in the city; (3) those who remain in the city for more than thirty days. Under the special verdict, the defendants are treated as falling within the second class; their homes are outside the corporate limits, but they are employees of a railroad company, whose shops are within the city, and they regularly drive their cars to and from the place in which they work. When arrested they were driving upon the streets of the city without a license.

The defendants, as we understand, do not controvert the power or authority of the aldermen to enact a valid ordinance regulating the grant of a chauffeur's license (Private Laws 1907, ch. 209, sec. 39 *et seq.; Thompson v. Lumberton,* 182 N. C., 260), but they rest their exceptions on the contention that the ordinance in question is invalid as to all persons embraced in the second enumerated class.

They insist, first, that the ordinance is unreasonable, because, if a license may be required of them, it may be required of any person driving a car into the city for any cause or for any period of time; but this reasoning does not commend itself to our approval. It is obvious that the board of aldermen never contemplated the imposition of an examination for a driver's license upon all who might enter or pass through the city; and it is equally obvious that the ordinance does not apply to cases of this kind.

They further contend that, as the special verdict does not fix the duration of their employment, they occupy the position of those who casually drive their cars into the city for a temporary purpose, and are therefore not within either of the specified classes; but the test of inclusion is not the duration of their employment, but their presence as employees and the operation of their cars in the city. They go there by virtue of a contractual obligation to do certain work which requires their presence at the railroad shops within the corporate limits day after day for a period definite or indefinite. Driving their cars inside the corporate limits is an incident, perhaps an essential incident, of the business relation which they have voluntarily assumed; and if so, they may not successfully claim exemption from the inhibition of the ordinance

merely on the ground that while their days are passed within, their nights are spent without, the corporate limits. In *Whitfield v. Longest,* 28 N. C., 268, *Nash, J.,* said: "It is very certain that the legislative acts of the commissioners of a town are and must be limited to, and can have no effect beyond, the limits of the corporation; but the proposition is not true that none are bound by them but those who, in common parlance, are inhabitants of the town. All who bring themselves within the limits of the corporation are, while there, citizens, so as to be governed by its laws. If this were not so, those town laws or police regulations, so absolutely necessary and useful, would be entirely nugatory. No matter how important and necessary, whether to the health or peace of the town, or to the supply of its inhabitants with their daily provisions, they might be set at defiance, so far as the police of the town was concerned, by any individual who was not a corporator." And in *Wilmington v. Roby,* 30 N. C., 250, *Chief Justice Ruffin* observed: "It is settled that by coming within the town and acting there, a person becomes liable as an inhabitant and member of the corporation." The defendants, by accepting employment in the city and doing their work there, bring themselves within the class described in the ordinance as "employed in said city." *Comrs. v. Capeheart,* 71 N. C., 156.

The defendants say, in addition, that the ordinance is discriminatory and therefore unenforcible; but this position, we think, cannot be upheld. Of course, if a municipal ordinance appears upon its face to be discriminatory, or oppressive, or unreasonable, it will not be enforced; but ordinarily there is no discrimination where the impeached provision relates to all of a class. McQuillin states the rule in this language: "Laws relating to persons and things as a class, and not to persons or things of a class, are common, and usually sustained. The law will be held valid if it operates equally upon all subjects within the class for which the rule is applied. It thus follows that local police regulations are not to be condemned because not specifically aimed at all persons in whatever business engaged, as they may have an express design of reaching certain classes in certain characters of work." Municipal Ordinances, sec. 193 *et seq.* "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint, because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."—*Mr. Justice Field,* in *Soon Hing v. Crowley,* 113 U. S., 703; 28 Law Ed., 1145.

See, also, *Ins. Co. v. Hale,* 219 U. S., 307, 319; 55 Law Ed., 229, 236; *Reinman v. Little Rock,* 237 U. S., 171, 177; 59 Law Ed., 900, 903; *Booth v. Indians,* 237 U. S., 391, 395; 59 Law Ed., 1011, 1016. The principle has often been applied by this Court. *Gatlin v. Tarboro,* 78 N. C., 119; *S. v. Powell,* 100 N. C., 525; *S. v. Moore,* 104 N. C., 714; *S. v. Pendergrass,* 106 N. C., 664; *Rosenbaum v. New Bern,* 118 N. C., 83; *S. v. Carter,* 129 N. C., 560; *Lacy v. Packing Co.,* 134 N. C., 567, affirmed in 200 U. S., 226; 50 Law Ed., 451; *S. v. Danenberg,* 151 N. C., 718; *S. v. Lawing,* 164 N. C., 492; *Stone v. Texas Co.,* 180 N. C., 546; *S. v. Vanhook,* 182 N. C., 831.

It is contended that, owing to the provisions of the Public Laws of 1921, ch. 2, sec. 29, the ordinance is without legislative sanction. It will be noted, however, that the second proviso has reference to the privilege of operating a motor vehicle, while the third provides for regulating, licensing and controlling chauffeurs and drivers. We cannot concur with the defendant in construing the words, "any such car," in the third proviso, as restricting the driver's license to cars on which the privilege tax is laid. This construction would make the one tax entirely dependent upon the levy of the others. In our opinion, this was not the legislative intent. See *Thompson v. Lumberton, supra,* p. 265.

We find

No error.

STATE v. L. H. REDDITT.

(Filed 18 February, 1925.)

Criminal Law—Assault—Deadly Weapon—Statutes—Burden of Proof—Instructions—Appeal and Error.

For a conviction under the provisions of C. S., 4214 for an assault with a deadly weapon, with intent to kill, and inflicting a serious injury, not resulting in death, the burden of proof is on the State to show the various elements of the offense, beyond a reasonable doubt; and it is reversible error for the trial judge to instruct the jury, upon the evidence, that the use of a deadly weapon cast the burden upon the defendant to disprove his guilt.

APPEAL by defendant from *Sinclair, J.,* at November Term, 1924, of BEAUFORT.

Criminal prosecution, tried upon indictments charging the appealing defendant and his son, D. E. Redditt, with maliciously maiming Tobe Minor (C. S., 4212) and with assaulting him with a deadly weapon, with intent to kill, and inflicting serious injury, not resulting in death.

C. S., 4214. As all the cases grew out of the same occurrence, they were consolidated and tried before the same jury. Both defendants were acquitted on the charge of maiming, and the son, D. E. Redditt, was acquitted on the charge of an assault with a deadly weapon, with intent to kill, resulting in serious injury; but the father, L. H. Redditt, was convicted on this latter charge, and from the judgment pronounced thereon he appeals, assigning errors.

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

W. A. Thompson, Lindsay C. Warren, and Small, MacLean & Rodman for defendant.

STACY, J. The statute under which the appealing defendant was indicted and convicted provides that any person who assaults another (1) with a deadly weapon, (2) with intent to kill, and (3) inflicts serious injury, not resulting in death, shall be guilty of a felony and shall be punishable by imprisonment in the State's Prison or be worked on the county roads for a period of not less than four months nor more than ten years. C. S., 4214. These three essential elements must be proved in order to warrant a conviction under the statute (*S. v. Crisp,* 188 N. C., 800), and the burden is on the State to establish them all, beyond a reasonable doubt, where the defendant enters a plea of "not guilty" to the charge contained in the bill of indictment, as was done in the instant case. *S. v. Singleton,* 183 N. C., 738; *Speas v. Bank,* 188 N. C., p. 527.

The following excerpt from the charge forms the basis of one of the defendant's exceptive assignments of error:

"In this case, gentlemen of the jury, when the defendants admit that they fired the guns which wounded Tobe Minor, the burden of proof thereupon shifts to the defendants to satisfy the jury that they were justifiable in shooting him. In other words, after having admitted that they shot him, the law presumes that they are guilty of assault with a deadly weapon, with intent to kill, and there is no dispute in this case that serious injury was inflicted upon him, and in that case the burden rests upon the defendants to satisfy the jury from such facts and circumstances as may appear from the evidence in the case that they acted in self-defense, and, therefore, were justifiable in shooting him."

This instruction, we think, must be held for error. The admission or proof of an assault with a deadly weapon, resulting in serious injury, but not in death, cannot be said, as a matter of law, on the present record, to establish a presumption of felonious intent, or intent to kill, sufficient to overcome the presumption of innocence, raised by a plea

of traverse, and cast upon the defendant the burden of disproving his guilt. *S. v. Wilbourne,* 87 N. C., 529; *S. v. Falkner,* 182 N. C., 793.

The intent to kill was denied by the defendants, it being their contention that they discharged their guns, loaded with bird shot, to repel an attack made upon them in which it reasonably appeared that they were in danger of losing their lives or sustaining great bodily harm. The case is dissimilar to an indictment for murder, where malice is presumed from the deliberate use of a deadly weapon; for there it could be said that the defendant intended the consequences of his act, but here the intent to kill, if present, was not followed by such grievous consequences. Hence, it cannot be said, as a matter of law, that the defendant intended to kill; his act fell short of that intention, and no killing occurred. The law will not ordinarily presume a murderous intent where no homicide is committed. This is a matter for the State to prove. *S. v. Allen,* 186 N. C., 302; *S. v. Hill,* 181 N. C., 558.

The case of *S. v. Knotts,* 168 N. C., 173, in no way conflicts with our present position, for there the Court was discussing the presumption of malice which arises from the deliberate use of a deadly weapon, and not the necessary intent to kill, as prescribed by the statute now before us.

The facts, adduced on the hearing, were amply sufficient to carry the case to the jury, but it was error to require the defendant to disprove the alleged intent to kill. This entitles the defendant to a new trial; and it is so ordered.

New trial.

LEE A. SMITH v. CITY OF WINSTON-SALEM.

(Filed 18 February, 1925.)

1. Courts—Superior Courts—Inferior Courts—Appeal—Supreme Court—Appeal and Error.

Where the Superior Court judge remands a case to the inferior or county court for another hearing, it is desirable that he specify the particulars upon which he has acted; and on appeal from him to the Supreme Court the question presented is whether error is shown on the face of the record.

2. Municipal Corporations — Cities and Towns — Charter — Statutes — Actions—Presentation of Claims—Damages.

Under the provisions of a city charter requiring that all claims arising in tort, etc., shall be presented in writing to the board of aldermen or the mayor, etc., within ninety days after the cause of action accrues: *Held,* a compliance with this requirement is necessary to the maintenance of

the cause of action against the city for its alleged negligence, unless valid excuse is shown, and where this demand has not been so made, the utmost damages the plaintiff could recover would be those arising within the 90 days or from the time the cause of action accrued, plus all future damages accruing thereafter, and an instruction that the plaintiff's recovery would relate back for three years next preceding the institution of the action, is reversible error.

HOKE, C. J.; CLARKSON, J., dissenting.

APPEAL by plaintiff from *Lane, J.,* at November Term, 1923, of FORSYTH.

Civil action tried in the Forsyth County court, resulting in a verdict and judgment for plaintiff. On appeal to the Superior Court, the cause was remanded for another hearing, without specifying in what particular or particulars error or errors had been committed on the trial. From this order plaintiff alone appeals, contending that no reversible error appears on the record.

Swink, Clement & Hutchins for plaintiff.
Parrish & Deal for defendant.

STACY, J. We are limited in our consideration on this appeal to the single question as to whether or not error was committed on the hearing, sufficient to warrant a *new trial.* We are precluded, by the condition of the record, from considering any other question. The plaintiff alone is appealing, and none of the defenses urged by the city and which go to the plaintiff's right to recover, is presented for decision on the present record. We therefore confine ourselves to this one question.

In passing, it may be remarked that when the Superior Court is sitting as an appellate court, subject to review by the Supreme Court, and a new trial is awarded and the cause remanded for another hearing, it is desirable for the judge to state separately, either at the time of the trial or in the case on appeal, the several rulings he considers erroneous and which induced his action, just as he is required to do when setting aside a verdict in his own court as a matter of law for errors committed during the trial, and not in the exercise of his discretion. *Powers v. City of Wilmington,* 177 N. C., 361.

Plaintiff alleges that in the summer of 1919, the defendant repaved certain streets in the city of Winston-Salem, and in doing so, negligently constructed an intake, for carrying off the surface waters on the west side of South Main Street, directly in front of his premises, so that in times of more than a light rainfall, water and refuse are collected and thrown upon his premises, causing serious damage to his property, etc. *Lockwood v. Dover,* 73 N. H., 209; 23 Mich. Law Review, 325. The

defendant denied all allegations of negligence, and set up as a bar to plaintiff's right to recover, the following provisions in its charter (section 94, chapter 180, Private Laws 1915):

"All claims or demands against the city of Winston-Salem arising in tort shall be presented to the board of aldermen of said city or to the mayor, in writing, signed by the claimant, his attorney or agent, within ninety (90) days after said claim or demand is due or the cause of action accrues; that no suit or action shall be brought thereon within ten (10) days or after the expiration of twelve (12) months from the time said claim is so presented, and unless the claim is so presented within ninety (90) days after the cause of action accrued, and unless suit is brought within twelve (12) months thereafter, any action thereon shall be barred."

Notice of claim, as required by the above section of the city charter, was filed by the plaintiff on 15 November, 1921, and thereafter on 15 December, 1921, the plaintiff instituted this action.

The trial court instructed the jury that the plaintiff was entitled to recover all damages which had accrued within three years next immediately preceding the institution of his action, on 15 December, 1921. In this, we think there was error. In no event would the plaintiff be entitled to recover damages for a longer period than ninety days prior to the filing of his notice, plus all future damages accruing thereafter. *Dayton v. City of Asheville,* 185 N. C., 12; *Earnhardt v. Comrs. of Lexington,* 157 N. C., 234. In other words, notice of demand within ninety days after the claim arises or the cause of action accrues, being a prerequisite to the right to bring a suit of this kind, it follows that where no notice is given within ninety days after the claim arises or the cause of action accrues, in the absence of a valid excuse therefor (*Terrell v. Washington,* 158 N. C., 282), no action may be maintained for any part of the claim that did not mature within ninety days immediately preceding the date of his demand, where the defendant insists upon the provisions of its charter, as it does here. *Board of Education v. Greenville,* 132 N. C., 4; *Dockery v. Hamlet,* 162 N. C., 118; *Wood v. Wood,* 186 N. C., 559.

There being no appeal by the defendant, the question is not presented on the present record, as to whether or not the plaintiff's entire claim is barred, under the principles announced in *Dayton v. Asheville,* 185 N. C., 12; *Earnhardt v. Comrs. of Lexington,* 157 N. C., 234, *Barcliff v. R. R.,* 168 N. C., 268, *Roberts v. Baldwin,* 151 N. C., 407, *Hocutt v. R. R.,* 124 N. C., 219. We, therefore, refrain from any discussion of the point.

There was error in the charge on the issue of damages, and this makes it necessary to affirm the judgment of the Superior Court.

Affirmed.

HOKE, C. J., dissenting: I am of opinion that the charter restrictions relied upon by the defendant in this suit were designed to affect the claimant's right to maintain his action only in reference to the time during which same should be commenced, and do not and were not intended to establish any new or different rule as to the admeasurement of damages.

Assuming, as we must do in the present condition of the record, and as the opinion of the Court does, that plaintiff has established his cause of action within the time, I think the trial court has laid down the correct rule for ascertaining the quantum of damages, and that the judgment on the verdict should be affirmed.

CLARKSON, J., concurs with HOKE, C. J., in dissent.

R. E. L. DANIEL ET AL. v. TOWN OF BELHAVEN.

(Filed 18 February, 1925.)

Verdict—Evidence—Deliberation—Appeal and Error.

Where upon the evidence in several consolidated cases to recover damages to the lands of the various parties, it is shown that the amount of damages, if any, each should recover would depend upon the establishment of different elements as to each, a verdict fixing a uniform per cent of the amount claimed by each as his damages obviously does not meet the requirement that the jury should deliberate upon the evidence and find the amount of damages in each case, and is properly set aside on motion.

APPEAL by plaintiff from *Sinclair, J.*, at September Term, 1924, of BEAUFORT.

The plaintiff Daniel alleged that the defendant had wrongfully obstructed the flow of the water from his land through its natural outlet and drainway and had thereby caused the water to be ponded thereon and that he had suffered loss by reason of damage to his crops and land.

The defendant denied these allegations.

Similar actions were brought by the other plaintiffs and by consent they were tried together.

The jury returned the following verdict:

"1. Did the defendant, Town of Belhaven, negligently install an inadequate and insufficient tile or drainway in street at Shoemake Creek, as alleged? Answer: 'Yes.'

"2. Did the defendant, Town of Belhaven, negligently pond water upon the lands of plaintiffs, as alleged? Answer: 'Yes.'

"3. If so, in what amount, if any, is the plaintiff, E. L. Swindell, damaged? Answer: '$90.00.'

"4. What amount, if any, is the plaintiff, R. Y. Credle, damaged? Answer: '$450.00.'

"5. What amount, if any, is the plaintiff, R. E. L. Daniel, damaged? Answer: '$180.00.'

"6. What amount, if any, is the plaintiff, W. F. Frisbee, damaged? Answer: '$150.00.'

"7. What amount, if any, is the plaintiff, Ed. Hargrove, damaged? Answer: '$180.00.'

"8. What amount, if any, is the plaintiff, E. F. Cahoon, damaged? Answer: '$360.00.'"

In the margin of the paper on which the verdict was written is the following entry: "The jury agrees that each man shall be paid 30 per cent of his claim."

The damage alleged in each case was as follows: "R. E. L. Daniel, $600; E. L. Swindell, $300; E. F. Cahoon, $1,200; R. Y. Credle, $1,500; W. F. Frisbee, $500; Ed. Hargrove, $600."

The plaintiff tendered a judgment in each case for the amount awarded by the jury and costs. The defendant moved to set aside the verdict, and the court made the following order: "It appearing upon the face of the verdict that it is not based upon the evidence as applied to each case, but that the jury adopted a general rule to give each plaintiff thirty per cent of the amount each claimed in his complaint, it is the opinion of the court that the verdict is improper and it is hereby set aside as a matter of law."

The plaintiffs excepted and appealed.

H. C. Carter for plaintiffs.
Tooley & McMullan for defendant.

PER CURIAM. The principle is established that in arriving at a verdict it is the duty of the jury to consider and determine the rights of the parties by exercising the judgment, weighing the evidence, and applying the law to the facts as found in every case. It is also held that a verdict is invalid if it appears to be more nearly the result of a mathematical calculation than of an exercise of judgment based on the evidence. There seems to be no satisfactory or practical distinction between a case in which the jurors agree to accept one-twelfth of the aggregate amount of their several estimates without further deliberation and a case in which they agree arbitrarily to award 30 per cent of the plaintiffs' demands apparently without due regard to the evidence in each case. This becomes more manifest upon a consideration of the verdict

in the light of the evidence. *Castelloe v. Jenkins,* 186 N. C., 166, 173; *S. v. Snipes,* 185 N. C., 743, 747. The ratio which the acreage bears to the several demands is not uniform; the character of the crops varies; similarity in point of cultivation does not appear. The verdict was manifestly the result of a mathematical calculation not governed by the proper exercise of judgment under the fixed rules of the law. *Ottowa v. Gilliland,* 88 A. S. R., 232; *Commonwealth v. Fisher,* 134 A. S. R., 1061; Note 16 Ann. Cas., 910; Note Ann. Cas., 1917, ch. 1224.

The order setting aside the verdict is

Affirmed.

W. S. SPENCER v. D. G. SAUNDERS.

(Filed 18 February, 1925.)

Register of Deeds — Marriage License — Statutes — Issues—Evidence—Questions for Jury—Instructions—Appeal and Error.

In an action by the father against the register of deeds to recover the penalty for his issuing a marriage license to his daughter under 18 years of age, C. S., 2503, it is a question of law for the court when the facts are admitted or not controverted, but otherwise for the jury, it then being for the court to instruct them in the law arising upon the evidence in the case, as to the recoverable injury, and upon exception aptly taken, his failure to do so is reversible error.

APPEAL by plaintiff from *Allen, J.,* at October Term, 1924, of HYDE.

Civil action to recover the penalty for issuing a marriage license in breach of C. S., 2503.

The plaintiff requested the following instructions: "If you find from the evidence that plaintiff's daughter, Lillian Harris, at the time of the issuance of the license, was under 18 years of age, and that plaintiff had not given his consent to the marriage, and find further that the defendant relied upon the statement of the prospective bridegroom and defendant's own estimate of the age of the plaintiff's daughter, without having personal knowledge of her age and without making further inquiry, then the defendant did not make such reasonable inquiry as required by law, and it would be your duty to answer the second issue 'Yes.'"

The court gave this instruction, but added the following: "But if he relied upon the statement of the bridegroom, and if he knew the prospective bridegroom and also the prospective bride, and he knew that he was of good character, and knew of her size and appearance, and he thought or believed, from her size and appearance, that she was a girl of 18, and she appeared to be to him 18 years old, he knowing both par-

ties; and you find by the greater weight of the evidence that he acted reasonably, and that it appeared to him probable that she was 18 years of age, and, without making further inquiry, he issued the license; if these facts are shown to you by the greater weight of the evidence, then you will answer the second issue 'No.' If, however, upon his own knowledge and such inquiry as he did make, if you find by the greater weight of the evidence that it was not a reasonable inquiry, and he issued the license without reasonable inquiry and without probable grounds to believe she was 18 years of age, then you will answer the second issue 'Yes.' In other words, the test is this, as I have said: did it appear probable and reasonable to him that she was 18 or more? That is a question for you to answer, from the evidence and by the greater weight of the evidence—was that sufficient and did it appear probable to him, as register of deeds, that she was over 18 years of age? And if it did so appear, with his own knowledge and with the inquiry that he did make, he would not be required to go further, and he would not be liable in this action."

The plaintiff excepted.

The following verdict was returned:

1. Was the plaintiff's daughter, Lillian Harris, under 18 years of age at the time of the issuance of the marriage license? Answer: "Yes."

2. Did the defendant issue the marriage license without reasonable inquiry? Answer: "No."

3. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: "None."

Judgment. Appeal by plaintiff.

Walter L. Spencer for plaintiff.
S. S. Mann for defendant.

PER CURIAM. Every register of deeds who, knowingly or without reasonable inquiry, issues a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of 18 years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian or other person standing *in loco parentis* who sues for the same. C. S., 2503.

Reasonable inquiry, within the meaning and intent of this statute, is a question of law for the court, upon facts admitted or found by the jury. If the facts are admitted, it is the duty of the court to instruct the jury whether they are sufficient to constitute reasonable inquiry; if they are in controversy, it is the duty of the court to instruct the jury that certain facts to be determined from the evidence do or do not constitute reasonable inquiry. *Gray v. Lentz,* 173 N. C., 346; *Wilkinson v. Wilkinson,* 159 N. C., 265.

After adopting the plaintiff's prayer, the trial court gave an additional instruction, which submitted to the jury as an issuable fact the legal question involved in the statutory requirement. In other words, the jury were permitted to exercise their judgment as to whether the defendant's inquiry was reasonable without any legal standard for determining whether their finding did or did not disclose reasonable inquiry within the meaning of the statute. They may have concluded the inquiry was reasonable upon a finding of facts which was altogether insufficient in law for that purpose.

There was error in the instruction, which entitles the plaintiff to a New trial.

W. C. SWAIN v. W. S. BONNER AND C. L. CARROW.

(Filed 18 February, 1925.)

1. Judgments—Verdict—Parties—Appeal and Error.

Where the verdict of the jury, in a suit properly constituted, and on evidence regularly presented, entitles the plaintiff to recover against two defendants in a certain amount, it is reversible error for the trial court to render judgment against only one of them in plaintiff's favor.

2. Same—Courts—Jurisdiction—Justice of the Peace.

Where an action has been brought against two defendants before a justice of the peace having jurisdiction of the subject-matter, one of them living within and the other without the county, it appearing of record they had both been served with summons, and both had appealed to the Superior Court: *Held*, they should both be bound by an adverse judgment.

CIVIL ACTION, heard on appeal from a justice's court at August Term, 1924, of TYRRELL, before *Allen, J.*, and a jury.

From a perusal of the record and case on appeal, it appears that plaintiff, making claim against the two defendants, instituted suit against them, returnable before W. L. Godwin, justice of the peace of said county; that summons was duly served on defendants, and on return day, defendants not appearing, evidence of plaintiff was duly presented and judgment rendered in his favor against both of defendants for $175.00. Defendants appealed, and on trial in Superior Court cause was submitted and verdict rendered, as follows:

"1. Are defendants indebted to plaintiff, and, if so, in what sum? Answer: '$212.50, less $125.' "

Judgment on verdict for plaintiff against defendant, W. S. Bonner. Plaintiff excepted and appealed, assigning for error that the judgment should have been entered against both of the defendants.

Thompson & Wilson for plaintiff.
No counsel for defendant.

HOKE, C. J., after stating the case: In *Lawrence v. Beck,* 185 N. C., pp. 196-200, it is said: "In this jurisdiction, and others basing their system of jurisprudence on the common-law principles, a judgment is but the conclusion that the law makes upon facts admitted or properly established in the course of a properly constituted suit; and when, in such proceedings, the ultimate facts have been so ascertained and declared, the correct judgment must follow and be entered thereon as of right." Citing *Beard v. Hall,* 79 N. C., p. 506; *Barnard v. Etheridge,* 15 N. C., p. 295; 23 Cyc., p. 665.

Considering the record in view of this accepted principle, it appears that plaintiff, in a suit duly constituted, and on evidence regularly presented, established his right of recovery against both defendants, and this result is fully affirmed by the jury verdict in the trial in the Superior Court, and there is nothing appearing in the cause to prevent the plaintiff from having his judgment on the verdict against both defendants.

True, it appears that one of the defendants seems to have been resident in another county, but the summons was served on him in said county, and, so far as the facts of record now disclose, the suit is properly constituted. 1 C. S., 1488. Apart from this, the record states that both defendants appealed from the justice's judgment and thereby submitted their cause to the court's jurisdiction.

For the error indicated, the cause is remanded, that judgment be entered for plaintiff against both defendants, as prayed.

Error.

FOUNTAIN DEPARTMENT STORE v. S. W. ANDERSON.

(Filed 18 February, 1925.)

Courts—Discretion—Judgments—Motions—Appeal and Error.

A motion to set aside a verdict as being against the weight of the evidence is addressed to the sound discretion of the trial judge, and is not reviewable on appeal when it appears, as on this appeal that this discretion had not been abused by him.

APPEAL by defendant from *Barnhill, J.,* at November Term, 1924, of EDGECOMBE.

IN RE RICKS.

Civil action on an account for goods, wares and merchandise sold and delivered. From judgment, in accordance with verdict, defendant appealed.

Allsbrook & Phillips for plaintiff.
Gilliam & Bond for defendant.

PER CURIAM. The issue submitted to the jury in this case, was, "In what amount, if any, is defendant indebted to plaintiffs?" Defendant admits that he is indebted to plaintiffs, for balance due on account for 1920. The amount only is in controversy, plaintiffs contending that this amount is $1,156, defendant contending that it is $80.47. It is admitted that the balance due bears interest from 1 January, 1921. The jury finds that the balance due is $900.

First assignment of error is the refusal of his Honor to set aside the verdict, upon motion of defendant, on the ground that same was against the weight of the evidence. This motion was admittedly addressed to the discretion of the court. The refusal of the motion is not subject to review, unless there was an abuse of this discretion. *Bailey v. Mineral Co.*, 183 N. C., 525.

A careful consideration of all the evidence submitted to the jury does not disclose that there was an abuse of discretion in this case. The issue involves only the controversy as to the balance due to plaintiffs by defendant. This was essentially a matter for the jury. There is sufficient evidence to sustain the verdict, and the assignment of error is not sustained.

Nor was there any error in the instructions of the court to the jury, or in the failure to give instructions as set out in defendant's exceptions.

There is

No error.

IN RE WILL OF TEMPE E. RICKS.

(Filed 18 February, 1925.)

Appeal and Error—Case—Settlement by Judge—Record.

Where, upon disagreement of counsel, the trial judge has regularly settled the case on appeal, the case so settled imports verity and must be accepted as true as to all matters involved therein and determined by the judge; and where only one party has appealed, the other may not successfully move before another judge holding a subsequent term of court to have the judgment set aside as embracing an unauthorized agreement by their attorney, evidently passed upon by the former judge in settling the cause.

CONNOR, J., not sitting.

IN RE RICKS.

APPEAL by caveators from an order of *Devin, J.,* denying their motion to set aside a judgment rendered by *Bond, J.,* at April Term, 1924, of NASH.

At the trial (April Term, 1924) the issue of *devisavit vel non* was answered in favor of the propounders, and judgment was rendered in their favor, but they were taxed with the costs. The caveators appealed, and upon disagreement of counsel Judge Bond settled the case on appeal to the Supreme Court, but the appellants declined to prosecute the appeal.

Thereafter (November Term, 1924) the caveators made a motion before Judge Devin to set aside the judgment entered upon the verdict at the April Term, 1924, on the ground that their attorneys compromised, but had no authority to compromise, their clients' cause of action, by agreeing not to appeal if the propounders were taxed with the costs. Judge Devin denied the motion, and the caveators excepted and appealed.

R. L. Ray & Son and N. Y. Gulley for appellants.

Spruill & Spruill, Battle & Winslow, and Finch & Vaughan for appellees.

ADAMS, J. It is perfectly evident from one of the affidavits in the record that the question presented to Judge Devin had previously been considered and disposed of by Judge Bond. Indeed, the facts were determined, according to the affidavit, when the case on appeal and the countercase were submitted to the trial judge for settlement. In these circumstances the case on appeal is controlling; it imports verity and must be accepted as true as to all matters involved in the appeal and determined by the judge. *S. v. Thomas,* 184 N. C., 666. The appellants had no right to call upon Judge Devin to decide a question which Judge Bond had previously considered in making up the case on appeal. *Bizzell v. Equipment Co.,* 182 N. C., 98, is not conclusive on the point raised here. In that case it is stated that want of authority to compromise the case was unknown to the presiding judge and was "only made to appear at a later hearing."

The caveators surely should not object to a judgment against the propounders for the costs; and if not content with the judgment in other respects, they should have prosecuted their appeal. *Runnion v. Ramsay,* 93 N. C., 411; *Falkner v. Hunt,* 68 N. C., 475.

The judgment is

Affirmed.

CONNOR, J., not sitting.

M. B. GILLAM v. ROBERT P. WALKER AND W. C. SPRUILL.

(Filed 25 February, 1925.)

1. Bills and Notes—Negotiable Instruments—Surety—Endorser—Agreement to Waive Notice—Statutes.

Where upon the face of a negotiable note there is an agreement to waive notice of dishonor or an extension of time, etc., one placing his name on the back thereof is deemed to be an endorser without indication of other liability therein, and is bound by the agreement expressed in the face of the instrument waiving notice, etc. C. S., 2998 (6), 3044, 3092.

2. Same—Evidence—Equity—Contribution—Actions.

It may be shown by parol evidence as between one signing a negotiable note and one who has endorsed the same that the former had signed for the accommodation of the maker, and the endorser for accommodation had verbally agreed with the surety whose name appeared upon the face of the note as a joint maker, that they both were to be bound equally thereon as sureties, and under the evidence in this case, the comaker who has paid the note, may maintain his action for contribution against the one whose name appeared thereon as endorser. C. S., 3965.

APPEAL by defendant, Robert P. Walker, from *Bond, J.*, and a jury, at August Term, 1924, of BERTIE.

This suit grows out of the following note:

"$2,000. RALEIGH, N. C., 18 July, 1921.

"Sixty days after date, without grace, we promise to pay the Merchants National Bank, or order, the sum of two thousand dollars, negotiable and payable at said bank, with interest after maturity, if unpaid, at the rate of six per cent per annum, payable semiannually, for value received, being for money borrowed; and the subscribers and endorsers hereby agree to continue and remain bound for the payment of this note and all interest thereon, notwithstanding any extension of time granted to the principal, and notwithstanding any failure or omission to protest this note for nonpayment, or to give notice of nonpayment or dishonor or protest, or to make presentment or demand for payment, thereby expressly waiving any protest and any and all notice of any extension of time or of nonpayment or dishonor or protest in any form, or any presentment or demand for payment, or any other notice whatsoever.

9/16 W. C. SPRUILL,
M. B. GILLAM."

The name of Robert P. Walker is on the back of this note.

It is admitted that Robert P. Walker signed the note. This note was a renewal of notes theretofore executed, all of which, as appears from

the record, were executed in exactly a similar manner. M. B. Gillam, the plaintiff, was compelled to pay the note to the bank, W. C. Spruill having become insolvent; and this suit is brought against Robert P. Walker to contribute one-half of the amount paid by plaintiff.

The plaintiff contends that he and Walker were liable in equal degree, and that both were sureties, and that W. C. Spruill was principal on the note. The record shows that Spruill was the real beneficiary of the note.

It is contended by defendant Walker that he wrote his name across the back of the note as an accommodation endorser without any consideration to him; that the note became due 16 September, 1921. The note was not paid, and Walker was not notified of this fact until 21 March, 1922, over six months after the maturity of the note. That the plaintiff, M. B. Gillam, and W. C. Spruill executed the note jointly and were joint makers.

The following issues were submitted to the jury, and their answers thereto:

"1. Is the defendant R. P. Walker indebted unto the plaintiff, M. B. Gillam? Answer: 'Yes.'

"2. If so indebted, then in what sum? Answer: '$1,080.75, with interest on same from 10 January, 1923.'.

"3. Is defendant W. C. Spruill indebted unto M. B. Gillam, plaintiff, and if so, in what sum? Answer: 'Yes, $2,161.50, with interest on same from 10 January, 1923.' "

The court below rendered judgment in accordance with the verdict. The defendant Walker excepted, and assigned error, and appealed to the Supreme Court. Numerous exceptions and assignments of error appear in the record. The material ones we will consider in the opinion, and other facts necessary for the determination of the controversy.

Winston & Matthews and John W. Davenport for plaintiff.
W. L. Whitley for defendant.

CLARKSON, J. The main questions in this suit are: (1) Were M. B. Gillam and Robert P. Walker sureties on the W. C. Spruill note, and can Gillam sue Walker for contribution? (2) Can this fact be shown by parol evidence?

The defendant Walker contends that the note speaks for itself; that Gillam is an "accommodation maker" and Walker an "accommodation endorser"; that Gillam's liability is primary to that of Walker, and that when he paid the note, he did so voluntarily in discharge of that liability, thereby discharging the note, and that he cannot now call

upon Walker for contribution; that parol evidence is incompetent to change this liability; that there is no competent evidence, upon the whole record, to show any valid agreement between Walker and Gillam, upon which to predicate the theory of joint suretyship; that, on the entire record, defendant's motion for judgment as of nonsuit should have been granted; that defendant's prayer for instruction that on all the evidence plaintiff could not recover, and the first issue, should be answered "No." After careful reading of the entire record and the authorities, we cannot so hold.

It will be noted in the present case the bank is not suing on the note. The rights of third parties are not involved. The action is for contribution between the parties to the note.

"Prima facie, an indorser of a promissory note is not a cosurety with a surety who signs the note as maker, but it may be shown by parol evidence that they were in fact cosureties. . . . It is a general rule that the true relation subsisting between the several parties bound for the performance of a written obligation may be shown by parol evidence. . . . The surety on the face of a note, and an accommodation indorser, may, as between themselves, be shown by parol to be cosureties by virtue of a verbal understanding to that effect. So, several successive accommodation indorsers of a negotiable instrument may be shown by parol to be cosureties." Brandt Suretyship Guaranty, Vol. 1 (3 ed.), pp. 562-3; *Sykes v. Everett,* 167 N. C., 600.

Mr. Brandt (page 562, *supra*) gives the reason: "The liability to contribution does not arise from contract, but from equitable principles. There is no agreement between the sureties contained in the obligation signed by them. The agreement is between the obligors and obligees. As between the various sureties, there is no written agreement; there is only an equitable presumption, raised by the fact of payment, that the sureties ought to contribute equally for the default of the principal. This equity can be rebutted by parol." *Comrs. v. Dorsett,* 151 N. C., p. 307.

C. S., 2998, subsec. 6, is as follows: "Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser."

C. S., 3044, is as follows: "A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

Whatever may have been the law heretofore, under our present negotiable-instrument law, a person placing his name on the back of a note is deemed an indorser, unless otherwise indicated. *Perry v. Taylor,* 148 N. C., 362.

C. S., 3092, is as follows: "Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only."

In *Bank v. Johnston,* 169 N. C., p. 528, it is said: "It is well settled that a surety on a promissory note or bond is not entitled to notice of dishonor or nonpayment, but one who places his signature upon the back of a commercial paper without indication that he signed in any other capacity is deemed an indorser, and is entitled to notice of dishonor. *Houser v. Fayssoux,* 168 N. C., 1; *Bank v. Wilson,* 168 N. C., 557. This notice of dishonor may be waived by the indorser before or after the maturity of the note, by express words or by necessary implication. When so waived, notice of dishonor need not be given."

In the present case the waiver of notice of dishonor is embodied in the note; therefore, that question does not arise.

From the authorities in this State and elsewhere, we think parol testimony clearly admissible to show the agreement between Gillam and Walker upon which to predicate the relationship of joint suretyship, but defendant Walker contends that if this be true the evidence was not sufficient to establish the agreement. W. C. Spruill, the principal of the note, testified: "I spoke to R. P. Walker, in Plymouth, and he agreed to become bound with Mr. Gillam. I had not spoken to Mr. Gillam up to that time. At the time Mr. Walker agreed to become surety, he recalled to me that he had been assisted, when he started out, by a friend helping him, and said he was willing to help me if Mr. Gillam would become equally bound with him as surety. He agreed to sign if his signing would help me."

The plaintiff, Gillam, on 8 September, 1922, wrote defendant, inclosing a renewal note. Defendant testified: "This is the letter and note I received. On this note Spruill is the maker, and M. B. Gillam's name is on the back, and I refused to sign it because of the difference in place of M. B. Gillam's name." This letter read: "I am inclosing for your indorsement note of W. C. Spruill for $2,000, covering like note due Merchants National Bank of Raleigh, on which you and I are sureties," etc. Defendant denied that he was surety, but it was evidence to be considered with the other evidence that there was a mutual understanding between the parties that, although defendant indorsed the note, in fact, they were sureties.

Defendant wrote plaintiff, on 23 March, 1922, in regard to the note then in the Merchants National Bank of Raleigh. Mr. Drake was president of the bank. He said: "If Wilber (meaning Wilber C. Spruill) is unwilling or unable to do anything with Mr. Drake, it appears to me that you and I had better take a hand in the matter." This and other evidence and circumstances were sufficient to submit to the jury.

Upon proper charge by the court below, the jury, on the evidence, found that plaintiff and defendant were cosureties on the Spruill note, and answered the first issue "Yes."

One surety has the right to sue his cosurety under facts and circumstances as in this case.

C. S., 3965, is as follows: "Where there are two or more sureties for the performance of a contract, and one or more of them may have been compelled to perform and satisfy the same, or any part thereof, and the principal shall be insolvent or out of the State, such surety may have and maintain an action against every other surety for a just and ratable proportion of the sum which may have been paid as aforesaid, whether of principal, interest, or cost." *Shuford v. Cook,* 164 N. C., 46.

The case of *Bank v. Burch,* 145 N. C., p. 316, cited by defendant, is not contrary to the position taken in the present case. In that case the Court said: "In order to constitute the appellant, Smith, a cosurety with the defendant, L. R. Burch, there must have been a mutual understanding between the parties to that effect." In the *Burch case* there was no evidence that there was an agreement of cosuretyship, as in the present case.

Meyers v. Battle, 170 N. C., 168, cited by defendant as authority, we do not think sustains his position. In that case *Brown, J.,* says: "The plaintiff undertook to prove by parol evidence that defendant signed as an *original promissor* and not as an indorser. We suppose, by the term 'original promissor' is meant that defendant signed either as principal or surety, so as to dispense with notice of nonpayment as well as presentation, in order to charge him. We think his Honor erred in admitting such evidence. The statute (Rev., 2212, 2213, now C. S., 3044-5) declares that a person placing his signature upon an instrument, otherwise than a maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. It is so held in *Perry v. Taylor,* 148 N. C., 362, and *Houser v. Fayssoux,* 168 N. C., 1. There is nothing in or on the notes sued on which indicates that the defendant intended to be charged other than as indorser. *Of course, this does not prevent an indorser from showing that his indorsement was an accommodation indorsement, or from showing the relation of indorsers as between themselves.*" (Italics ours.)

Mr. Page, in his treatise on the Law of Contracts (2 ed.), Vol. 4, sec. 2200, says: "Whether a contract of indorsement can be varied by contemporaneous parol agreement depends on whether it is looked upon as a complete contract. A regular indorsement—that is, an indorsement by one in the chain of title—is held in many jurisdictions to be a complete contract, and hence within the parol-evidence rule. Where

this view obtains, a parol agreement that an indorsement was without recourse, . . . or that he entered into an oral contract of guaranty, or that he was a maker, is in each case unenforceable." Mr. Page, in citing authorities in other states, refers to the cases cited by defendant. *Meyers v. Battle,* 170 N. C., 168; 86 S. E., 1034 (citing *Perry v. Taylor,* 148 N. C., 362; 62 S. E., 423, and *Houser v. Fayssoux,* 168 N. C., 1; 83 S. E., 692).

Mr. Justice Hoke, in *Bank v. Wilson,* 168 N. C., 557, at p. 560, in speaking of the negotiable-instrument law in this State, says: "On the facts as presented, it would seem to be the purpose of the statute to fix the status of this defendant as an indorser, and to exclude parol evidence to the contrary in this and all cases coming under the statutory provision, 'unless he clearly indicates by appropriate words his intention to be bound in some other capacity.' There is conflict of authority, however, as to the effect and extent of this statutory change (see Daniel on Negotiable Instruments, 6 ed., pp. 806-7, annotations by T. H. Calvert, more particularly notes 32 and 33), and we are not called on to determine the question, in this case, for the reason that the jury, under a correct charge, has found that due and proper notice has been given, and defendant is liable, therefore, whether indorser or surety."

The present case does not fall within the principle contended for by defendant in the above North Carolina cases which he cites. It will be noted that in *Meyers v. Battle, supra,* the learned judge distinctly says: "Of course, this does not prevent an indorser from showing that his indorsement was an accommodation indorsement, or from showing the relation of indorsers as between themselves." This latter principle is the one which the plaintiff relies on in this case, and which we think correct.

From a careful review of the entire record and authorities, we can find

No error.

S. J. ROBERTS v. T. M. MERRITT.

(Filed 25 February, 1925.)

Pleadings—Clerks of Court—Courts—Jurisdiction—Order Allowing Extension of Time.

The powers of the trial judge to permit the filing of an answer to a complaint are not affected by Public Laws 1921, Extra Session, ch. 92, sec. 1 (3), restricting the power of the clerk of the court to allow answer to be filed after the statutory time.

APPEAL by plaintiff from *Barnhill, J.,* at October Term, 1924, of WAYNE.

The judge found the facts to be as follows:

"The summons in the above-entitled cause was issued by the clerk of the Superior Court of Wayne County on 22 December, 1922, addressed to the sheriff of Wayne County, commanding him to summons T. M. Merritt, the defendant, to appear at the office of the clerk of the Superior Court of Wayne County on 8 January, 1923, and answer the complaint which would be deposited on or before that date, and notified defendant if he failed to answer or demur within twenty days from the return date of said summons, relief prayed for in the complaint would be granted; that the said summons was personally served on the defendant by the sheriff of Wayne County on 23 December, 1922; that a duly verified complaint was filed on the return date, to wit, 8 January, 1923; that the defendant did not file any answer within twenty days after the return day of said summons and after the statutory time in which to file answer had expired, and before answer was filed the plaintiff objected to the clerk permitting answer to be filed, and excepted to the filing of the answer. A duly verified answer was filed on 24 February, 1923. The summons docket of the clerk of the Superior Court shows the following entries:

"Summons issued 22 December, 1922. Summons returnable 8 January, 1923. Summons served 23 December, 1922. Complaint filed 8 January, 1923. Answer filed 24 February, 1923. Transferred to civil issue trial docket October Term, 1923. Time extended for answer by the clerk, as shown by his docket entries, but such time was not extended to a day certain, as required by statute. The plaintiff filed with the clerk a motion to strike out the answer and for judgment by default and inquiry. On 23 October, 1923, plaintiff subsequently tendered judgment to strike out answer, and for judgment by default and inquiry, which the clerk declined to sign, and to which plaintiff excepted. That the plaintiff tendered judgment finding the facts as alleged by the plaintiff, and declining to render judgment of any kind, which the clerk declined to sign, to which the plaintiff excepted; that this case was calendared for trial at the April Term, 1924, and June Term, 1924, but same was in each instance continued at the request of the plaintiff.

"The plaintiff has not been delayed in the trial of this case by reason of the delay of the defendant in filing his answer, and the defendant has a meritorious defense to the cause of action set out in the complaint."

Judgment: Upon the foregoing facts, found at the request of the plaintiff, the court, in the exercise of its sound discretion, denies the motion of the plaintiff to strike out the answer and enter judgment by default and inquiry, and permits the defendant to file his answer *nunc pro tunc.*

John H. Manning for plaintiff, appellant.
W. S. O'B. Robinson for defendant, appellee.

PER CURIAM. The clerk made an order extending the time for filing the answer, but not to a day certain, as the statute requires. Public Laws 1921, Extra Session, ch. 92, sec. 1 (3). After the statutory time for filing the answer had expired, the clerk permitted the answer to be filed, and the plaintiff excepted. The case was then transferred to the civil issue docket.

Whether the clerk's order extending the time for answering without naming a "day certain" was invalid or merely irregular we need not now determine. In the Superior Court the plaintiff twice procured a continuance of the cause; and upon the facts appearing in the record whether the answer should have been retained or stricken from the file was a matter addressed to the sound discretion of the presiding judge. In *McNair v. Yarboro,* 186 N. C., 111, it is held that the restrictions referred to do not and were not intended to impair the broad powers conferred on the judge by section 536 of the Consolidated Statutes: "The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order to enlarge the time."

The judgment is

Affirmed.

B. E. EDMONDSON, NEXT FRIEND OF FRANCIS LEIGH, ANNIE BLANCHE LEIGH, HOMER LEIGH, AND JULIAN LEIGH, INFANT CHILDREN OF EFFIE EDMONDSON LEIGH AND HER HUSBAND, GEORGE LEIGH (DECEASED); H. D. HARDISON, NEXT FRIEND OF BERTHA LEIGH THIGPEN AND JOHN LEIGH, INFANT CHILDREN OF COLUMBUS LEIGH, (DECEASED); H. D. HARDISON, NEXT FRIEND OF MARTHA LEIGH AND THOMAS HENRY LEIGH, INFANT CHILDREN OF CALVIN LEIGH, (DECEASED), v. WILLIAM G. W. LEIGH, TURNER LEIGH, MARY JOHNSTON AND HUSBAND, SAMUEL JOHNSTON; MARION LEIGH, WILLIAM ANN HATHAWAY, MARTHA WILLIAMS AND HUSBAND, DAVID WILLIAMS; JENNIE BELL LEIGH, AND EFFIE LEIGH.

(Filed 25 February, 1925.)

1. Wills — Estates — Contingent Remainders — "Issue" — "Children"— Statutes.

The intent of the testator, as gathered from the language of his will, construed as a whole, will control its interpretation, and he may so use the word "issue," in a devise of lands, in connection with the word "children," etc., as to mean lineal descendants.

2. Same—Partition.

A devise of lands to testator's two sons for life, if either should die without issue the lands to go to the whole of their children—that is, one-half to the children of each—according to the law of the land: *Held*, upon the happening of the contingency, the children of the two sons, the grandchildren of the testator, will take the lands so devised, and the grandchildren of the first takers were not excluded under the terms of the devise; and *held, further*, a partition of the lands between the first takers, the testator's two sons, could only affect their own life estate.

APPEAL by defendants from *Devin, J.*, at October Term, 1924, of EDGECOMBE.

William C. Leigh died in Edgecombe County leaving a last will and testament dated 6 November, 1854. The will was duly probated in 1855 and is recorded in the office of the clerk of the Superior Court of said county in Will Book G, pages 103 *et seq.* Items 6 and 8 of said last will and testament are the only items thereof which are pertinent to this controversy, and said items 6 and 8 are in words and figures as follows:

"Item 6. I lend unto my two sons, Francis M. Leigh and William G. W. Leigh, during their natural lives, one tract of land called the Scott land and one tract of land called the Cherry land, and one tract called the Temperance Pippin land, reserving 30 square yards around the graveyard as the deeds will more fully show, and the tract whereon I now live, after the death of my wife Lucy Leigh, reserving 30 square yards around the graveyard, and the Brown tract after the death or widowhood of my wife Lucy Leigh as the deed will show, and the tract I purchased from Christopher Harrell, and if Francis or William should either of them die without issue, then the other one is to take all the land above described and in the same manner as is loaned to both of them, or, if either Francis or William should die leaving a widow for her to be entitled to a dower of one-third in value of one-half of said land, and provided Francis and William should die leaving children, I give and bequeath all of said land to the whole of their children, that is, one-half of said land to the children of each, according to the laws of the State, and if Francis or William should either of them die without children, then, I lend the whole of said land to the other for life, and then, I give and bequeath the said land to his children; and if both Francis and William should die without children then I give the whole of said land to the children of John H. Leigh and Temperance Harrell, one-half to John's children, and the other half to Temperance's children, and if John should die leaving no children then I give the whole of the land to the children of Temperance Harrell."

"Item 8. It is my will and desire that my executors shall have 3 years to settle my estate, and shall have the right to rent out all my lands that I have not loaned to my wife Lucy Leigh, and if my estate shall be destitute of funds to pay all my just debts and legacies, that I have given away, and any of my estate shall have to be sold to pay the remaining parts of my debts and legacies after using all the funds on hand, it is my will and desire that my tract called the Temperance Pippin land shall be sold up to the post oak near the road, then south through the Josey Pond to Jesse Stancill's line, and if there should be any money remaining after paying all my just debts and legacies I give and bequeath all the balance of the money to my two sons, that is, Francis M. Leigh and William G. W. Leigh, to them and their heirs forever."

At the death of William C. Leigh, he was seized in fee and possessed of all the land described in the above items of his will.

Francis M. Leigh and William G. W. Leigh had a partition of the land set forth in item 6 of their father's will. The two sons were the sole parties to the partition proceeding, which was by order of court and recorded in the office of the register of deeds of Edgecombe County, Book 28, p. 161. The land set forth in item 8 was sold by the executors to one Lawrence Bunting and deed duly made and recorded in office of register of deeds of Edgecombe County, Book 28, p. 628.

Lucy Leigh, wife of William C. Leigh, is long since dead. Francis M. Leigh, son of testator and mentioned in items 6 and 8 of said last will and testament, died on the ..... day of January, 1923; that the wife of Francis M. Leigh predeceased him many years, and the said Francis M. Leigh never remarried.

There were born of the marriage between said Francis M. Leigh and his wife the following children, to wit, George Leigh, Columbus Leigh, Marion Leigh, Mary Leigh Johnston, Turner Leigh, Martha Leigh Johnston, Effie Leigh, Calvin Leigh and William Ann Hathaway.

George Leigh, one of the children above mentioned, intermarried with Effie Edmondson, and died ..... April, 1917, and prior to the death of his father, Francis M. Leigh. George Leigh left him surviving his widow, Effie Edmondson, and the four following children, to wit, Francis Leigh, Annie Blanche Leigh, Homer Leigh and Julian Leigh.

Columbus Leigh, one of the children of Francis M. Leigh, above mentioned, died some 7 or 8 years prior to the death of Francis M. Leigh, his father, leaving him surviving his widow, Jennie Bell Leigh, and the two following children, to wit, Bertha Leigh Thigpen and John Leigh.

Calvin Leigh, one of the children of Francis M. Leigh, above mentioned, died several years prior to the death of Francis M. Leigh, his

father, leaving him surviving his widow, Effie Leigh, and two following children, to wit, Martha Leigh and Thomas Leigh.

All the children of George Leigh, Columbus Leigh and Calvin Leigh are infants, under the age of 21 years and are parties plaintiff to this action and are represented by duly appointed next friends.

The remaining children of Francis M. Leigh, son of testator, are now living and are all *sui juris* and parties to this action.

William G. W. Leigh, son of testator, and brother of Francis M. Leigh, deceased, is now living and is, and has been in possession of the tracts of land allotted to him in the partition proceedings aforementioned had between him and his brother, Francis M. Leigh, deceased.

Marion Leigh, Mary Leigh Johnston, Turner Leigh, Martha Leigh Williams, Effie Leigh and William Ann Hathaway, the living children of William C. Leigh, testator, are now, and have been since the death of their father, in possession of the land allotted to said Francis M. Leigh, deceased, in the partition proceedings aforementioned.

It is contended by plaintiffs that Francis Leigh, Annie Blanche Leigh, Homer Leigh and Julian Leigh, infant children of George Leigh, deceased, are together entitled to an undivided one-eighteenth interest in all of the land set out and described in item 6 of the last will and testament of William C. Leigh, deceased.

That Bertha Leigh Thigpen and John Leigh, infant children of Columbus Leigh, are together entitled to a one-eighteenth undivided interest in said lands.

That Martha Leigh and Thos. Henry Leigh, infant children of Calvin Leigh, are together entitled to a one-eighteenth undivided interest in said lands.

Defendants demur to plaintiffs' action on the following grounds:

"For that under the terms and conditions of the will of William C. Leigh, the children of George Leigh, Calvin Leigh, and Columbus Leigh, the plaintiffs herein, are not devisees of said Leigh and have no interest in the lands devised by him, and take nothing under his will. And for that the complaint does not state a cause of action.

"For that the complaint does not allege and show that the children of the said George Leigh, Calvin Leigh, and Columbus Leigh are not barred by the partition of said lands between Francis M. Leigh and W. G. W. Leigh, the first takers."

The court below rendered judgment, in part, as follows: "It is further ordered, adjudged and decreed that Francis Leigh, Annie Blanche Leigh, Homer Leigh and Julian Leigh, infant children of Effie Edmondson Leigh and her husband George Leigh, deceased, are the owners of an undivided one-eighteenth interest in the lands described and mentioned in item 6 of the last will and testament of William C.

Leigh, deceased, except that portion of said lands described in item 8 of said last will and testament which portion was sold by the executors of the estate of William C. Leigh, testator; that Bertha Leigh Thigpen and John Leigh, infant children of Columbus Leigh, deceased, are the owners of an undivided one-eighteenth interest in said lands; and that Martha Leigh and Thos. Henry Leigh, infant children of Calvin Leigh, deceased, are the owners of an undivided one-eighteenth interest in said lands."

The defendants duly excepted to the judgment and assigned error and appealed to the Supreme Court.

H. H. Phillips for plaintiffs.
John L. Bridgers and Gilliam & Bond for defendants.

CLARKSON, J. The two questions presented in this appeal are:

(1) Do the words "issue," "the whole of their children, . . . according to the laws of this State," and "children," used in the testator's will, include and embrace testator's great-grandchildren (the children of children who died prior to the first life takers)?

(2) Was the partition had between Francis M. Leigh and William G. W. Leigh (the two life tenants) binding upon the remaindermen who were entitled to the land and the possession thereof upon the death of the life tenants, or either of them?

It is settled law in this State that the intent of the testator, as expressed by the terms and language of the entire will, must be given effect unless in violation of law. "Every tub stands upon its own bottom," except as to the meaning of words and phrases of a settled legal purport. A will must be construed "taking it by its four corners." *Patterson v. McCormick,* 181 N. C., p. 313; *Smith v. Creech,* 186 N. C., p. 190; *Wells v. Williams,* 187 N. C., p. 138.

The defendants rely strongly on *Lee v. Baird,* 132 N. C., p. 755. In that case, *Mr. Justice H. G. Connor,* says: "Certainly the use of the words 'all my children' by the testatrix is free from ambiguity and the uniform current of authority in this and other courts sustains the proposition that they will not be construed to include grandchildren unless from necessity, which occurs when the will would be inoperative unless the sense of the word 'children' were extended beyond its natural import and when the testator has clearly shown by other words that he did not use the term 'children' in the ordinary actual meaning of the word but in a more extensive sense; that this construction can only arise from a clear intention or necessary implication, as where there are no children but are grandchildren, or where the term children is further explained by a limitation over in default of issue."

In the *Baird will case, supra,* the testatrix, Mrs. Baird, when she made the will had seven living children and six living grandchildren—children of a deceased daughter, Mrs. Lee. She also had numerous other grandchildren, children of living children. The deceased daughter, Mrs. Lee, had married a man of wealth and she had received large sums by way of advancements. Other pertinent facts appear in the will showing an intent as to the meaning of "all my children." The main clause in the Baird will relied on, is as follows: "I bequeath to my daughter, Vickie Baird, all my household and kitchen furniture, to be hers forever, and I bequeath to Vickie during her life time my Forest Hill property; and at her death to be sold and divided equally among all my children."

The setting of the parties and the language in the Baird will are different from the instant case. In item 6, William C. Leigh, the testator, uses these words: "If Francis or William should either of them *die without issue* . . . I give and bequeath all of my said land *to the whole of their children,* that is, one-half of said land to the children of each, *according to the laws of this State,*" etc. After that he uses the word "children" many times, but in the latter part of item 8 of the will he says, in regard to the balance after the sale of certain land for the payment of debts and legacies by his executors, "I give and bequeath to my two sons, that is, Francis M. Leigh and William G. W. Leigh, *to them and their heirs forever.*"

It will be noted that the testator used the words "die without issue" referring to the first takers—those who have a life estate. The usual acceptance of the word "issue" is "an indefinite succession of lineal descendants who are to take by inheritance, and hence heirs of the body." (*Harrell v. Hagan,* 147 N. C., 116.) He qualifies the word "children" by saying, *"the whole of their children . . . according to the laws of this State."* The law in regard to descent, C. S., 1654, Rule 3, is as follows:

"Lineal descendant represents ancestor. The lineal descendant of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living."

"The word 'issue' is usually construed to mean more than children.

"In real law. Descendants. All persons who have descended from a common ancestor. 3 Ves., 257; 17 Ves., 481; 19 Ves., 547; 1 Rop. Leg., 90. In this sense, the word includes not only a child or children, but all other descendants in whatever degree; and it is so construed generally in deeds. But, when used in wills, it is, of course, subject to the rule of construction that the intention of the testator, as ascertained from the will, is to have effect, rather than the technical meaning of the language used by him; and hence, issue may, in such a connection, be

restricted to children, or to descendants living at the death of the testator, where such an intention clearly appears. Abbott." Black's Law Dictionary, p. 658. *Harrell v. Hagan, supra; Fillyaw v. Van Lear,* 188 N. C., 772.

Taking the words "issue," "the whole of their children . . . according to the laws of this State,"—after the executors were given power to sell certain land to pay debts and legacies, "the balance of the money to my two sons, that is Francis M. Leigh and William G. W. Leigh, to them and their heirs forever,"—it seems that by clear intention or necessary implication the grandchildren of the first takers would be entitled to their parent's share.

The fact that in subsequent portions of item 6 of the will "children" is used, we think the word "children" is taken as qualified by the word "issue" and "according to the laws of this State."

In *Carroll v. Herring,* 180 N. C., p. 372, it is said: "The law, also, if possible, adopts the just, natural and reasonable rule of an equal distribution among children (40 Cyc., 1411), and if words are used in one part of a will in a certain sense, the same meaning is to be given them when repeated in other parts of the will, unless a contrary intent appears. It is a well settled rule of testamentary construction that if it is apparent that in one use of a word or phrase a particular significance is attached thereto by the testator, the same meaning will be presumed to be intended in all other instances of the use by him of the same word or phrase. *Taylor v. Taylor,* 174 N. C., 537."

Courts look to the will as a whole to discover testator's intention. We think from reasonable, just and righteous interpretation of the entire will, the testator did not intend to exclude grandchildren of the first takers, and the holding of the court below was correct. We do not think the partition between the two sons, life tenants, binding on any one except themselves during their lifetime. This is so clear we do not think it necessary to discuss it.

The judgment below is

Affirmed.

J. H. GURGANUS v. GREENVILLE MANUFACTURING COMPANY.

(Filed 25 February, 1925.)

Partnership—Employer and Employee — Independent Contractor—Evidence — Share in Profits — Negligence — Instructions—Appeal and Error.

While an agreement for the sharing of the profits of a business undertaking is strong evidence of a partnership creating a joint and several liability of the parties, it may be shown that it was to fix the compensa-

tion one of them was to receive from the other as an independent contractor, and to exclude the one from liability to an employee of the other, the independent contractor, who was physically injured by the latter's negligence; and where the evidence is conflicting, an instruction that fixes them both with joint and several liability depending upon the evidence of the partnership, is reversible error.

CLARKSON, J., dissents.

APPEAL by Greenville Manufacturing Company from *Barnhill, J.*, at November Term, 1924, of EDGECOMBE.

Civil action to recover damages for an alleged breach of a lumbering contract.

From a verdict and judgment for plaintiff, the defendant, Greenville Manufacturing Company, appeals, assigning errors.

Henry C. Bourne for plaintiff.
George M. Fountain for defendant.

STACY, J. The plaintiff entered into a contract with one P. G. Sheffield to haul a certain quantity of lumber at a stipulated price. He alleges that Sheffield failed to pay him according to the terms of his contract. Recovery is sought against the Greenville Manufacturing Company upon the ground that said corporation and Sheffield were co-partners in the sawmilling business and therefore both were jointly and severally liable to the plaintiff on his lumbering contract, admittedly made with Sheffield alone. *Chemical Co. v. Walston,* 187 N. C., p. 821. The Greenville Manufacturing Company denies the existence of any partnership arrangement, and contends that Sheffield was an independent contractor. The case was fought out upon these two contentions, and there was evidence to support both positions.

The appealing defendant complains at the following instruction given to the jury:

"If you find from the evidence that Sheffield and the Greenville Manufacturing Co. entered into an agreement whereby the Greenville Manufacturing Co. furnished the lumber and mill and Sheffield furnished the labor, and even though you find certain amount to be deducted as representing the value of the timber, they were to participate in the profits arising from the cutting of this timber, or find that Sheffield was to receive certain portions of the profits as pay for his labor and operating the mill for the Greenville Manufacturing Co., so far as this plaintiff is concerned Sheffield and the Greenville Manufacturing Co., would be copartners and the Greenville Manufacturing Co. would be liable for any amount due the plaintiff for hauling lumber in the operation of that mill."

The latter part of this instruction, we think, must be held for error. If Sheffield were an independent contractor, as the Greenville Manufacturing Company contends he was, then the bare fact that he was to receive a certain portion of the profits, as pay for his labor, would not necessarily make him a copartner with the Greenville Manufacturing Company, and thus render the corporation jointly and severally liable on his contract with the plaintiff, though it would be evidence on the present record of such liability, and the defendant's motion for judgment as of nonsuit was properly overruled. 20 R. C. L., 823; *Bank v. Odom,* 188 N. C., 672.

Speaking to the question in *Lance v. Butler,* 135 N. C., 419, *Clark, C. J.,* said: "In *Kootz v. Tuvian,* 118 N. C., 393, it is held that while an agreement to share profits, *as such,* is one of the tests of a partnership, an agreement to receive part of the profits for his services and attention, as a means only of ascertaining the compensation, does not create a partnership, citing to that effect *Mauney v. Coit,* 86 N. C., 463; *Fertilizer Co. v. Reams,* 105 N. C., 296." To like effect is the decision in *Trust Co. v. Ins. Co.,* 173 N. C., 558.

Nor can this instruction be held for harmless error, as was strongly urged for the plaintiff. A charge which goes to the question of liability, if erroneous, cannot be said to be without prejudice. *S. v. Hightower,* 187 N. C., p. 309.

For error in the charge, as indicated, there must be a new trial; and it is so ordered.

New trial.

CLARKSON, J., dissents.

HARDY ALSTON v. DISTRICT GRAND HOUSEHOLD NO. 10 OF THE G. U. O. OF ODDFELLOWS OF NORTH CAROLINA.

(Filed 25 February, 1925.)

1. Courts—Discretion of Court—Evidence—Motion to Set Verdict Aside.

In the absence of its abuse, the refusal by the trial judge of a motion to set aside a verdict as being against the weight of the evidence, is addressed to his sound discretion, and is not reviewable on appeal.

2. Insurance—Evidence—Policies—Receipt Cards.

In an action to recover upon a policy issued by an insurance order, the receipt card of the company, referred to in the policy, is competent as evidence of the payment of the premiums.

3. Evidence—Prima Facie Case—Nonsuit.

Defendant's motion as of nonsuit upon the evidence is properly denied if plaintiff has made out a prima facie right to recover.

4. Appeal and Error—Harmless Error—Instructions.

The introduction of irrelevant and immaterial evidence upon the trial is not reversible error when the charge of the court renders it nugatory.

APPEAL by defendant from *Bond, J.,* at September Term, 1924, of WARREN.

From judgment upon verdict of the jury finding that defendant is indebted to plaintiff in the sum of $158.00, defendant appealed, assigning errors based upon exceptions duly noted during the trial.

Daniel, Daniel & Daniel and Polk & Polk for plaintiff.
T. T. Hicks & Son for defendant.

PER CURIAM. On 20 April, 1916, defendant issued its policy of insurance to Ida Alston by which it agreed to pay to Hardy Alston, her husband, the sum of $125 upon her death, at any time after the expiration of three years from the date of the policy, provided she paid the monthly premiums in accordance with the terms of the policy. It is provided in the policy that the "receipt card containing the entries of premiums paid shall be exhibited on demand to the officers or authorized agents of the company." It is further provided therein that "any member becoming in arrears exceeding four weeks will forfeit all amounts paid to the company and all rights under the policy. After such forfeiture, upon payment of all arrears, the insured, being in good health, may be reinstated with the consent of the company as evidenced by the endorsement of an officer of the company on the policy or attached thereto."

Ida Alston, the insured, died on 29 July, 1923; plaintiff, as beneficiary, made demand upon defendant for payment of the amount due and upon denial by defendant of all liability, on 14 April, 1924, instituted this action.

Plaintiff contends that defendant is indebted to him in the sum of $125 in accordance with the terms of the policy and the further sum of $8.00, sick benefit and $25.00, funeral benefit, in accordance with contract as evidenced by the receipt card referred to in the policy. Defendant denies liability on the policy, contending that insured forfeited all rights under said policy by becoming in arrears for premiums exceeding four weeks prior to February, 1923. Defendant further denies liability for sick or funeral benefits, denying that same are within the terms of the contract. There was evidence sufficient to sustain the allegations and contentions of plaintiff; the motion to set aside the verdict was addressed to the discretion, vested by law, in the judge presiding. We cannot hold that there was any abuse of this discretion,

and the denial of the motion is therefore not subject to review upon appeal to this Court.

Defendant's first and second exceptions to the introduction of the receipt card are not sustained. There was evidence that the card offered by plaintiff was the card furnished to the insured in accordance with the provisions of the policy; it was therefore competent as evidence.

Exceptions three and four are to the testimony of plaintiff that Hugh Williams paid his wife during her sickness $1.00. His Honor expressly instructed the jury that this was to be considered by them only as establishing the fact that Hugh Williams paid insured $1.00. There was no evidence showing any connection between Hugh Williams and the defendant. The fact, therefore, is not relevant to this controversy. The evidence, however, was not prejudicial to defendant.

Defendant's motion for nonsuit was properly overruled. There was evidence sufficient to establish plaintiff's prima facie right to recover; *Lyons v. Knights of Pythias,* 172 N. C., 408.

His Honor instructed the jury that the burden was upon the plaintiff to prove by the greater weight of the evidence the fact of the debt and the amount thereof. The jury upon competent evidence has returned verdict in favor of the plaintiff and there was judgment in accordance with the verdict. We have carefully considered each of defendant's assignments of error. We find no errors in the record based upon exceptions, entitling defendant, as a matter of law, to a new trial.

There is

No error.

CUMMER LUMBER COMPANY v. SEMINOLE PHOSPHATE COMPANY.

(Filed 25 February, 1925.)

Employer and Employee—Contracts—Collections—Salaries—Deductions—Corporations—Receivers—Liens.

Where an employee of a corporation has money in his hands collected for the corporation, and accepts another position, that of State manager of the same corporation, under a contract that he shall deduct his salary and expenses from the collections he may make for the company as such manager, and files his claim against the receiver of the corporation, which has become insolvent, the claimant may only deduct from his collections as state manager, his salary and expenses as such, and the balance is held by him as a fiduciary and not subject to his salary then due him in the former occupation, and the former services having been rendered more than two months prior to the receivership, he can acquire no superior rights to general creditors to the surplusage.

LUMBER CO. *v.* PHOSPHATE CO.

APPEAL by administrator of R. H. McCrary, from *Barnhill, J.*, at October Term, 1924, of WAYNE.

Claimant filed claim with the receiver of defendant, appointed in the above entitled action. Exceptions to the report of the receiver with respect to this claim were heard, upon appeal, by *Barnhill, J.* From his judgment, claimant appealed, assigning errors, upon exceptions, duly noted, to conclusions of law, in accordance with which judgment was rendered.

D. H. Bland and E. M. Land for appellant.
Kenneth C. Royall for appellee.

PER CURIAM. Prior to February, 1923, R. H. McCrary was employed by defendant, Seminole Phosphate Company, as salesman in Eastern North Carolina. He had authority to make collections for the company. Out of sums of money in hand from collections, he was authorized to pay expenses incurred in performance of his duties as salesman. There is a balance due him by the company, on account of salary and expenses, earned and incurred prior to February, 1923, of $876.46.

In February, 1923, McCrary was sent by the company to the State of Florida, to take complete charge of the company's business in that state as general manager. He had authority to make collections for the company in that state, and out of moneys collected to pay all expenses, incident to the company's business in Florida, including his salary. He collected for the company, as general manager, in Florida, $1,783.98. His salary for two months, and the sum paid for expenses incurred by the company in Florida amounted to $1,241.06.

His Honor held that claimant should be allowed to deduct the sum of $1,241.06, covering salaries and expenses, as general manager in Florida, from the sum of $1,783.98, the sum collected by him, leaving the balance due by him as general manager for Florida, $542.92. This sum his Honor ordered and directed claimant to pay to receiver of defendant. His Honor further approved and allowed as a valid claim in favor of claimant the sum of $876.46, the balance due claimant for salary and on expense account, prior to February, 1923.

Receiver of defendant was appointed on 19 April, 1923. Claimant contends that he should be allowed to deduct the sum of $542.92, the balance in his hands as general manager from the amount of his claim as salesman, allowed by his Honor. He excepted to the refusal of his Honor to allow this contention, and assigns same as error.

Under the contract between claimant and the company, the sum due claimant, for salary and expenses incident to the Florida business, was properly deducted from the sum collected by him, as general man-

ager. The balance due, to wit, $542.92, was held by claimant as a fiduciary; his withholding and refusal to pay same, was a tort.

The sum due to claimant by the company for salary and expenses, accrued and incurred prior to February, 1923, was due by contract, and was a valid claim against the receiver. No part of it, however, was due for services rendered within two months prior to appointment of receiver and therefore claimant has no lien for same under C. S., 1197.

"A party cannot set up as a counterclaim to an action in tort matters which arise out of a contract, unconnected with the transaction sued on." *Smith v. Young,* 109 N. C., 224, cited and approved by *Walker, J.,* in *Hamilton v. Benton,* 180 N. C., 79. See, also, *Mauney v. Ingram,* 78 N. C., 96.

Assignment of error is not sustained and the judgment is

Affirmed.

HERMAN P. CULBRETH v. BORDEN MANUFACTURING COMPANY.

(Filed 25 February, 1925.)

Jury—Verdict—Polling Jurors—Constitutional Law.

The losing party in a civil action may demand a polling of the jury upon the return of the verdict, as a matter of right. Const., Art. I, sec. 19.

APPEAL by plaintiff and defendant from *Barnhill, J.,* and a jury, at October Term, 1924, of WAYNE.

The issues submitted and answers thereto were as follows:

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

"2. Did the plaintiff by his own negligence contribute to his own injury? Answer: 'No.'

"3. In what amount, if any, is the defendant indebted to the plaintiff? Answer: '$2,000.'"

The plaintiff's only exceptions are to the setting aside of the verdict by the court as a matter of law, and to the refusal of the court to sign judgment tendered in accordance with the verdict of the jury, the facts in respect to which are set forth in his Honor's judgment and findings of facts as follows:

"This cause coming on to be heard upon motion of the defendant to set aside the verdict of the jury, and for a new trial, for that the court refused to allow a polling of the jury upon the return of the verdict as appears of record, and in connection therewith the court finds the following facts:

"At the time the jury retired there was an agreement of counsel that the verdict of the jury might be taken by the clerk in the absence of the court. The verdict, however, was returned by the jury in a body in open court in the presence of the presiding judge, and the verdict was taken by the clerk at the direction of the judge. Each issue and the answer thereto was read over to the jury and they were asked the usual question, 'So say you all?' to which the jury responded in the affirmative.

"Thereupon the defendant, through its counsel, moved for a polling of the jury; the court then being of opinion that the defendant was not entitled to the same as a matter of right and that the jury had returned its verdict as required by law, denied the same, to which the defendant excepted. The case of *Smith v. Paul,* 133 N. C., p. 66, being now directed to the attention of the court, it is now of the opinion that the defendant was entitled as a matter of right to have the jury polled, and that its refusal to permit the same is error, and it sets aside the verdict as a matter of law."

Plaintiff thereupon tendered judgment in accordance with the verdict, which his Honor refused to sign for the reasons given in above findings of fact. Plaintiff excepted, assigned error and appealed to the Supreme Court.

The court declined to assign as its reason for setting aside the verdict any error appearing in the record other than that designated, to wit, the court's failure to poll the jury, to which defendant excepted, assigned error and appealed to the Supreme Court.

D. H. Bland and W. A. Finch for plaintiff.
Langston, Allen & Taylor for defendant.

PER CURIAM. From the findings of facts, we think the judgment of the court below that "it is now of the opinion that the defendant was entitled as a matter of right to have the jury polled, and that its refusal to permit the same is error, and it sets aside the verdict as a matter of law," was correct under the authorities in this jurisdiction.

Plaintiff complains that the matter was technical, but we cannot so hold. It was a matter of right. Const. of N. C., Art. I, sec. 19, is as follows: "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."

We think the case of *Smith v. Paul,* 133 N. C., p. 66, relied on by the court below, determinative of this question.

We find in the judgment of the court below

No error.

MRS. DENA A. BLOUNT v. S. L. SAWYER, AND S. L. SAWYER v. W. D. MORRISON ET AL.

(Filed 25 February, 1925.)

1. Courts—Actions—Consolidation—Torrens Law—Trespass—Injunction.

The trial court has the authority to consolidate proceedings pending under the Torrens Law (C. S., 2377 *et seq.*), wherein the title to the lands was put in issue, and proceedings for injunction brought by separate action by the adverse party, wherein the same matters were put at issue.

2. Same—Procedure—Burden of Proof.

Where the trial judge has acted within his authority in consolidating proceedings to register title under the Torrens Law with an independent action to enjoin a trespass between the same parties involving the same subject-matter, objection that such consolidation would confuse the question as to which party had the burden of proof is untenable, being only an objection to the procedure.

APPEALS by S. L. Sawyer from *Sinclair* and *Cranmer, JJ.*, at October and December Terms, 1924, of BEAUFORT.

W. C. Rodman and J. D. Paul for appellant.

H. C. Carter, Lindsay C. Warren and Small, MacLean & Rodman for appellees.

STACY, J. On 18 July, 1921, S. L. Sawyer instituted a special proceeding in rem in the Superior Court of Beaufort County for the purpose of registering title to certain lands, situate in said county, under the "Torrens Law" (C. S., 2377 *et seq.*), description of which was duly set out in his petition. Mrs. Dena A. Blount and Mrs. R. H. Criffield, being two of the respondents in said proceeding, answered promptly, alleging ownership of certain lands, described by metes and bounds in their respective answers, and denying the petitioner's title to so much of their lands as was covered by his petition. The clerk made the usual order of reference to the "examiner of titles" as provided by C. S., 2387. This having been done, the appellant, S. L. Sawyer, without proceeding further before the examiner of titles to establish his title and boundaries as alleged in his petition, entered upon the lands claimed by Mrs. Dena A. Blount and began to cut the timber therefrom. Whereupon, on 5 October, 1921, Mrs. Blount instituted an action against S. L. Sawyer for trespass and obtained an injunction restraining him from cutting the timber, until the title could be determined.

The lands claimed by the respective parties are identically the same in both proceedings.

BLOUNT *v.* SAWYER; SAWYER *v.* MORRISON.

At the October Term, 1924, an order was made by *Sinclair, J.,* consolidating the special proceeding brought by S. L. Sawyer under the Torrens Law and the action for trespass instituted by Mrs. Blount and ordered that they be tried together, "subject to the right of S. L. Sawyer to move for a severance of the issues between himself and Mrs. Blount and Mrs. Criffield." To this order, S. L. Sawyer excepted and appealed to the Supreme Court. The authority of the judge to make such order of consolidation is the only question presented in No. 15, the case of *Blount v. Sawyer.*

The issues raised by the petition and answer in the proceeding under the Torrens Law and by the complaint and answer in the injunction suit (it being in effect an action of trespass to try title) are in no way dissimilar; the same lands, the same titles and the same boundaries are involved in both proceedings, requiring the attention of the same lawyers, the work of the same surveyors and the attendance and testimony of the same witnesses. It would seem that the judge was not without power to enter the order of consolidation. *Wilder v. Greene,* 172 N. C., 94; *Sumner v. Staton,* 151 N. C., 198; *Hartman v. Spiers,* 87 N. C., 28; *Jones v. Jones,* 94 N. C., 111; *Blackburn v. Ins. Co.,* 116 N. C., 821; *Caldwell v. Beatty,* 69 N. C., 365; *Person v. Bank,* 11 N. C., 294.

After objecting and excepting to the order of consolidation and giving notice of appeal therefrom in No. 15, the appellant, S. L. Sawyer, at a later time, offered to submit to a voluntary nonsuit in No. 17, the special proceeding instituted by him under the Torrens Law. This was not allowed by Cranmer, J., and the correctness of this ruling is the only question presented by the appeal in No. 17, *Sawyer v. Morrison et al.*

It is the position of the appellant that the order of consolidation, and the subsequent refusal to allow him to take a nonsuit in the proceeding instituted by him under the Torrens Law, will necessarily lead to great confusion on the trial; because in one proceeding he has the burden of proof, while Mrs. Blount has the laboring oar in the other, and the consolidation of the two, he says, will have the inconsistent effect of placing the burden of proof on both parties at the same time. *Speas v. Bank,* 188 N. C., p. 529; *Bank v. Ford,* 216 Pac. (Wyo.), 691. Without conceding this to be a necessary conclusion on the present record, it is sufficient to say that the objection urged is one of procedure and does not go to the extent of questioning the power of the court to consolidate the two proceedings.

The order of consolidation having been made in the exercise of a proper power, we think the subsequent order disallowing the petitioner's motion for judgment as of nonsuit in the proceeding in rem, instituted by him under the Torrens Law, was correctly entered.

We find no error on either appeal.

Affirmed.

EVA HOWELL, BY HER NEXT FRIEND, VAN HOWELL, v. AMERICAN NATIONAL INSURANCE COMPANY.

(Filed 4 March, 1925.)

1. Insurance, Accident—Policies—Contracts—Issues.

Where the liability of an insurance company, in accordance with the terms of the policy contract, is made to depend upon whether the insured's death was wholly caused by an accident, it is proper for the trial court to refuse to submit an issue tendered by the defendant, insurer, as to whether the death was caused by a particular accident received in the course of the insured's employment of a certain corporation where a proper issue has been submitted.

2. Insurance, Accident — Insurable Interest — Payment of Premiums — Beneficiary—Policy—Contracts.

A person may take out a valid policy of insurance against death by accident on his own life, and pay the premiums thereon himself, and name as beneficiary one who has no beneficial interest in the life of the insured; and the principle that one without a beneficial interest may not take out a valid policy on the life of another applies when such other person pays the premiums, and has no application to the facts of this case.

3. Same — Application — Misrepresentation—Representations—Warranties—Statutes.

Under the terms of our statute, representations made in an application for life and accident insurance are representations and not warranties (C. S., 6289), and the misrepresentation of the relationship of a beneficiary to the insured in an application therefor, as a matter of law for the court, will not be held as material or such as affect the consideration of the company in the issuance of the policy. When the evidence is conflicting, a mixed question of law and fact arises for the jury, under a proper instruction from the court.

APPEAL by defendant from judgment rendered by *Sinclair, J.*, at January Term, 1925, of WASHINGTON.

On 29 September, 1920, defendant, in consideration of the statements made in a written application, signed by him, issued to John Walker a policy of insurance. In said application John Walker stated that his age, at nearest birthday, was thirty-three years, and that, in case of his death, the beneficiary should be Eva Howell, related to him as daughter. The policy provided indemnity for loss of life, limb, limbs, sight, or time, caused by accidental means, and for loss of time by sickness. Defendant agreed to pay to insured certain sums fixed by the terms of the policy for loss of limb, limbs, sight, or time. For loss of life, resulting directly and exclusively of all other causes from bodily injuries sustained solely through external, violent and accidental means, defendant agreed to pay to the beneficiary named the principal sum of five hundred dollars, with an increase of ten per centum for each consecutive

year's renewal of the policy. If beneficiary named did not survive insured, the indemnity for loss of life was payable to the executors or administrators of insured.

John Walker, the insured, died on 18 October, 1922, leaving surviving plaintiff, Eva Howell, named in the application as beneficiary of indemnity provided in the policy for loss of life. Summons in this action was issued on 27 April, 1923, and the action was tried at January Term, 1925, of the Superior Court of Washington County, before Judge Sinclair and a jury. The verdict was as follows:

1. Was John Walker's death the direct and exclusive result of bodily injuries sustained solely through external violence and accidental means? Answer: "Yes."

2. Was Eva Howell the daughter of John Walker, as stated by him in the application for the policy? Answer: "No."

3. Did the beneficiary, Eva Howell, have an insurable interest in the life of John Walker at the time the policy was issued? Answer: "No."

4. Did John Walker procure the policy of insurance and pay all premiums thereon as a gift to Eva Howell? Answer: "Yes."

5. In what amount, if any, is the defendant indebted to the plaintiff? Answer: "$550 and interest from 18 October, 1922."

From judgment in accordance with this verdict, defendant, having excepted thereto, appealed, assigning errors based upon exceptions.

Horace V. Austin for plaintiff.
W. L. Whitley for defendant.

CONNOR, J. Defendant, in apt time, tendered issues as set out in statement of case on appeal, and excepted to the refusal of the court to submit the same as tendered. Defendant also excepted to issue No. 1 and to issue No. 4, as submitted by the court. The issues submitted arose upon the pleadings, liberally construed, and the answers thereto were determinative of the matters in controversy between the parties. The first issue tendered would have unduly limited the right of plaintiff to recover in this action, as it was predicated upon the assumption that defendant was liable, under the policy, only in the event that the death of insured was the result of injuries caused by the Norfolk Southern Railroad Company. It is true that plaintiff alleges in her complaint that John Walker "was accidentally struck near Mackeys, N. C., by the Norfolk Southern train." Defendant, however, had insured John Walker "against death or disability resulting directly and exclusively of all other causes from bodily injury sustained solely through external, violent and accidental means," and had agreed that if loss of life should result solely from "such injury" it would pay to the beneficiary the amount provided in the policy as indemnity for such loss. If death

was the result of such injury, it was wholly immaterial whether the injury was caused by the Norfolk Southern Railroad Company or not. The issue submitted was in the identical language of the policy and embodied the essential fact alleged in the complaint.

Nor was there error in submitting issue No. 4. The right of the plaintiff to recover as beneficiary named in the application for the policy was not to be determined solely by whether or not she had an insurable interest in the life of John Walker, at the time the policy was issued. Assuming that the jury should answer issue No. 3 in the negative, as it did, it became material, under the law, to plaintiff's cause of action and to her right to recover, to determine whether or not insured procured the policy to be issued on his own life, and whether or not he paid the premium required to keep the policy in force. The issues submitted by his Honer were proper issues. There was no error in refusing to submit the issues tendered by defendant.

Defendant relies, chiefly, on this appeal, upon its contention that plaintiff cannot recover in this action (1) because she had no insurable interest in the life of John Walker at the date of the issuance of the policy under which she claims as beneficiary, and (2) because of the statement in the application by John Walker that she was his daughter, contending that this was a false statement of a fact material to the acceptance of the application and the issuance of the policy by defendant. These contentions are presented by defendant's motion for judgment as of nonsuit, to the refusal of which defendant excepted. There are other exceptions presenting these contentions. Assignments of error, based upon these exceptions, are discussed by counsel for defendant, in his brief, with full citation of authorities relied upon to sustain the exceptions and with his accustomed clearness of statement and intelligent comprehension of the principles of law involved.

These contentions of defendant cannot, however, be sustained. It is true that a contract of life insurance, not supported by an insurable interest, is held to be contrary to public policy, and void. Vance on Insurance, page 125. An insurable interest in the life of another has been defined to be "such an interest, arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage, to him as will justify a reasonable expectation of advantage or benefit from the continuance of his life." May on Insurance, sec. 102, cited and approved in *Trinity College v. Ins. Co.*, 113 N. C., 245. See *Albert v. Ins. Co.*, 122 N. C., 94; *Powell v. Dewey*, 123 N. C., 105; *Hinton v. Ins. Co.*, 135 N. C., 321; *Victor v. Mills*, 148 N. C., 116; *Hardy v. Ins. Co.*, 152 N. C., 291; *Life Ins. Clearing Co. v. O'Neill*, 54 L. R. A., 225, and note; *Warnock v. Davis*, 104 U. S., 779, 26 L. Ed., 926.

However, every person has an insurable interest in his own life, and may lawfully insure it for the benefit of his own estate, or in behalf of any other person. It is not necessary that such beneficiary shall possess an interest in the life insured. Vance on Insurance, page 125. *Albert v. Ins. Co.,* 122 N. C., 93. In *Hardy v. Ins. Co.,* 152 N. C., 286, *Justice Hoke,* writing for this Court, says: "We consider it, however, as established by the great weight of authority that where an insurant makes a contract with a company, taking out a policy on his own life for the benefit of himself or for his estate generally, or for the benefit of another, the policy being in good faith, and valid at its inception, the same may, with the assent of the company, be assigned to one not having an insurable interest in the life of the insured; provided, this assignment is in good faith and not a mere cloak or cover for a wagering contract." See *Pollock v. Household of Ruth,* 150 N. C., 211; *Johnson v. Ins. Co.,* 157 N. C., 107; *Wooten v. Order of Odd Fellows,* 176 N. C., 51.

Where the insured procures a policy of insurance on his own life, and pays the premiums himself, he may name as beneficiary, in the event of his death and of liability of the company for the loss thereby sustained, a person who has no insurable interest in his life, at the date of the issuance of the policy. The insurable interest covered by the policy is the interest which the insured has in his own life; the amount due by the terms of the policy is indemnity for the loss which the insured sustains by his death, and is payable to the beneficiary, not as an indemnity for his loss, by the death of the insured, but as a bounty in accordance with the direction of the insured. So, after the policy has been issued, payable to the estate of the insured, or to another, it may be assigned, subject to the provisions of the policy itself, to one who has no insurable interest in the life of the insured at the date of the assignment. It is only when a policy has been issued upon the life of another, upon application and for the benefit of one who has no insurable interest in the life insured, and who pays or undertakes to pay the premiums, that the policy is void as against public policy. Such a policy is a wagering transaction. So, although a policy of insurance be issued, payable to the estate of the insured, if at the inception of the contract, there is an agreement that it shall subsequently be assigned to one who has no insurable interest and who agrees to pay the premiums, the policy is void, for notwithstanding the form of the transaction, it is in fact a wager upon the life of another, and is therefore condemned by the law as against public policy; *Hinton v. Ins Co.,* 135 N. C., 321. A contract of insurance is primarily a contract for indemnity, and where there can be no loss there can be no indemnity.

In view of the law as thus declared, his Honor having instructed the jury, that if they found the facts to be as testified, they should

answer the third issue "No," it became material to ascertain whether or not John Walker procured the policy on his own life, and himself paid the premiums thereon. The learned judge properly submitted the fourth issue. We cannot sustain defendant's contention that there was no evidence upon which the jury could answer this issue in the affirmative. The testimony of Emma Howell was sufficient for that purpose. She testified that John Walker gave her the money and that she sent it to the defendant to pay the premiums. She is the mother of plaintiff, but the credibility of her testimony was for the jury. There is evidence corroborating her testimony. There was no error in the refusal of his Honor to allow the motion of nonsuit upon defendant's first contention.

John Walker, the insured, in his application for the policy of insurance, upon which this action was brought, designated plaintiff as beneficiary, in case of his death, and stated that she was his daughter. This was not a true statement. She is not related to him by blood or marriage. Defendant contends that the statement of the relationship of beneficiary to the insured was material, and being false, as appears by the evidence of plaintiff, rendered the policy void, at least so far as plaintiff's right to recover as beneficiary is involved. It is not contended that the statement was fraudulent; only that it was material, within the meaning of C. S., 6289.

Whether or not, the statement of relationship between insured, who procured the policy upon his own life, and paid the premiums thereon, designating as beneficiary, in case of death, one who had no present insurable interest in his life, and such beneficiary, was material under the facts of this case, is a question of law. The rule by which the materiality of a statement, made in an application for a policy of insurance is to be determined has been settled in this State. *Chief Justice Hoke,* in *Ins. Co. v. Box Co.,* 185 N. C., 543, says that "in authoritative cases, construing the law (C. S., 6289) it is held that every fact untruly asserted or wrongfully suppressed, must be regarded as material, if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premium." *Schas v. Ins. Co.,* 166 N. C., 55; *Bryant v. Ins. Co.,* 147 N. C., 181; *Fishblate v. Fidelity Co.,* 140 N. C., 589.

In that case, insured stated in his application for the policy that he had never had spitting of blood, or Spanish influenza. Both statements were found by the jury to be false, but not fraudulent. This Court held that this was a material representation, and being false, the policy should be surrendered and canceled. "The statute itself and the general principles applicable are to the effect that fraud is not always essential, and that the contract will be avoided if statements are made and accepted

as inducements to the contract which are false and material." *Ins. Co. v. Woolen Mills,* 172 N. C., 534. The Court took judicial notice of the fact, very generally recognized, that spitting of blood always is regarded as a dangerous symptom, and that Spanish influenza has a tendency, at least for a period following the disease, to weaken the resisting powers of a patient. These facts would naturally call for a further and fuller investigation.

But whether a representation is material or not, is not always a question of law. It is sometimes a question of fact or rather, like the question of negligence, or reasonable time, a mixed question of law and fact. Where there is a controversy as to the facts, or where upon the facts admitted or found by the jury, the court cannot hold that knowledge or ignorance of them, upon all the facts in the particular case, would or would not naturally influence the judgment of the underwriter, in making the contract at all or in estimating the degree and character of the risk, or in fixing the rate of premiums, an appropriate issue should be submitted to the jury, in order that they may, upon competent evidence, determine whether or not the representation was material.

In *Hines v. Casualty Co.,* 172 N. C., 225, applicant for insurance policy represented that he was in sound condition, mentally and physically, with no exceptions at date of application. There was evidence that at this date, applicant had hernia, and the company contended, in defense to an action on the policy, that the statement that applicant was sound, physically, was false, and that such false statement was material. There was evidence as to the effect of the hernia upon the soundness of applicant's physical condition. Plaintiff testified that the hernia caused him no trouble and no suffering. An expert testified that in his opinion, the hernia would not affect applicant's health to any degree. The Court held that the issue involving the materiality of the representation was properly submitted to the jury. An instruction that whether plaintiff was in sound health or not was a matter for the jury to determine upon the evidence, depending upon the extent of the hernia and its effect upon the physical condition of the applicant, was approved.

In *Gardner v. Ins. Co.,* 163 N. C., 376, the submission of an issue as to whether a representation, which the jury found was false, was material or not was approved in opinion written by *Walker, J.,* who says: "Whether it (the representation) was material depends upon how, if at all, it would have influenced the company in deciding for itself, and in its own interest, the important question of accepting the risk and what rate of premium should be charged." See *Daugtridge v. R. R.,* 165 N. C., 188; *Hardy v. Ins. Co.,* 167 N. C., 23.

We have then for consideration the question whether the representation of the relationship between the applicant and the beneficiary was

material or not. Did the fact that the beneficiary was represented to be related to applicant as his daughter, naturally and reasonably influence the company to accept the application and to issue the policy in which she is designated as beneficiary in case of death? There is no controversy as to the facts involved in the consideration of this question.

Applicant states that his name is John Walker; that he is 33 years of age; that in case of his death, his beneficiary shall be Eva Howell, related to him as daughter. If the company had attached any importance to the relationship, it would have observed that Eva Howell, as daughter of John Walker, would have borne his name, unless she was married, and that the age of John Walker—33 years—made it improbable that he had a married daughter. It is significant that no information is sought from John Walker as to whether or not he was married.

The primary purpose of this policy was to provide indemnity to John Walker for loss of limb, limbs, sight or time, caused by accidental means, or loss of time caused by sickness. Only in the event of his death, caused by external, violent and accidental means, is provision made for the payment of the principal sum, as indemnity for loss of life, to Eva Howell as beneficiary, and then only if she survive him. If she does not survive insured, the indemnity is payable to the executors or administrators of insured.

The fact, which it is admitted was falsely represented, could not have added to or in any manner affected the risk involved. Liability of the company for the indemnity provided could arise only in the event that insured should die as the result of a bodily injury, sustained solely through external, violent and accidental means. Whether or not the beneficiary was the daughter of the applicant could not have naturally and reasonably influenced the company in accepting the application and issuing the policy.

Upon the uncontroverted facts in this case, his Honor was correct in holding that the false representation of the relationship between insured and beneficiary was, as a matter of law, immaterial. No explanation is suggested upon the record as to how this misrepresentation occurred. In any event it was immaterial, and there was no error in overruling motion for nonsuit upon the second contention of defendant.

The effect of a false statement as to relationship between insured and beneficiary, made in the application for a policy of insurance, does not seem to have been heretofore presented to this Court. In 14 R. C. L., page 1079, it is said that "Even where representations are made warranties, a misstatement as to relationship of the beneficiary does not, according to the better opinion, avoid the policy, though the contrary has been held." There are full citations to sustain the text.

In *Berdan v. Ins. Co.*, 136 Mich., 396, 4 Anno. Cas., 332, it was held that a false statement in an application for a policy of life insurance,

to the effect that the beneficiary named in the application is a nephew of applicant, there being in fact no blood relation between them, will not avoid the policy, notwithstanding a clause therein to the effect that misstatements in the application shall forfeit and annul all rights named in the policy. This holding is declared by the annotator to be contrary to the weight of authority. In the cases cited to sustain the note, the statement of relationship is treated as a warranty and not as a representation. Where the statement is, by virtue of a statute, as in this jurisdiction (C. S., 6289) not a warranty, but a representation, which does not avoid the policy, unless fraudulent or material, the authorities seem to be to the effect that the statement of relationship, certainly in the absence of allegation and proof to the contrary, is not material. See *Cunat v. Supreme Tribe of Ben Hur,* 249 Ill., 448, 34 L. R. A. (N. S.), 1192; *Goff v. Supreme Lodge,* 90 Neb., 578, 37 L. R. A. (N. S.), 1191.

Assignments of error not discussed in this opinion have been considered, and cannot be sustained. The judgment is affirmed. There is No error.

JOE E. HARRIS ET AL. v. JOHN CHESHIRE ET AL.

(Filed 4 March, 1925.)

1. Liens—Material—Laborers—Statutes.

The liens acquired by laborers and material furnishers on a building, in accordance with our statute, relate back to the furnishing of the material for and the doing the work on the building, and have priority over a mortgage registered since then, but not over one registered prior to the furnishing of the material and the doing of the work.

2. Same—Mortgages—Deeds in Trust—Marshaling of Assets—Equity.

Where a mortgage has been given on a dwelling having priority over the statutory labors and material liens thereon, but including also personal property of the owner, and the whole property has been sold under the mortgage by the trustee, those of the material men and laborers who have properly filed their liens in accordance with the statute prior to the sale of the personalty have the right to have the money so derived from the sale of the personal property first applied to the satisfaction of the mortgage under the equitable doctrine of the marshaling of assets in order to reserve the application of the proceeds of the sale of the dwelling to the satisfaction of their liens, so far as the same may extend.

3. Same—Notice.

Where a mortgagee has sold the dwelling of the owner upon which materialmen and laborers have acquired a statutory lien, together with

certain personal property also covered by the same mortgage, the materialmen and laborers acquire the equity of marshaling of assets only when the mortgagee before the sale had notice of their claims by the filing of their liens in conformity with the statute or notice otherwise sufficient, and the materialmen or laborers have no equity in the proceeds of the sale of the personal property when, without sufficient notice of any kind, the mortgagee or trustee has sold the personal property and applied the proceeds to the satisfaction of the mortgage debt.

4. Same—Priority of Sale.

Where a deed in trust embraces real and personal property with direction that the personalty first be sold and the proceeds applied to the satisfaction of the mortgage deed, a lienor on the realty for materials supplied for or labor performed in the erection of a dwelling on the lands whose lien is secondary to that of the mortgage, and who has not given notice before the sale, cannot successfully insist after the mortgage sale and the application of the proceeds to the mortgage debt, that the terms of the mortgage as to the priority of sale should have been observed by the trustee to the protection of his lien.

5. Same—Commissions for Sale.

Under the facts of this case: *Held*, the commission for the sale of the mortgaged premises was properly allowed and deducted, under the terms of the mortgage, as against the right of materialmen or laborers who had acquired a subsequent lien to that of the mortgage.

APPEAL from *Devin, J.*, at October Term, 1924, of EDGECOMBE.

This action, begun on 17 July, 1922, was referred to Mr. F. E. Winslow. The referee, having heard the same, filed his report, setting out in full his findings of fact and conclusions of law. Exceptions were filed to the report by both plaintiffs and defendants. The action was then heard upon the report and these exceptions. From the judgment rendered plaintiff, W. M. Wiggins, and defendants, Farmers Banking & Trust Company, George A. Holderness and John Cheshire, upon exceptions thereto duly noted, appealed to the Supreme Court.

The essential facts involved in these appeals, are as follows:

1. On 7 January, 1920, a paper-writing, in form an agricultural lien and deed of trust, executed by John Cheshire and wife, parties of the first part, to Farmers Banking & Trust Company, party of the second part, and George A. Holderness, party of the third part, was duly recorded in Edgecombe County.

2. By virtue of this paper, Farmers Banking & Trust Company acquired a lien for advancements, not to exceed $7,500, upon all the crops to be made by John Cheshire on the "Ballyhack Farm" in Edgecombe County, during the year 1920; the indebtedness for said advancements was evidenced by a note for $7,500, executed by John Cheshire, payable to Farmers Banking & Trust Company and due on 1 November,

1920. For the purpose of further securing the payment of said note, parties of the first part conveyed to George A. Holderness, party of the third part, the following described real and personal property, to wit: (1) All crops of every kind grown by John Cheshire on said farm during the year 1920; (2) All mules and horses, one cotton gin and equipment, and all farming implements on said farm and used in the cultivation of the same; (3) The "Ballyhack Farm" containing 824 acres; and (4) One vacant lot in the town of Tarboro, known as the "Home Place" of John Cheshire. The said paper-writing provided that "if John Cheshire shall fail or neglect to pay the note for $7,500, when due, and payable, it shall be lawful for and the duty of the said party of the third part" after advertisement, to sell the said property, real and personal, to the highest bidder for cash, and to convey the same to the purchaser; and out of the proceeds of the sale, he shall pay said note for $7,500 and interest, and the costs and expenses of the sale, "first retaining out of the proceeds of the sale the usual commission of 5 per cent for making said sale" and the surplus, if any, he shall pay to John Cheshire.

The following clause appears in said paper-writing: "In making the aforesaid sale, it is distinctly understood and agreed by and between all the parties hereto that the said George A. Holderness, trustee, shall first offer for sale all crops then on hand and unsold; he shall next sell all team and all personal property on said farm; he shall next sell the lot of the said John Cheshire in the town of Tarboro; he shall next sell the undivided one-half interest of John Cheshire in and to the farm, hereinbefore fully described."

3. In the spring of 1920, after the registration of the said paper-writing, John Cheshire began the erection of a residence on the vacant lot in the town of Tarboro, known as the "Home Place," at an expense, approximately, of $20,000; the claims and liens of the plaintiffs, involved in this action, are for labor done, and material furnished in the erection and construction of the said residence upon this lot.

4. The several plaintiffs herein acquired liens for labor done or material furnished, on said residence and lot, upon claims filed, as of the dates and for the amounts as follows:

Name	*Claim Filed*	*Date of Lien*	*Amount*
1. Joe E. Harris	16 Feb. 1921	6 Apr. 1920	$ 355.06
2. Pender Hdw. Co.	16 Feb. 1921	31 May 1920	264.81
3. F. G. Davis	16 Feb. 1921	5 Aug. 1920	340.19
4. Johnson & Wiggins	16 Feb. 1921	16 Aug. 1920	438.62
5. W. M. Wiggins	30 Mar. 1921	21 Aug. 1920	1,961.95
W. M. Wiggins	30 Mar. 1921	30 Mar. 1921	112.41
W. M. Wiggins	30 Mar. 1921	30 Mar. 1921	19.26

Each of the liens of plaintiffs, as aforesaid, was duly and regularly recorded by the clerk of the Superior Court of Edgecombe County, on the lien docket in his office, and judgments, thereafter obtained on each claim, declaring the same a lien on said residence and lot, in favor of each plaintiff, respectively, and against the defendant, John Cheshire, were duly and regularly docketed in said office.

5. On 8 June, 1920, there was recorded in the office of the register of deeds of Edgecombe County, a mortgage deed, executed by John Cheshire and wife, conveying to Edgecombe Homestead & Loan Association to secure the sum of $7,000, for money borrowed, the lot known as the "Home Place." On 8 December, 1920, a mortgage deed from John Cheshire and wife, conveying the said lot to said Edgecombe Homestead & Loan Association, to secure an additional loan of $3,000, was recorded in the office of the register of deeds of Edgecombe County.

6. On 19 October, 1920, there was recorded in the office of the register of deeds of Edgecombe County, a paper-writing, in form an agricultural lien and deed of trust, executed by John Cheshire and wife, conveying to George A. Holderness, trustee, to secure payment of note for $2,500 to Farmers Banking & Trust Company, the same real and personal property as that described in the paper-writing recorded on 7 January, 1920; this paper-writing contains the same provisions with respect to the sale of said property, upon default in payment of indebtedness secured thereby as are contained in said paper-writing recorded 7 January, 1920; the indebtedness secured therein, together with the paper-writing was thereafter for value but after maturity transferred and assigned to T. P. Cheshire, who is now and has at all times since been the owner thereof, by virtue of such transfer and assignment.

7. Prior to 15 April, 1922, the farm conveyed by John Cheshire and wife to George A. Holderness, trustee, in the paper-writing recorded on 7 January, 1920, was sold under a mortgage, executed and recorded prior to 7 January, 1920, and out of the proceeds of said sale, the sum of $5,782.22 was paid by the mortgagee in said mortgage to Farmers Banking & Trust Company and credited on the note for $7,500, secured in the paper-writing recorded on 7 January, 1920. Said mortgage was prior to the claims of all parties to this action, either plaintiffs or defendants upon said farm.

8. On 15 April, 1922, George A. Holderness, trustee, under the power of sale contained in the paper-writing recorded on 7 January, 1920, sold the personal property, conveyed to him by said paper-writing, for $800; and also on said date sold and conveyed the "Home Place," upon which the residence had been erected, for $10,975; after paying the costs and expenses of the sale, and taxes and assessments upon the said Home Place, and retaining commissions of 5 per cent on the

gross amount of the sale, the said George A. Holderness, trustee, paid the balance due on the note to Farmers Banking & Trust Company, to wit: $2,435.63; and the surplus, to wit: $7,538.53, he paid to Edgecombe Homestead & Loan Association, upon the indebtedness of John Cheshire to said association, secured in the mortgages recorded on 8 June, 1920, and on 8 December, 1920.

9. The purchaser at said sale of the personal property sold by the trustee was T. P. Cheshire, who was the last and highest bidder in sum of $800; at date of sale, the said T. P. Cheshire was the owner of the indebtedness and paper securing same, executed by John Cheshire and recorded 19 October, 1920; the trustee did not collect from said T. P. Cheshire the amount of his bid, but upon demand of said T. P. Cheshire consented that same should be credited upon the indebtedness secured by the junior mortgage.

10. The cotton, tobacco, and peanuts made on the "Ballyhack Farm" during the year 1920, upon which Farmers Banking & Trust Company had lien, and which were conveyed to George A. Holderness, trustee, by the paper-writing recorded on 7 January, 1920, were sold by John Cheshire, and proceeds deposited to the credit of John Cheshire, subject to his check, in the Farmers Banking & Trust Company. Neither the Farmers Banking & Trust Company nor George A. Holderness, trustee, took or demanded possession of said crops, or the proceeds of the sale of the same; George A. Holderness on 7 January, 1920, and at all times since was and is now chairman of the board of directors of Farmers Banking & Trust Company, and both he and said company had actual knowledge of the erection of said residence upon the lot known as the "Home Place," of the sale of the said crops by John Cheshire, and of the deposit by him of the proceeds of said sale with said company; said John Cheshire withdrew by checks the amounts so deposited by him, and no part of the proceeds of the sale of said crops was applied to the payment of or as credit upon the note held by the said Farmers Banking & Trust Company. John Cheshire was the owner, on 1 November, 1920, of crops on hand, grown upon the "Ballyhack Farm" during 1920, free from claims of tenants, of the value of $3,100, which he after that date sold, depositing the proceeds to his credit with Farmers Banking & Trust Company, from which he withdrew same by his checks.

11. All of said crops had been sold, and the proceeds, deposited to his credit with Farmers Banking & Trust Company, withdrawn by John Cheshire before notice of claim of lien on the Home Place was filed by plaintiffs or any one of them; plaintiff, W. M. Wiggins, began to perform labor and furnish material, upon which his claim of lien for $1,961.95 was founded, on 21 August, 1920, and completed same on

26 January, 1921; on 15 April, 1922, the date of the sale of the personal property by George A. Holderness, trustee, to T. P. Cheshire, the said Holderness and Farmers Banking & Trust Company had constructive and actual notice of each and all the liens and judgments of plaintiffs herein; on said date none of the crops made on "Ballyhack Farm" during 1920, were on hand and unsold.

Upon the facts found by the referee, as set out in his report, and as modified and amended, by consent, at the hearing before his Honor, *Judge Devin*, it was ordered, considered, and adjudged (1) that plaintiff, Joe E. Harris, recover of defendants, John Cheshire, George A. Holderness and Edgecombe Homestead & Loan Association, the sum of $355.06, interest and cost; (2) that plaintiff, Pender Hardware Company, recover of said defendants the sum of $264.81, interest and costs. No exception was taken to the judgment as affecting these two plaintiffs.

It was further ordered, considered and adjudged that plaintiffs, Johnson & Wiggins and F. G. Davis recover of John Cheshire, George A. Holderness and Farmers Banking & Trust Company, the sum of $800, with interest from 9 January, 1922, and that said sum be paid to them in the order of their priorities, in payment of or as credit upon their judgments, respectively. To this part of the judgment, defendants, John Cheshire, George A. Holderness and Farmers Banking & Trust Company excepted and assign same as error.

Plaintiff W. M. Wiggins excepted to and assigns as error the clause in the judgment as follows: "It appearing to the court that the amount of the recovery will be exhausted by the above mentioned claims and recoveries, it is ordered and adjudged that plaintiff, W. M. Wiggins, recover nothing."

Plaintiff, W. M. Wiggins, further excepted to and assigns as error his Honor's failure to sustain plaintiff's exception to conclusion of law No. 4, of the referee, which is as follows:

"Plaintiffs are not entitled to recover anything from the Farmers Banking & Trust Company or from George A. Holderness, trustee, for the value of any crops raised in 1920, by John Cheshire on 'Ballyhack Farm' embraced within the mortgage from Cheshire to the bank and George A. Holderness, trustee." This was plaintiff's exception No. 1.

Plaintiff, W. M. Wiggins, further excepted to and assigns as error, the refusal of his Honor to sustain plaintiff's exception to the conclusion of law No. 5 of the referee, which is as follows: "The plaintiffs are not entitled to recover anything from W. A. Hart or S. S. Nash for cotton raised by John Cheshire on the Ballyhack Farm in 1920, and received by these defendants. Plaintiffs had no lien on said cotton when defendants Hart and Nash received the same. Though the plaintiff might have required the bank to seize this cotton while it was in reach,

either by formal demand or by legal proceedings, they did not do so at all and an unenforced equity is not a lien." This is plaintiff's exception No. 2.

Plaintiff, W. M. Wiggins, further excepted to and assigns as error, the refusal of his Honor to sustain plaintiff's exception to conclusion of law No. 8 of the referee, which is as follows: "The plaintiffs are not entitled to recover anything from George A. Holderness, trustee, and the Farmers Banking & Trust Company on account of the failure of the trustee to first sell the crops before selling the 'Home Place' under the bank's paper. The plaintiffs are seeking damages for wrongful application of the proceeds of the sale of the Home Place and thereby recognized the validity of the sale of the Home Place and are estopped to assert that the sale was invalid." This is plaintiff's exception No. 3.

Plaintiff, W. M. Wiggins, further excepted to and assigns as error the refusal of his Honor to sustain plaintiff's exception to conclusion of law No. 10 of the referee, which is as follows: "Plaintiffs are in the position of unsatisfied execution creditors, having liens on John Cheshire's Home Place, some being superior to his homestead right, and they stand in John Cheshire's place with respect to other persons claiming interest in said land; but they are not purchasers for value in the legal sense." This is plaintiff's exception No. 4.

Plaintiff, W. M. Wiggins, excepted to and assigns as error the refusal of his Honor to sustain plaintiff's exception to conclusion of law No. 11 of the referee, which was as follows: "The plaintiffs are not entitled to recover anything on account of commissions retained by George A. Holderness, trustee, in the foreclosure of his instrument, since under his contract with the mortgagor, John Cheshire, he was authorized to retain five per cent commissions on the proceeds of the sale, and there is no evidence that this provision was inserted in the mortgages through undue influence, fraud, oppression, or as a cloak for usury, nor is the amount retained by such trustee so large as to furnish in itself evidence of oppression." This was plaintiff's exception No. 5.

Defendants, George A. Holderness, trustee, the Edgecombe Homestead & Loan Association, John Cheshire and Farmers Banking & Trust Company excepted to and assign as error, the sustaining by his Honor of plaintiff's exception to conclusion of law No. 12 of the referee, which is as follows: "The plaintiffs are not entitled to recover anything of George A. Holderness, trustee, on account of $800 for which the personal property was sold under his instrument. Plaintiffs had no lien on said property and took no steps to enforce this equity to have the same applied in exoneration of the Home Place, making no demand that the same be so applied, until this suit was brought, the trustee having paid the same to T. P. Cheshire, who held a junior mortgage on

said personal property, on the said T. P. Cheshire's demand before this suit was brought." This was defendant's first and only material exception.

The only parties to this action, now complaining of the judgment of his Honor, are plaintiff, W. M. Wiggins, who contends that defendants, Farmers Banking & Trust Company and George A. Holderness, trustee, should be required to account for the crops sold and disposed of by John Cheshire and for commissions retained by the trustee, before applying the proceeds of the sale of the Home Place to the satisfaction of the balance due on the note for $7,500, and defendants, Farmers Banking & Trust Company, George A. Holderness, trustee, and John Cheshire who contend that there was error in holding that the amount bid for the personal property should have been collected by the trustee and applied to the payment of the judgments and liens of plaintiffs, Johnson & Wiggins, and F. G. Davis. These contentions are presented by the assignments of error and are discussed in the opinion below.

Allsbrook & Phillips for W. M. Wiggins and F. G. Davis.

Lyn Bond for Pender Hardware Company and Johnson & Wiggins.

W. O. Howard and Don Gilliam, for Farmers Banking & Trust Company, George A. Holderness and John Cheshire.

CONNOR, J. It was adjudged that plaintiff, Joe E. Harris, recover of defendants, John Cheshire, George A. Holderness and Edgecombe Homestead & Loan Association the sum of $355.06, with interest from 2 September, 1920, and that plaintiff, Pender Hardware Company recover of said defendants the sum of $264.81, with interest from 1 January, 1921. George A. Holderness, trustee, from the proceeds of the sale of the Home Place, paid to Edgecombe Homestead & Loan Association, its note executed by John Cheshire and secured in mortgage recorded on 8 June, 1920. At the date of the sale, these two plaintiffs had docketed liens on said "Home Place," effective 6 April, 1920, and 31 May, 1920, respectively. These liens were prior to said recorded mortgage, and manifestly the judgments secured by these liens had priority over the mortgage to the association, and should have been paid before the application of the surplus remaining in the hands of the trustee, after fully satisfying the note of Farmers Banking & Trust Company, taxes, assessments and costs, to the indebtedness secured in the mortgage to the association. There was no exception to the judgment as affecting these claims.

On 15 April, 1922, the date of the foreclosure sale by George A. Holderness, trustee, the Farmers Bank & Trust Company, and said trustee, by

virtue of the paper-writing recorded on 7 January, 1920, had first lien on the "Home Place," and also on the "personal property" sold by the trustee, upon default by John Cheshire in the payment of the note for $7,500 secured in said paper-writing. Plaintiffs, other than Joe E. Harris and Pender Hardware Company, whose claims have been satisfied by judgment against Edgecombe Homestead & Loan Association and the trustee, had liens only on the Home Place in the following order of priority, to wit: (1) F. G. Davis, claim filed 16 February, 1921, lien as of 5 August, 1920, for $340.19, with interest from 30 November, 1920, and costs; (2) Johnson & Wiggins, claim filed 16 February, 1921, lien as of 16 August, 1920, for $438.62, with interest from 29 August, 1920, and costs; (3) W. M. Wiggins, claim filed 30 March, 1921, lien as of 21 August, 1920, for $1,961.95, with interest from 19 January, 1921, and costs.

T. P. Cheshire, as assignee and transferee of the note for $2,500, secured in mortgage from John Cheshire and wife to George A. Holderness, trustee, recorded on 19 October, 1920, was postponed as to his right to proceeds from sale of said Home Place to these liens. He was not entitled to any part of the surplus left in the hands of the trustee, until these prior liens had been fully paid and satisfied. Although the notices of claim, upon which these liens were acquired were subsequent to the registration of his mortgage, the liens related back to the commencement of the work and the furnishing of materials for the construction of the residence, by these respective claimants, and as established by the judgments these liens were all prior to his mortgage. *McAdams v. Trust Co.*, 167 N. C., 494.

The Farmers Banking & Trust Company and George A. Holderness, trustee, had two sources from which to derive money for the payment of the balance due on its debt: (1) The Home Place, (2) The personal property. These lien creditors had only one source—the "Home Place." The trustee, having sold both the personal property and the Home Place, should have applied the proceeds of the sale of the personal property as a payment on the note held by the Farmers Banking & Trust Company, and thus have increased the surplus in his hands arising from the sale of the Home Place, after the payment therefrom of all claims prior to the claims of these lien creditors. Upon the facts found by the referee, this would have left in his hands, applicable to these claims, in the order of their priority, as among themselves, eight hundred dollars. It is true that these lien creditors had no lien upon the personal property sold by the trustee, but they had an equity recognized in our jurisprudence and uniformly enforced by the courts. "Where one person has a clear right to resort to two funds and another person has a

right to resort to but one of them, the latter may compel the former, as double creditor, to exhaust the fund on which the latter, as single creditor has no claim." Eaton on Equity, p. 513.

"It is well settled that if one party has a lien upon two pieces of property and the other has a lien on one piece only, the latter has the right in equity to compel the former to resort to the other piece of property in the first instance if this is necessary to satisfy the claims of both parties. There is no difficulty in applying this principle when the property is in the possession of the mortgagor." *Harrington v. Furr,* 172 N. C., 610.

At the date of the sale, while the trustee had in his possession the proceeds of the sale of both the Home Place and the personal property, he had notice, both actual and constructive, of the facts upon which the equity of the lien creditors arise. The payment of the $800 to T. P. Cheshire, rather than to Farmers Banking & Trust Company, in reduction of its note, was a denial of the rights of these creditors. There is no error in his Honor's judgment that these creditors, in the order of their priority, recover of the trustee the sum of $800, with interest from the date of the sale. Nor is there error upon the facts appearing to the court, in adjudging that W. M. Wiggins recover no part of said $800. The right of these creditors to recover judgment against Farmers Banking & Trust Company for the money which the trustee failed to collect and pay upon its note, is not clear, but the Farmers Banking & Trust Company does not assign error in this respect. It joins the trustee in a common defense to the claim of the lien creditors and seems content to share with the trustee the results of the litigation.

Plaintiff, W. M. Wiggins, contends, and by his assignment of error presents to this Court for review, upon appeal, his exceptions to the refusal of his Honor to hold, that Farmers Banking & Trust Company and George A. Holderness, trustee, should have seized and taken into possession the crops, grown by John Cheshire on the "Ballyhack Farm" during 1920, which were subject to lien held by the said company, and which were conveyed to the trustee, by the paper-writing, recorded on 7 January, 1920, as security for the payment of the note for $7,500, and that such security should have been exhausted before the sale of the personal property or the Home Place, conveyed to the trustee in said paper-writing as additional or further security for said note.

This contention was not made until after the said crops had been sold and the proceeds disposed of by John Cheshire, the mortgagor. The said crops were never in the possession of the said company or the trustee, and therefore the principle successfully invoked by the lien creditors, F. G. Davis and Johnson & Wiggins, with respect to the personal

property, seized and sold by the trustee, and the proceeds of the sale thereof does not apply to this contention. W. M. Wiggins at no time had any lien upon or legal claim to said crops. At most, he had an equity, at the maturity of the note held by the Farmers Banking & Trust Company, and while his lien, upon the Home Place, which attached thereto upon the commencement of the labor and the furnishing of material upon the residence, was maturing. This equity, if it existed at all, to compel the company and the trustee, to take possession of the said crops, on or after 1 November, 1920, was not a lien, but an equity to be administered. "The doctrine of marshalling is not determined by the situation when the successive securities are taken, but is to be determined at the time the marshalling is invoked. If defendant (who was insisting upon the equity) had any right to have the securities marshalled, he should have begun proceedings before the sale." *Harrington v. Furr*, 172 N. C., 610. "The equity (of marshalling) is a personal one against the debtor, and does not bind the paramount creditor, nor the debtor's alience for value." Adams Equity, star page 272.

"Though the proposition, that a creditor of two funds will be restrained from proceeding against the doubly charged fund, till he has exhausted the other, is often repeated in the decisions, it has been acted on in general, only where both funds were actually within the control of the court." Adams Equity, note on page 272, note by Bispham.

Plaintiff says that his right to recover in this action is not dependent upon the doctrine of marshalling; that he is seeking to recover of the banking company and the trustee for that they should be required to account for the value of the security, which they released, or failed to seize and apply, as a primary security, to the payment of the note due the company. It has been held that if a senior creditor, with notice of the junior creditor's lien, releases or discharges the security not available to his junior, he is accountable for the actual value of the property in the adjustment of the equities of the parties with regard to the property on which both have liens. 18 R. C. L., 465, and cases cited. This principle, however, does not aid appellant here, for neither the Banking & Trust Company nor the trustee had notice, actual or constructive, of the lien of the appellant, until 30 March, 1921, when notice of the claim of lien was filed. Appellant by filing his claim of lien, acquired a lien as of 21 August, 1920, but this does not suffice as notice to the company or the trustee prior to the date on which notice of claim was filed. The filing of notice of claim of lien could have no other effect than to give claimant priority from the date on which the work was begun or the first material was furnished, over subsequent liens on the property, subject to the liens. All the crops made by John

Cheshire, during 1920, on the "Ballyhack Farm" had been sold prior to 30 March, 1921, the date on which the first constructive notice of the claim of W. M. Wiggins of lien on the Home Place was given to the company or the trustee. Knowledge that John Cheshire was having a residence erected upon his lot was not notice that W. M. Wiggins was performing labor or furnishing material in the construction of said residence or that Cheshire was not paying him. Conceding that the company and the trustee, in contemplation of law, released the crops to which they were entitled as security, neither had notice of the claim of W. M. Wiggins, subsequently asserted, and the principle here invoked by W. M. Wiggins upon which to hold the company and the trustee liable for such release, fails to establish such liability on account of lack of such notice.

Plaintiff, W. M. Wiggins, further contends that his right of recovery in this action is not dependent upon any general principle or doctrine of equity, but is to be determined by the terms of the paper-writing under which the company and the trustee acquired lien upon and title to the crops and Home Place, involved in this contention. It is true that as between John Cheshire, as debtor, and the company as creditor, and the trustee, under the express terms of the paper-writing, the trustee was required to sell first the crops. A third party, who subsequently acquired, for value, title to or lien upon any of the property conveyed, as security, in said paper-writing, it may be conceded, also acquired the right to insist, for his protection, upon the sale of the several properties, in the order as required by John Cheshire. If W. M. Wiggins, by virtue of his lien had the right to require the trustee to sell the crops first, he should have made demand upon the trustee and the company while the crops or their proceeds were available for sale or application to the company's debt. Neither the company nor the trustee had notice, by demand or otherwise, of any fact by virtue of which appellant acquired or claimed any rights with respect to the sale of the crops or the application of their proceeds to the debt of the company. The principle applicable is thus stated in Bispham's Equity, section 341: "When the paramount creditor has been guilty of some negligence or default, as where he has put one of the funds beyond his own reach, with full knowledge that his debt cannot be satisfied out of the other fund without injury to the interests of third persons, he may be restrained from coming in upon the second fund."

We cannot hold that the failure of the bank and the trustee to foreclose the lien and deed of trust immediately upon the maturity of the note of John Cheshire, was negligence such as to subject them to liability to Cheshire or to any one claiming under him, for any loss which was

thereafter sustained, certainly, in the absence of any demand to foreclose or of any notice of the existence of any facts upon which rights of third parties had arisen or might thereafter arise, in or to any property covered by the lien or deed of trust.

Nor is the assignment of error with respect to the amount retained by the trustee as commission sustained. This amount was fixed by contract between the parties to the paper-writing and no facts appear upon which we can hold that the amount retained was excessive. *Banking Co. v. Leach,* 169 N. C., 706.

Both appeals in this case are determined by the existence or lack of existence of notice.

In defendant's appeal, the trustee had notice, both actual and constructive, at the date of the sale of the personal property, of the rights of appellees, as determined upon the uncontroverted facts, and in accordance with a well-settled principle of equity. With knowledge of such rights, arising from such notice, he applied the proceeds of the said sale, in disregard of the rights of appellees. His Honor held that the trustee was liable to appellees for the misapplication of the proceeds of the sale of the personal property. This holding is approved by us, as a correct application of a well-settled principle of equity to the facts found by the referee.

In plaintiff's appeal, neither the Farmers Banking & Trust Company, nor the trustee had notice, either actual or constructive, until after the crops had been sold and the proceeds disposed of by the debtor, of the rights or claims of appellant. They cannot be held liable to one of whose rights or claims they had no knowledge or notice from which knowledge can be imputed to them. As between themselves, the debtor and creditor could waive rights and liabilities arising out of the terms of the paper-writing, by which the debtor had secured the creditor. The creditor cannot be held liable to a third party, who, although he had rights subsequently acquired which might be or were affected by the waiver, gave no notice actual or constructive to the creditor or trustee of such rights or claims and made no demand for the protection by the creditor or the trustee of such rights or claims as he had or might thereafter have.

His Honor held that appellees are not liable, in any aspect of the case, to appellant with respect to the crops or the proceeds of same. This holding we approve, as sustained upon principle and by authoritative text-writers, and decisions of the courts.

Upon both appeals, the judgment is

Affirmed.

DR. C. A. ADAMS ET AL. CITIZENS AND TAXPAYERS v. CITY OF DURHAM.

(Filed 4 March, 1925.)

Municipal Corporations—Cities and Towns—Public Buildings—Public Purposes—Constitutional Law.

The erection by a city of a public building with funds for the purpose on hand, for governmental offices, academy of music, public meetings, etc., if for a governmental purpose, and within the exercise of the discretionary powers conferred upon the governing body of the municipality, and where no further expense may be incurred such as to pledge the credit of the city, or therein impose an obligation upon it, there is no violation of our Constitution, Art. VII, sec. 7, C. S., 2673, 2786, 2787, (3), (4).

CIVIL ACTION to restrain the expenditure of certain moneys in the erection of a city auditorium, heard by consent and as on final hearing before *Cranmer, J.*, at Oxford, N. C., 17 November, 1924.

There was judgment dissolving the preliminary restraining order and dismissing the action, and plaintiffs excepted and appealed.

R. H. Sykes for plaintiff.
S. C. Chambers for defendant.

HOKE, C. J. From the facts properly presented at the hearing and deemed pertinent to the inquiry, it appears that the city of Durham has now on hand a fund amounting to $250,000.00, the proceeds of the sale of a city lot on which was erected a building used for city governmental offices, an academy of music, etc. The said fund consists of cash to the amount of $150,000.00 and the remainder of solvent and secured purchase-money notes payable in May, 1925. That the city owns a desirable lot, accessible and centrally located, on which they have constructed the governmental and administrative offices of the city, and on the remainder of said lot it is proposed and intended to erect with this $250,000.00 a public auditorium for the convenience of the city and its inhabitants and for the purpose of public meetings, school commencement exercises, lectures, and "incidentally for operas and dramatic performances, etc." And on these facts we can see no valid objection to the proposed expenditure.

The power of the city authorities to make the sale of the former lot has been directly approved by this Court in *Harris v. Durham,* 185 N. C., p. 571. The erection of a public auditorium, while it may not be a necessary expense, is to our minds undoubtedly a public purpose, and it has been so directly held in well considered cases on the subject. *Wheelock v. City of Lowell,* 196 Mass., p. 220; *Denver v. Hallett,* 34 Colo., p. 393. And the city authorities having funds already on hand, clearly have the right to erect such a building in the exercise of the

powers conferred upon them both by the general law and provisions of the charter applicable. C. S., secs. 2673, 2786 and 2787, subsecs. 3 and 4.

The only objection seriously urged against the proposed measure is that the same would be in violation of Article VII, sec. 7 of the Constitution, which provides that no county, city, town or other municipal corporation shall contract any debt or loan its credit except for necessary expenses, unless sanctioned by the popular vote. But this provision, in our opinion, has no application to the facts of this record, where, as stated, the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. *Brockenbrough v. Comrs.*, 134 N. C., p. 12; *Gardner v. New Bern*, 98 N. C., p. 231; *Sackett v. New Albany*, 88 Ind., p. 473.

In recognition of the Constitutional inhibition, however, any contract for the erection of the auditorium shall be so drawn that only the said fund of $250,000.00 may be used for the purpose and in no event shall further liability be imposed on the city and its inhabitants in favor of any builder, contractor, or others engaged in the work. So construed, the judgment of his Honor dissolving the restraining order and dismissing the action is

Affirmed.

STATE v. CHEATAM EVANS.

(Filed 4 March, 1925.)

Appeal and Error—Evidence—Identity of Prisoner—Prejudice—Harmless Error.

Upon this trial for the capital offense of murder in the first degree, the evidence was sufficient to convict of the crime and was conflicting as to whether the defendant continued after reaching his home to drive the deceased in his automobile to the place of the occurrence, or whether another in the automobile did so and committed the offense: *Held*, under this and other evidence in the case, it was not prejudicial or reversible error to the defendant to permit a witness to testify that the defendant drove in his automobile the deceased to the place of the homicide. As to whether this testimony would be error otherwise, *quere?*

APPEAL by defendant from *Lyon, J.*, at October Special Term, 1924, of NASH.

Criminal prosecution tried upon an indictment charging the defendant with murder in the first degree. From an adverse verdict, finding the defendant guilty of the capital felony as charged in the bill of indictment, and judgment of death pronounced thereon, he appeals, assigning errors.

S. *v.* EVANS.

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

F. S. Spruill, Jr., for defendant.

STACY, J. On 26 July, 1924, about 8:00 or 8:30 p. m., A. L. Joyner, a jitney driver in the town of Hollister, Halifax County, was employed to make a trip down into Nash County where the defendant lives. He had in his car Tom Lee, Ernest Lee, and the defendant, Cheatam Evans. Soon after arriving at the defendant's home, the driver of the car, A. L. Joyner, was shot twice and almost instantly killed. The State contended that the deceased was shot and killed by the defendant. The defense, on the other hand, contended that Ernest Lee did the shooting, while the defendant was in his house and away from the scene of the homicide. There was evidence tending to support the two contentions, and the jury took the State's view of the matter.

It was in evidence that the deceased was shot with a gun belonging to the defendant; that the car with Joyner's body in it, was driven to Davis' Bridge, some distance away, where the bloody foot-mat of the car was thrown into the creek; that the car was driven from there to another creek where Joyner's body was thrown into the water; that a watch taken from the defendant was Joyner's watch, and when Joyner's body was found, his watch chain was in the button hole of his shirt and that a knife taken from the defendant was similar to one owned by Joyner. Early in the morning, following the night of the homicide, the defendant came to the home of Washington Lynch, driving Joyner's automobile, and wanted to borrow some license plates. There was other evidence tending to show the defendant's guilt.

The defendant, a witness in his own behalf, testified that he was invited by Tom and Ernest Lee to ride with them in Joyner's car as they were going down into Nash County, by the defendant's home. This he consented to do, and upon arriving at his house, they all stopped for water. Taking advantage of the delay, the defendant went into his house to get supper; soon after he began eating his evening meal, Ernest Lee came to the door and wanted to borrow his gun, saying that he (Ernest Lee), Tom Lee and Joyner were going down the road to get some whiskey and that they might need it before they got back. Ernest Lee took the gun and went out to the car. In a very short time, the defendant heard two shots; he ran to the door and saw Ernest Lee with the gun. Ernest Lee told the defendant that he shot Joyner because he would not carry him and Tom Lee to get the whiskey. Defendant further testified that after the killing, he was forced by Ernest Lee, under threats of death, to get in the car and go with them; that they finally let him out of the car near Hollister after repeatedly

threatening him with death if he dared tell what had happened. The jury rejected this view of the evidence.

In corroboration of the State's evidence and in support of its theory of the case, the prosecution undertook to show that the deceased was employed by the defendant to make the trip in question, and not by the Lee boys as the defendant contended. The admission of the following evidence, looking to that end and given by the witness, G. A. McClelland, forms the basis of one of the defendant's exceptive assignments of error:

"I talked to Mr. Joyner just before he left Hollister and he told me—" (Objection by defendant; overruled; exception) "Mr. Joyner told me that Evans had employed him. I didn't hear them say anything to each other. I didn't hear any conversation between the dead man, Arthur Joyner, and Evans that night."

Q. "I ask you if you heard Joyner say anything to Evans?"

A. "No, sir."

Q. "I ask you this question: Did Mr. Joyner say anything to you in Evans' presence?"

(Objection by defendant; overruled; exception.)

A. "Evans was present so he could hear what Joyner said to me. He told me that Evans had employed him to take him to his home to get his wife. That last remark was made just before he left. There was no conversation between Evans and Joyner in my presence. He (Joyner) was talking to me when this remark happened to be made."

It is the position of the defendant that this conversation, had between the witness and the deceased, although in the presence and hearing of the defendant, is purely hearsay and should not have been admitted in evidence against him. The defendant says that no crime had been committed at that time; that it was an immaterial circumstance, and that he was under no obligation to deny it. The defendant's position is not without force, if it be conceded the occasion was such as to call for no expression from him; and, if this were determinative of the case, a very serious question would be presented. Silence alone, in the hearing of a statement, is not what makes it evidence of probative value, but it is in connection with some circumstance or significant conduct on the part of the listener that gives the statement evidentiary weight. *S. v. Record,* 151 N. C., 695; *S. v. Burton,* 94 N. C., 947; *S. v. Bowman,* 80 N. C., 432; 2 Chamberlayne on Evidence, sec. 1418. "Where the *occasion* is such that a person is not called upon or expected to speak, no statement made in his presence can be used against him on the ground of his presumed assent from his silence"—*Ashe, J.,* in *Guy v. Manuel,* 89 N. C., p. 86.

Here, however, the evidence in question would seem to be competent as tending to show the presence of the defendant in the car, which

had not been admitted at the time it was offered. The matter spoken of took place at the beginning of the trip, which subsequently proved fatal, and really formed a part of it. But admitted or rejected, true or untrue, this evidence was not decisive of the case, and formed no necessary link in the State's chain of circumstances. It is thought that its admission, in any event, should not be held for reversible error. This same witness also testified that he saw the defendant and the deceased leaving Hollister together in Joyner's car about eight o'clock that night.

A careful perusal of the record leaves us with the impression that no reversible error was committed on the trial. The verdict and judgment, therefore, will be upheld.

No error.

W. T. WHITE AND LIZZIE P. WHITE, HIS WIFE, v. DUDLEY A. WHITE AND C. F. WHITE, HER HUSBAND.

(Filed 4 March, 1925.)

Wills—Estates—Powers of Appointment—Life Estate—Heirs—Fee Simple—Contingent Interests.

Where there is a devise of an estate for life with power in the devisees to dispose of the same by will to whomsoever he may choose the devisee under the power when exercised takes from the testator, and where the lands are held by the donee under the power and another in common, a partition thereof of the fee-simple title may not be had between them, and this cannot be remedied by having the heirs at law made parties, as the exercise of the appointment by the life tenant will deprive them of their inheritance thereof.

APPEAL by plaintiffs from *Bond, J.*, at November Term, 1924, of HALIFAX.

The proceeding was brought 7 May, 1923, for the partition of certain lots situated in the town of Scotland Neck, of which the plaintiff W. T. White and the defendant Dudley A. White were tenants in common. On 26 October, 1923, W. T. White died leaving the following will which was probated 8 November, 1923:

"Item 1. I give and devise to my beloved wife, Lizzie P. White, for the term of her natural life, all of my real estate, which I shall own at the time of my death, with full power and authority, by her last will and testament, to dispose of the same in any manner which she may deem right, and to such person or persons as she shall by said will appoint, in fee simple.

"Item 2. I give and bequeath to my said wife all of my personal property of every kind and description, with the full power and

authority to use the same for her support, during her life, either wholly or in part and with the further right to dispose of the same, or such part thereof as she shall not have used, by her last will and testament, in any manner which she shall desire or think right.

"Item 3. I name and appoint my said wife, Lizzie P. White, as sole executrix of this my last will and testament."

On 17 December, 1923, Lizzie P. White was made a party plaintiff and an order was entered by the clerk directing a sale of the lots by commissioners. On 19 January, 1924, the lots were sold and Dudley A. White became the last and highest bidder at the price of $6,550. The commissioners filed their report 31 January, and before confirmation thereof Alfred L. White, S. R. White, Eugene White, Robert White appearing by his guardian Bertha B. Swindell, Alice Witherington and Walter M. Witherington, her husband, heirs at law of W. T. White, were made parties plaintiff. The report was confirmed on 31 March, 1924, and the commissioners were directed to execute a deed to Dudley A. White upon payment of the purchase money; but she refused to accept the deed and pay the purchase price on the ground that the commissioners could not convey a good and indefeasible title. From the clerk's order the defendant Dudley A. White appealed, and *Bond, J.*, being of opinion that the commissioners could not convey a good and indefeasible title, adjudged that the purchaser be not required to pay the purchase price, and from this judgment the plaintiffs appealed.

Stuart Smith for plaintiffs.
Allsbrook & Philips for defendants.

ADAMS, J. The right of action survived (C. S., secs. 162, 163, 461) and after the death of W. T. White (26 October, 1923) his heirs at law and his wife, Lizzie P. White, the beneficiary under his will, were made parties plaintiff. The will was probated 8 November and the order of sale was made 17 December, 1923. As the commissioners could sell and convey only such title as the parties owned it is necessary to determine whether the substituted plaintiffs or any of them had an undivided half-interest in fee; that the defendant Dudley A. White had such interest is admitted.

The devise of an estate generally, with the power of disposing of it, carries the fee; but if an estate is devised for life the devisee takes only a life estate, though a power to appoint the fee by deed or will be annexed, unless there be a manifest intent of the testator which would be defeated by adhering to the particular intent. *Bass v. Bass,* 78 N. C., 374; *Patrick v. Morehead,* 85 N. C., 62; *Long v. Waldraven,* 113 N. C., 337; *Chewning v. Mason,* 158 N. C., 578; *Griffin v. Commander,* 163 N. C., 230; *Darden v. Matthews,* 173 N. C., 186. In *Norfleet v. Haw-*

kins, 93 N. C., 393, the Court said: "The donee is the mere instrument by which the estate is passed from the donor to the appointee, and when the appointment is made the appointee at once takes the estate from the donor as if it had been conveyed directly to him."

It will be seen from the application of these principles that under the first item of the will Lizzie P. White acquired only a life estate, with power to dispose of the fee by her last will and testament. The defect of title is not cured by making the testator's heirs at law parties to the action for the reason that they may not be the ultimate donees under the power.

The judgment is

Affirmed.

E. F. YOUNG, J. R. YOUNG AND ISABELLE Y. WILLIAMS, HEIRS AT LAW OF A. F. YOUNG v. ATLANTIC COAST LINE RAILROAD COMPANY AND WALTER D. HINES, FEDERAL ADMINISTRATOR OF RAILROADS.

(Filed 4 March, 1925.)

1. Limitation of Actions—Nonsuit—Statutes—Pleadings—Questions of Law—Parol Evidence.

Where upon plaintiff's voluntary nonsuit in an action he may bring the same again within one year under the provisions of our statute (C. S., 415), the question of whether the second action is in contemplation of the statute is a question of law for the court upon the construction of the complaints in both actions; and where no complaint has been filed in the first action (C. S., 506), testimony of the plaintiff as to the cause of action intended to have been alleged therein is properly excluded.

2. Same—Railroads—Lands—Dower—Reversion—Remainders.

In an action against a railroad company by a remainderman to recover lands covered by dower, the statute of limitations begins to run at the death of the widow, when the cause of action arose, and the reversionary or remainder interest as against a railroad is barred within the five-year period therefrom under the statute.

3. Same—Constitutional Law.

C. S., 440 (1) requiring that no suit, action or proceeding be brought against a railroad company for damages or compensation for lands, etc., unless within five years after the land has been entered, has now no exception, Public Laws of 1893, ch. 152, sec. 2; the exception having been repealed.

APPEAL by plaintiff from *Barnhill, J.,* September Term, 1924, of HARNETT.

The land in controversy originally belonged to J. C. Surles, who died sometime prior to the year 1884, and was included in the dower allotment to his widow, Mary E. Surles, who in the year 1886, conveyed her

interest to the Wilmington & Weldon Railroad Company. Said land is now owned by the Atlantic Coast Line Railroad Company, defendant. The Wilmington & Weldon Railroad Company consolidated with defendant and it took over the land. The fee-simple title to the land in controversy, subject to the dower right of Mary E. Surles, was conveyed by Daniel Stewart, commissioner, to H. A. Hodges, the same land was conveyed by J. H. Pope, sheriff, to the plaintiff, E. F. Young, by deed 1 November, 1897, and in turn the same was conveyed to Alma F. Young, by deed dated 16 February, 1906, from R. L. Godwin, J. M. Hodges and J. D. Barnes, trustees in bankruptcy of E. F. Young. The present plaintiffs, J. R. Young and Isabelle Y. Williams, are the heirs at law of Alma F. Young and E. F. Young, her husband. The Wilmington & Weldon Railroad Company was incorporated prior to 1868.

The defendant railroad, about the year 1886, appropriated the strip of land in controversy and has continually used the same since that time. The life tenant, Mary E. Surles, died 10 March, 1909, and this first action by Alma F. Young and E. F. Young was brought 26 October, 1909, by summons being issued and duly served. The action was nonsuited at the February Term, 1918, within the year allowed by law after the nonsuit, this second action was brought, a summons issued and duly served, and complaint filed in the latter suit on 3 February, 1919. No complaint was filed in the first suit.

Other necessary facts and the exceptions and assignments of error will be considered in the opinion.

James Best and Godwin & Williams for plaintiff.
Clifford & Townsend and Charles G. Rose for defendant.

CLARKSON, J. Plaintiffs', appellants', exceptions and assignments of error are as follows:

"1. The witness, E. F. Young, was asked the following question:

"Q. State, Mr. Young, whether or not the causes of action in the first and in the second are identical or different?

"The defendant objected, sustained, and the plaintiffs excepted, this being plaintiffs' first exception. The witness would have answered that the causes of action were the same.

"2. The court erred in sustaining the motion of the defendant to nonsuit the plaintiffs at the close of all of the evidence of the plaintiff, and in signing the judgment of record, to which the plaintiffs duly objected, excepted and appealed therefrom."

Mary E. Surles, the widow of J. C. Surles, owned a life estate (dower) in the land in controversy—it was allotted to her about 1886. The railroad was put through the land in 1883, and the Atlantic

Coast Line Railroad Company, defendant, took possession in 1886. Mary E. Surles sold her interest to the Wilmington & Weldon Railroad Company, about the year 1886, and defendant, Atlantic Coast Line Railroad Company, now owns her said interest. The possession of said land has been in defendant, Atlantic Coast Line Railroad Company and its predecessor since 1883. Double tracks, side tracks, etc., were constructed on the land and the land used by defendant railroad in its ordinary business as a common carrier. Mary E. Surles died 10 March, 1909. Alma F. Young and E. F. Young, her husband, brought suit against the Atlantic Coast Line Railroad Company on 26 October, 1909. Summons was duly issued and served on defendant 28 October, 1909. No complaint or pleadings of any kind were ever filed in this action and the same was nonsuited at February Term, 1918, of Harnett County. After the nonsuit, E. F. Young and Alma F. Young had summons issued against defendant 30 January, 1919, and duly served on defendant within the year after nonsuit. Complaint was duly filed in the last action for the land in controversy and damages on 3 February, 1919. Since the commencement of this last action, Alma F. Young has died. Her children, J. R. Young and Isabelle Y. Williams, her only heirs at law, have been made parties plaintiff.

The first question presented on the record for our decision is the competency of the testimony of E. F. Young. He was offered as a witness to show by parol that the cause of action commenced by Alma F. Young, his wife, he being a party plaintiff to same, in which summons was issued 26 October, 1909, and no complaint or pleadings were filed, was identical with the action started 30 January, 1919, in which complaint was duly filed for the land in controversy and damages. The second suit, in which the complaint is filed, is now by E. F. Young who is a tenant by the curtesy in the lands of his wife Alma F. Young, and his children by Alma F. Young owning the remainder. This suit is to recover his wife's land and damages. When the suit was first brought, she had the right of action. C. S., 454, sec. 1: "When the action concerns her separate property, she may sue alone." Can he now by parol testify as to what his wife's suit, regularly started by summons being issued and no complaint filed, was about over defendant's objection? Our civil procedure is broad and liberal, but we must have orderly procedure, and we cannot hold parol testimony is competent under the facts and circumstances in this case.

25 Cyc. of Law and Procedure, p. 1315-16, is as follows:

"Nature or form of action. In order that the second action may be deemed a continuation of the first, the cause of action must be the same in both cases. This does not mean that the second suit be a literal copy of the first, or that the same form of action should be

adopted. A new action of any kind is permitted, having for result the same relief as was sought in the original action. The court will not presume that the first suit was for the same cause of action as the second; but plaintiff must establish the identity of the causes of action in the two suits, by the record, and it cannot be shown by evidence *aliunde.*"

C. S., 415, is as follows: "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought *in forma pauperis.*"

It was held in *Gibbs v. Crane Elevator Co.,* 180 Ill., p. 191, under statute similar to C. S., 415, *supra,* headnote 4, as follows:

"Where, after the usual *præcipe* the summons in an action of case, the plaintiff is nonsuited for failure to file a declaration, the court cannot presume that a second suit brought thereafter for a personal injury was based upon the same cause of action as the first suit; nor is the fact capable of parol proof under such circumstances." The reason of the Court (*supra,* p. 194-5) was as follows: "When the plaintiff avers that the cause of action in the first suit is the same as that declared upon in the present action and claims the right to prove it by parol testimony, he tenders no issue of fact capable of being proved on his part and disproved on the part of the defendants. Manifestly, his proof would be, in effect, that when he brought his first suit he intended it for the purpose of recovering damages for the same injuries averred in his present declaration. But that proof would be of nothing more than an intention on his part,—that is, that which rested in his own mind and known to no one else. Upon his *præcipe* and summons in the first cause he might have filed a declaration for any one of the many causes of action proper to be brought in case."

In this jurisdiction, the complaint must contain (C. S., 506):

"1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant.

"2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered."

The complaint in the first action must necessarily be in writing—none was filed. It is accepted law that the interpretation and construc-

tion placed upon pleadings is a matter of law for the courts. There is no complaint filed in the first case for the court to compare with the complaint in the second case to determine by inspection that they were identical causes of action. This cannot be presumed.

In *Atlanta K. & N. Ry. Co. v. Wilson,* 119 Ga., p. 784, *Lamar, J.,* says: "Where, to prevent the bar of the statute of limitations, the plaintiff relies on the privilege of renewal within six months, conferred by the Civil Code, sec. 3786, a copy of the record in the first suit should be attached, so that the court may determine, as a matter of law, whether the two suits were for the same cause of action and between the same parties. The court should have before it the petition rather than the conclusions of the pleader thereon, for the further reason that it should be in position to determine whether the first suit was itself brought within the statute, and in a court having jurisdiction of the subject-matter. But here there was no special demurrer for failure to attach such exhibit. Enough appears to permit the determination of the question as to whether the present suit was saved by the renewal statute. Compare *Gibbs v. Crane,* 180 Ill., 191." It is not necessary to cite further authorities from other jurisdictions. The matter is settled in this State by a long line of decisions. *Bryan v. Malloy,* 90 N. C., p. 508; *Tomlinson v. Bennett,* 145 N. C., p. 279; *Gauldin v. Madison,* 179 N. C., p. 461.

If Alma F. Young had a cause of action, it accrued on the death of Mary E. Surles, which took place 10 March, 1909, she being entitled to the remainder after the life estate which had been acquired by defendant. The defendant pleads the statute of limitations, C. S., 440 (1), which is as follows:

"No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right of way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation." Revisal of 1905 of N. C., sec. 392 (1); *Abernathy v. R. R.,* 159 N. C., p. 340.

Plaintiffs contend that "the defendant pleaded the five-year statute of limitations, thereby casting the burden upon the plaintiffs to come within the requirements of C. S., 440. This statute was enacted in 1893, and it excepts actions against railroads chartered prior to the year 1868. It is admitted in the pleadings that the conveyance of Mary E. Surles was made to the Wilmington & Weldon Railroad Company, and that this company was chartered prior to the year 1868, and that the defendant in this action succeeded to all the rights and prop-

erties of said Wilmington & Weldon Railroad Company. This being true, the five-year statute of limitations does not apply to this case."

It will be noted that in the Revisal of 1905, the meaning is the same as C. S., 440 (1). There is no exception. Public Laws 1893, ch. 152, sec. 2, is as follows:

"That this act shall not apply or be deemed to apply to any action or proceeding pending at the time of the passage of this act, nor shall the provisions of this act apply to railroads chartered prior to January first, eighteen hundred and sixty-eight."

This section was held constitutional in *Narron v. R. R.*, 122 N. C., 856. This section and exception was omitted from the Revisal and Consolidated Statutes.

The cause of action accrued on the death of Mary E. Surles, 10 March, 1909. *Pritchard v. Williams,* 175 N. C., 319. At that time the statute pleaded by defendant was in full force and effect with no exception.

The parol evidence of E. F. Young is incompetent to show what Alma F. Young, now dead, intended to sue the defendant, Atlantic Coast Line Railroad Company, for—what her intentions were—she should have filed her complaint defining her cause of action. The court, by inspection of the record, could then determine whether the two were identical. This being our view of the law, the only action is the one brought 30 January, 1919, and now prosecuted by E. F. Young and the children of Alma F. Young. Upon the allegations in the complaint in this action, the right of action accrued on the death of Mary E. Surles, 10 March, 1909. This cause of action has long since been barred by the five-year statute of limitations, *supra,* which was duly pleaded by defendant.

In the judgment of the court below, we think there was

No error.

J. O. PROCTOR AND W. E. PROCTOR, TRADING AS J. O. PROCTOR & BRO., v. THE CAROLINA FERTILIZER AND PHOSPHATE COMPANY, THE BANK OF GRIMESLAND, THE BANK OF ROSE HILL, AND JESSE FUSSELL.

(Filed 4 March, 1925.)

1. Bills and Notes—Negotiable Instruments — Fraud — Holder in Due Course—Notice—Banks and Banking—Certificates—Deposits.

When one has acquired a note tainted with fraud between the original parties, with notice of the fraud, he is not an innocent holder for value, under the provisions of the statute; and when a bank has issued to him

a certificate of deposit upon acquiring the note in good faith, for value, for the amount thereof, without notice and before maturity, the original fraud invalidates the certificate of deposit as to such holder, and can confer no superior right upon him than that existing under the note itself.

2. Same—Evidence—Burden of Proof.

When the evidence and verdict thereon establishes the fact that a negotiable instrument had been acquired by a holder with notice of the fraud between the original parties, the burden of proof is on him, claiming to be an innocent holder in due course, to establish that fact.

3. Appeal and Error—Contentions—Objections and Exceptions—Instructions—Prejudice.

A statement by the trial judge of the contention of the parties, if incorrect, should be excepted to at the time, in order to be available on appeal; and when it relates to contentions as to the law upon the evidence, it will not be held for reversible error, in the absence of an erroneous instruction to that effect.

APPEAL by Jesse Fussell from *Barnhill, J.*, and a jury, at January Term, 1925, of PITT.

F. G. James & Son for plaintiffs.

Stevens, Beasley & Stevens and Julius Brown for defendant Jesse Fussell.

CLARKSON, J. This case was before this Court on appeal by Jesse Fussell from a continuance of restraining order to the hearing, heard by Lyon, J., at Beaufort, 17 August, 1921, and is reported in 183 N. C., p. 153. This Court, *Clark, C. J.*, writing the unanimous opinion, affirmed the judgment of the court below. The facts are fully set forth in that opinion and will not be repeated.

On the trial in the court below, the issues submitted to the jury, and their answers thereto, were as follows:

"1. Was the execution of the note for $10,000 procured from the plaintiff by false and fraudulent misrepresentation of the defendant Phosphate Company, as alleged in the complaint? Answer: 'Yes.'

"2. If so, did the Bank of Grimesland purchase said note for value, before maturity and without notice of any defect or infirmity therein? Answer: 'Yes.'

"3. Was the certificate of deposit in controversy given for, and in exchange of, said note and as the proceeds thereof? Answer: 'Yes.'

"4. Did the defendant Jesse Fussell take said certificate for value, before maturity, and without notice of any defect or infirmity therein? Answer: 'No.'"

We think the issues submitted to the jury were the proper ones raised by the pleadings and in accordance with the law, as set forth in the

decision in this case when here on appeal from the continuance of the restraining order to the hearing.

The finding of the jury on the first issue established the fact that the $10,000 note was procured by fraud from the plaintiffs and the finding of the jury on the third issue established the fact that the certificate of deposit purchased by Jesse Fussell was tainted and polluted with the same fraud. When the defendant, Phosphate Company, started out to negotiate the certificate of deposit, it had a paper tainted and polluted with fraud. Water cannot rise above its source. The certificate of deposit, the exchange for the fraudulent note (less discount) when it reached Jesse Fussell, was polluted with fraud. The burden was then on Jesse Fussell, as was said in *Bank v. Felton,* 188 N. C., p. 386, "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. Such notice on the part of 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." *Pierce v. Carlton,* 184 N. C., p. 175; *Bank v. Sherron,* 186 N. C., 297; *Bank v. Wester,* 188 N. C., 374; *Grace v. Strickland,* 188 N. C., 369.

The court below on this aspect of the case, charged the jury: "The court charges you if you shall answer the first issue 'Yes,' and the third issue 'Yes,' thereby finding that the note described in this suit was obtained by fraud, and that the certificate of deposit for $9,800.00 issued by the Bank of Grimesland was received by the defendant Fertilizer & Phosphate Company in exchange for and as the proceeds of said note, then the court charges you that the fraud by which said note was obtained would attach to the certificate of deposit, that is, said certificate would be tainted with fraud, and that places the burden upon him who claims to own the said certificate of establishing such facts as shown by the greater weight of the evidence that he received the same in good faith and for value before maturity, that is, that he purchased the same for value, before maturity, without knowledge of fraud, infirmity or defect in the title of the holder and without knowledge of such facts as would make the taking of such certificate bad faith on his part."

The court below clearly and accurately charged the law. This exception and assignment of error cannot be sustained.

In *Mfg. Co. v. Summers,* 143 N. C., 102, *Hoke, J.,* clearly established the law in this jurisdiction:

"When a man's property has been obtained from him by actionable fraud or covin, the owner can follow and recover it from the wrong-

doer as long as he can identify or trace it; and the right attaches, not only to the wrongdoer himself, but to any one to whom the property has been transferred otherwise than in good faith and for valuable consideration; and this applies not only to specific property, but to money and choses in action.

"Where the evidence and verdict established that the title of the party who negotiated the check to defendant was defective, the burden under Rev., 2208 (C. S., 3040), was on the defendant claiming to be a purchaser in good faith for value and without notice, to make this claim good by the greater weight of the evidence; and the court erred in charging that the burden was upon the plaintiff to prove that the defendant was not a holder in due course."

The *Summers case* was cited and approved in this case when it was here before, *supra,* 183 N. C., p. 157.

The defendant contends that the following is error (10th exception and assignment of error):

"Plaintiffs contend that the defendant Jesse Fussell, came into court and made his statements about the circumstances and the conditions under which he acquired the certificate of deposit, and contend that D. C. Fussell, the officer of the Carolina Fertilizer & Phosphate Company was in court and that he could have corroborated his statement by this witness, if it had been true, and that he has failed to do that, and contends you ought to take that fact or circumstance into consideration in determining what weight, if any, you shall give to the testimony of Jesse Fussell, and that you ought not to give his testimony any weight in respect to it. On the other hand the defendant contends that it was as much for these plaintiffs to do as for him, that if he had not been telling the truth about the transaction it was their duty to tender D. C. Fussell. Each party makes his respective contention about this circumstance. You will understand that I am merely stating to you the contentions. I am not stating it as a fact, or as law, but it is a contention of the defendant, it was as much the duty of the plaintiff as much as it was his to offer D. C. Fussell for your consideration. You will consider the relationship of D. C. Fussell to the Carolina Fertilizer & Phosphate Company, and any other fact or circumstance that might arise from this evidence of the defendant, which contentions you will give weight to and determine what weight, if any, you will give to the testimony of Jesse Fussell in passing upon the respective contentions as bearing upon the 4th issue."

"If the recitals of the court were incorrect as to the facts of the case, it was the duty of the defendant to call the court's attention to it, so that the correction could be made then and there. If this was not done at the time, the defendant cannot complain and wait and except

when the case is made up on appeal." *S. v. Barnhill,* 186 N. C., p. 450, and cases cited. *S. v. Ashburn,* 187 N. C., p. 723.

In *S. v. Galloway,* 188 N. C., 417, it is said: "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 see nothing prejudicial in the contentions as given by the court below and in the tenth exception and assignment of error.

We have examined carefully the prayers for instructions and assignments of error made by Jesse Fussell. The jury has found the issues against him.

In law, we can find

No error.

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

(Filed 4 March, 1925.)

Appeal and Error — Opinion of Supreme Court — Modification—Pleadings—Amendments—Principal and Surety.

When a case has been remanded by the Supreme Court modifying a former opinion to ascertain certain defalcations on official bonds separating the liability under each bond therefor: *Held* error for the trial judge to exclude from the case on the second trial the consideration as to other defalcations; and to this end he may allow amendments to the pleadings, and such action is not excluded by the former judgment.

APPEAL by relators from *Midyette, J.,* at Fall Term, 1924, of PAMLICO.

Z. V. Rawls for plaintiff.

F. C. Brinson and Ward & Ward for New Amsterdam Casualty Co.

STACY, J. This case was before us at the Fall Term, 1923, reported in 186 N. C., 127, and again on rehearing at the Spring Term, 1924, reported in 188 N. C., 119. In the opinion filed on the rehearing, modifying the original opinion, it was said:

"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." . . . "Thus it will be necessary to remand the case in order that the defalcations or misappropriations may be separ-

ated, 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."

"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."

Under a proper interpretation of the above excerpts from our last opinion, we think his Honor was in error in holding "that the recent opinion rendered by the Supreme Court in this action is a bar to plaintiff, relators' rights to show the dates of the defalcations of the various funds, other than as set out in the record in the case as tried before the Supreme Court."

The following provision was inserted in the original order, consolidating all of the cases for trial:

"It is also ordered that such judgment as shall be framed on the two verdicts already rendered in these causes shall be so framed that any recovery had on them shall be held in the control of the court in this action until after the 1st day of February, 1923, and until the further order of this Court, so that the court may make proper orders touching the limitations of the judgment as against the defendant, New Amsterdam Casualty Company to such part of the liability as this Court may order."

The appealing relators have never had an opportunity to present their claims under a clear and proper understanding of the legal rights of the parties. It was intended, by our last opinion, that they should have such opportunity and right. This should be accorded even to the extent of allowing amendments to the pleadings, if necessary.

Let the cause be remanded for trial in accordance with the principles heretofore announced.

Error.

STATE v. ALVIN DOVE.

(Filed 4 March, 1925.)

Verdict—Jurors—Impeachment of Verdict.

After the rendition of the verdict, the verdict may not be impeached by the testimony of one of the jurors.

APPEAL by defendant from *Midyette, J.*, at September Term, 1924, of CRAVEN.

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

George T. Willis, D. H. Willis and Henry A. Tolson for defendant.

PER CURIAM. The defendant was indicted for transporting intoxicating liquor in violation of law. The verdict was returned in the afternoon and when the court reconvened the next morning the defendant sought to impeach the verdict by a statement of one of the jurors who was contradicted by all the others. In *S. v. Best,* 111 N. C., 638, the Court said: "We find ourselves concluded by the authority of an established and long-settled rule based upon the wisest reasons of public policy, that a juror should not be permitted to impeach his own conduct in the rendition of a verdict." *S. v. Hall,* 181 N. C., 527; *S. v. Brittain,* 89 N. C., 482.

The motion to dismiss was properly refused.

We find

No error.

J. E. DIXON, ADMR. OF THE ESTATE OF ROBT. C. DIXON v. NORFOLK SOUTHERN RAILROAD CO.

(Filed 4 March, 1925.)

Removal of Causes—Federal Court—Order to Remove—Waiver.

Under the facts of this case: *Held* no error in the ruling of the Superior Court judge that defendant had not waived his right to the removal of the cause from the State to the Federal Court under a former order by offering copies of the papers in the case to the clerk of the State court to be used as a part of the record to be transmitted.

APPEAL from *Barnhill, J.,* at January Term, 1925, of PITT.

Julius Brown and Ward & Grimes for plaintiff.

F. G. James & Son for defendant.

PER CURIAM. The following findings of fact and order were made by the court below:

"This cause of action coming on to be heard before his Honor, M. V. Barnhill, judge presiding at the January Term, 1925, of Pitt County Superior Court, upon the appeal of plaintiff from the order made by J. F. Harrington, clerk Superior Court of Pitt County, overruling plaintiff's motion to set aside and vacate the order of removal made by

said clerk on 8 November, 1924, and being heard, the court finds the following facts: The court adopts the findings of the clerk and the following facts in addition thereto; from evidence of E. F. Tucker, D. C.

"That attorney for defendant carried answer to the deputy clerk and left it with him to be filed in order that all original papers could be sent up to the Federal Court and save the necessity of making certified copies thereof, stating at the time and calling to the attention of the deputy clerk that an order of removal had already been signed by the clerk.

"Upon said finding the court is of the opinion and so finds that the defendant by its action did not waive its right to removal nor make such general appearance in the cause as would estop it from insisting thereon.

"It is therefore ordered and adjudged by the court that the order of said clerk be and the same is affirmed and that this cause be and it is hereby removed to the District Court of the United States for the Eastern District of North Carolina, sitting at Washington, N. C., and the clerk of the Superior Court of Pitt County, North Carolina, is hereby directed to make up the record of this cause by transmitting all the original papers on file in said cause to the said District Court of the United States for the Eastern District of North Carolina."

The plaintiff duly excepted to the findings of fact and order above set forth, assigned error and appealed to the Supreme Court. After hearing the argument and examining the record, we can find

No error.

SNOW HILL LIVESTOCK CO. v. ELIJAH ATKINSON ET AL.

(Filed 4 March, 1925.)

Judgments—Irregularities—Appeal and Error—Statutes—Laches.

Negligence before judgment of a defendant in failing to appear and defend in an action prosecuted to judgment by default for the want of an answer will defeat his right to have the judgment set aside for excusable neglect under our statute C. S., 600, but will not affect his right to have an erroneous judgment corrected on appeal or an irregular judgment vacated, in the absence of laches, on motion, after notice thereof and upon his showing that his rights have thereby been prejudiced.

APPEAL by plaintiff from *Barnhill, J.*, at December Term, 1924, of JOHNSTON.

Civil action tried at April Term, 1923, upon the following issues:

"1. Is the plaintiff the owner and entitled to the possession of the mules described in the affidavits? Answer: 'Yes.'

"2. What was the value of the mules at the time of the seizure? Answer: '$600.00.'

"3. In what amount is the defendant indebted to the plaintiff? Answer: '$75.00 and interest.' "

Judgment against the plaintiff and in favor of the defendant in the sum of $525.00 and costs.

Motion by plaintiff at September Term, 1923, heard finally at December Term, 1924, to set aside and vacate judgment. Motion overruled; plaintiff excepts and appeals.

Langston, Allen & Taylor for plaintiff.
Ed. S. Abell for defendant.

STACY, J. This is an appeal from a refusal to set aside and vacate an alleged irregular judgment. Suit was instituted on 24 March, 1921, to recover on several promissory notes, aggregating $700.00, due the plaintiff by defendants, and to foreclose a chattel mortgage given as security therefor, the mortgaged property being taken under an ancillary writ of claim and delivery at the time of the issuance of summons. No pleadings were ever filed in the case, either complaint or answer, and the plaintiff was not present and did not know of the trial of the cause until sometime after the adjournment of the April Term, 1923.

The plaintiff has its principal place of business in Wayne County, and the defendants reside in Johnston County. Upon the verdict, the court adjudged that the plaintiff had converted the mortgaged property to its own use and signed judgment against the plaintiff for the difference between $600.00, the value of the property, and $75.00, the amount due plaintiff by defendants, as found by the jury, and taxed the plaintiff with the costs. The judgment was not in the alternative, as is customary in claim and delivery proceedings. *Hall v. Tillman,* 110 N. C., 220.

It could hardly be maintained that this is not an irregular judgment, as it was entered contrary to the usual course and practice of the court. *Becton v. Dunn,* 137 N. C., 559; *Gough v. Bell,* 180 N. C., 268. Apparently it is based on neither allegation nor sufficient finding by the jury, and the plaintiff is taxed with the costs, which would seem to make it also an erroneous one, though an erroneous judgment should be corrected by appeal. *Duffer v. Brunson,* 188 N. C., p. 791.

Upon the plaintiff's showing of reasonable diligence and a meritorious defense, as found by his Honor below, we think the motion to set aside

and vacate the judgment should have been allowed and the cause restored to the docket for trial on its merits. *Duffer v. Brunson, supra,* and cases cited. Negligence before judgment will defeat a party's right to have a judgment, regularly entered, set aside or vacated on the grounds of mistake, inadvertence, surprise, or excusable neglect under C. S., 600, but such negligence need not bar the right of the complaining party to have an erroneous judgment corrected by appeal, or an irregular judgment vacated on motion where he moves with proper diligence, after notice of such judgment, and is able to show that his rights have been wrongfully prejudiced thereby. *Cox v. Boyden,* 167 N. C., 320.

Error.

IDA P. CARTER ET AL. v. T. E. VANN ET AL.

(Filed 11 March, 1925.)

Evidence—Boundaries—Issues of Fact—Verdict—Appeal and Error.

Held, under the evidence in this case, the questions of inconsistencies in the description of lands and boundaries contained in the several deeds under which the parties claimed title, and the subsequently changed location thereof, were properly issues of fact that have been determined by the jury, and presented no questions of law that were reviewable on appeal.

APPEAL by defendants from *Bond, J.,* at October Term, 1924, of HERTFORD, in a proceeding to establish boundary lines.

On 19 February, 1885, B. B. Winborne and his wife conveyed to T. E. Vann one undivided half interest in the "Hill's Ferry Wharf property," on the Meherrin River, being a part of the old Hill's Ferry tract, formerly owned by R. G. Cowper, the other half interest having been released to said Winborne by said Cowper in 1882. This deed conveyed also a strip of land bounded by the wharf property, the public road, the river, and the brow of the hill upon the Shell Landing. This strip of land was reconveyed by Vann to Winborne on 11 November, 1889.

On ..... February, 1885, B. B. Winborne and his wife conveyed to T. E. Vann and P. D. Camp and J. L. Camp, trading as Camp & Co. (one-half interest to Vann and one-half interest to Camp & Co.), a piece of land bounded as follows: On the east and north by the lands of U. Vaughan and M. Vaughan and wife, Sarah; on the west by the public road leading from Buckhorn to Hill's Ferry on the Meherrin River, and on the south and southeast by the Meherrin River, said public road and the Hill's Ferry Wharf property, then owned by said

B. B. Winborne and said T. E. Vann; the boundaries of the wharf property being as follows: Said wharf property begins at a chopped cypress standing on the edge of the river below the ferry, where the fence in July, 1882, came to the river; thence up the run of said fence to a chopped gum; thence a few feet to a sycamore, chopped; thence a straight line across the road tract to a chopped pine standing on the edge of the river at a little gut; thence down the river to the beginning.

On 1 January, 1890, P. D. Camp, J. L. Camp, their wives, and T. E. Vann and his wife, in pursuance of a contract made 27 August, 1889, conveyed to J. E. Carter, testator of the plaintiffs, a tract of land bounded as follows: On the west by the road leading from Como to Hill's Ferry; north and east by the lands of Uriah Vaughan; south by Meherrin River; it being a part of the R. G. Cowper land, situated in Maney's Neck Township, conveyed to the grantors by B. B. Winborne, said to contain 200 acres, more or less.

On 2 January, 1890, J. E. Carter and his wife executed a deed of trust on this land to secure the purchase price.

On 3 February, 1914, B. B. Winborne and his wife conveyed to R. A. Magette a one-half undivided interest in the wharf property and river front on Meherrin River.

The jury answered the following issue "Yes": "Is the road marked on the plat 'Old Road' from X to point marked 'Old Ferry Landing,' and from point to the Meherrin River, the western and southern boundary of the lands of the plaintiffs?"

Judgment for the plaintiffs. The defendants appealed, assigning error.

Roswell C. Bridger for plaintiffs.
Stanley Winborne for defendants.

PER CURIAM. The jury found the old road and Meherrin River to be the western and southern boundaries of the plaintiffs' land, and the defendants contend that the true location of these boundaries is as represented on the plat by the lines A, B, C, X. The controversy seems to have arisen out of an alleged inconsistency in certain of the deeds that were offered in evidence. In the deed from Winborne to Vann and Camp & Co., dated.....day of February, 1885, the land conveyed is described as bounded on the south and southeast by the Meherrin River, the public road, and the Hill's Ferry Wharf property, the boundary of the wharf property being also set out. The land conveyed to J. E. Carter is bounded on the west by the road leading from Como to Hill's Ferry, etc., it being a part of the Cowper land, conveyed to the grantors by B. B. Winborne. The defendants contend that this deed automatically excepts the wharf property as described in B. B. Winborne's exception. *Hutton v. Cook,* 173 N. C., 496. But if this be granted, it does

not necessarily follow that the location of the eastern boundary of this property is as contended by the defendants; this was a question for the jury to determine upon all the evidence.

It is also insisted by the defendants that the old road cannot be the dividing line, even if the Winborne exception be ignored, for the reason that the deed to Carter must be construed in reference to the date it bears, and that the road therein called for is the new road, which lies a few yards east of the old road. The road is described as "leading from Como to Hill's Ferry," but it is not described as a "new road" or an "old road," and its location was essentially a matter of fact, not of law. We must therefore overrule all the exceptions based upon the assumption that in no view of the evidence can the old road be the dividing line. The defense was based primarily upon this contention.

The motion to nonsuit the plaintiffs was properly denied, as there was sufficient evidence to warrant the verdict. Indeed, practically the entire controversy was reduced to questions of fact, which were clearly presented to the jury upon competent evidence. We have examined all the exceptions, some of which were merely formal, and have found none that call for elaborate discussion. We find

No error.

STATE EX REL. B. F. GRIFFIN, GUARDIAN, ET AL., v. PAUL D. CAHOON, ADMINISTRATOR, ET AL.

(Filed 11 March, 1925.)

Judgments—Estoppel—Clerks of Court—Interveners—Appeal and Error—Actions.

The guardian of the minor children of the deceased sued the administrator and surety on his bond for the distributive share of his wards, in which creditors of the deceased intervened and made themselves parties, claiming the amount should be distributed among them. The clerk rendered judgment, declaring that the surety company had properly settled with the guardian, and relieving them of further liability, to which the interveners did not except, and from which no appeal was taken: *Held*, the interveners could not thereafter maintain an independent action against the surety on the administrator's bond for the same cause of action.

APPEAL by interpleaders from judgment rendered by *Midyette, J.*, at Fall Term, 1924, of PAMLICO.

This action was begun on 21 December, 1921, by B. F. Griffin, guardian of the infant children of Nathan Cahoon, deceased, against Paul D. Cahoon, administrator of Nathan Cahoon, and the New Amster-

dam Casualty Company, surety on his bond as administrator. Complaint was filed on 3 January, 1923. Plaintiff demanded judgment that he recover of defendant administrator the sum of $6,040, alleged to be due his wards as distributees of the estate of Nathan Cahoon by said administrator, and that he recover of the surety for said administrator the sum of $1,000, the penal sum of the bond. Neither defendant filed answer.

On 7 March, 1923, a judgment was signed by the clerk of the Superior Court of Pamlico County, reciting that the New Amsterdam Casualty Company, surety on the bond of Paul D. Cahoon, administrator of Nathan Cahoon, had paid to B. F. Griffin, guardian, the sum of $1,000, the penal sum of said bond, and thereupon adjudging that the said surety was discharged from all further liability on the bond of the said administrator.

On the same day, to wit, 7 March, 1923, C. S. Weskett & Co. and C. H. Fowler & Co., upon motions duly filed in this cause, were permitted, over the objections of plaintiff, to interplead, to the end that they might share in any recovery had in this action against defendants. Neither of the interpleaders excepted to the judgment rendered on the same day. Thereafter, both interpleaders filed complaints, each alleging that he was a judgment creditor of the administrator of Nathan Cahoon, and demanding judgment that the fund recovered in this action be distributed among the parties according to their respective interests.

To the judgment declaring that the interpleaders had no interest in or to the fund recovered by and paid to the guardian in this action, interpleaders excepted and appeal therefrom to this Court.

D. L. Ward and T. C. Brinson for appellee.
Z. V. Rawls for appellants.

CONNOR, J. His Honor held that interpleaders, having failed to except to the judgment approving the payment by the surety of the sum of $1,000 to plaintiff, were precluded from thereafter asserting any rights to the funds recovered by and paid to the plaintiff as guardian of the infant distributees of the estate of Nathan Cahoon. This holding, and the judgment in accordance therewith, interpleaders assign as error. The assignment of error cannot be sustained. The fund was not in the custody of the court at time complaint was filed, but had been paid to the guardian, who held it under a final judgment in an action to which interpleaders had, upon their motion, been made parties. There are other assets available to the administrators and interpleaders, as creditors of the estate, must look to these assets for the payment of their judgments. The judgment is

Affirmed.

J. W. ROBINSON v. W. B. WILLIAMS AND W. D. WILLIAMS, COPARTNERS, TRADING AS DIXIE SALES COMPANY.

(Filed 11 March, 1925.)

1. Actions — Parties — Partnership — Deeds and Conveyances — Fraud —Causes of Action—Misjoinder—Pleadings—Demurrer.

The bringing of a creditor's bill to establish the existence of a partnership between the defendants, to obtain judgment on their respective claims and to set aside a fraudulent conveyance made by one of these defendants to another on all the assets of the alleged copartnership, is not a misjoinder of parties and causes of action, and a demurrer thereto will not be sustained.

2. Equity—Creditor's Bill—Courts—Jurisdiction.

A creditor's bill is an equitable remedy and is cognizable in the Superior Court; and the jurisdiction of the court in such suits applies to the joinder of creditors whose claims ordinarily would be only cognizable in the court of a justice of the peace.

APPEAL by defendant W. D. Williams from *Devin, J.*, at October Term, 1924, of EDGECOMBE.

Civil action, brought by a number of creditors in the form of a creditor's bill, to establish their claims, to show the existence of a partnership between the defendants, and to assail the validity of a mortgage given by one of the defendants to the other on all the assets of the alleged partnership, it being alleged that said conveyance was fraudulently made to secure an ostensible but unreal indebtedness of $18,000.00.

Demurrer interposed, on the ground of an alleged misjoinder, both of parties and of causes of action; overruled, and defendant W. D. Williams appeals.

Thorne & Thorne, J. B. Ramsey, and John H. Kerr, Jr., for plaintiff.
Battle & Winslow for defendant W. D. Williams.

STACY, J. The demurrer was properly overruled. It is held with us that where there is a misjoinder, both of parties and of causes of action, and a demurrer interposed upon this ground, the demurrer should be sustained and the action dismissed. *Shore v. Holt,* 185 N. C., 312; *Rose v. Warehouse Co.,* 182 N. C., 107; *Roberts v. Mfg. Co.,* 181 N. C., 204. But this is not our case. The present action is brought by a number of creditors, who file a creditors' bill, or a bill in equity, to establish the existence of a partnership between the defendants, to obtain judgments on their respective claims, and to set aside, as a fraudulent conveyance, an $18,000-mortgage given by one of the defendants to the other on all the assets of the alleged copartnership. Such relief may

properly be had in a single suit, and several or all of the creditors may unite as parties plaintiff in the same action. *Wofford v. Hampton,* 173 N. C., 686; *Smith v. Summerfield,* 108 N. C., 284; *Hancock v. Wooten,* 107 N. C., 9; *Bank v. Harris,* 84 N. C., 206; *Fisher v. Bank,* 132 N. C., p. 773.

Nor will a creditor be denied the right to join as party plaintiff in this action pending in the Superior Court, because his claim is less than $200.00. *Machine Co. v. Burger,* 181 N. C., 241. The proceeding is one in equity, and the full relief sought may be administered only in a court of equity. *Mebane v. Layton,* 86 N. C., 572; *Fisher v. Webb,* 84 N. C., 44.

Affirmed.

J. F. WHEDBEE v. J. B. RUFFIN, F. F. TRIPP AND S. W. McKEEL.

(Filed 11 March, 1925.)

1. **Contracts, Written — Consideration — Statute of Frauds — Parol Evidence—Mortgages—Deeds in Trust.**

   Where the consideration of the extension of time for the mortgagor to redeem his lands is expressed as one dollar, it may be shown by parol that it was upon a different consideration, the written contract in this respect not being either within the intent and meaning of the statute of frauds or the varying of the words of a written agreement by parol.

2. **Mortgages—Deeds in Trust—Contracts—Extension of Time to Redeem—Breach—Measure of Damages.**

   Where the holder of the legal title has breached his valid contract to extend to the mortgagor the time for redemption, and the mortgagor remains in possession upon paying a consideration to the date thus extended, the measure of the mortgagor's damages is the consideration he has paid to remain upon the lands plus the price he could have sold the lands for at the later date, had he not redeemed it by then, and while the market value of the land was a circumstance that could be considered by the jury upon the issue of damages, it was not controlling.

APPEAL by defendants from *Bond, J.,* at August Term, 1924, of BERTIE.

On 24 April, 1920, J. F. Whedbee was the owner in fee and in possession of two certain tracts of land, situate in Bertie County. On 28 May, 1919, said Whedbee and wife executed a mortgage, conveying said lands to T. C. Brown to secure four notes, aggregating $2,000, payable to T. C. Brown, each for $500, due one, two, three and four years after date, successively. On 12 March, 1920, said Whedbee and wife by deed of trust conveyed said lands to T. Gillam, Jr., trustee, to secure notes, aggregating $6,550, payable to T. C. Brown, each for $1,310, due one,

two, three, four and five years after date successively. Both the mortgage and deed of trust were duly recorded. The notes thus secured were owned by T. C. Brown, on 24 April, 1920, and continuously thereafter until same were paid out of the proceeds of the sale of said lands by Gillam, trustee.

On 24 April, 1920, J. F. Whedbee and wife contracted and agreed, in writing, to convey the said lands to M. L. Whedbee, his heirs or assigns at any time before 1 January, 1921, upon the payment to said Whedbee of the sum of $13,000; this contract was duly recorded; thereafter the said M. L. Whedbee transferred and assigned all his rights under said contract to defendants. On 8 December, 1920, for the recited consideration of one dollar, J. F. Whedbee and wife extended said contract to 1 January, 1922. This extension was made at the request and for the benefit of defendants.

Plaintiff alleges that the consideration for the extension of the contract or option by him was the promise or agreement by defendants that they would pay off the notes secured by the mortgage and deed of trust, then held by T. C. Brown or make satisfactory arrangements with said T. C. Brown "so as to prevent the land from being sold and to allow plaintiff the use of the same for the year 1921"; that the true consideration for said extension was the agreement of defendants that they would, by paying the notes or making satisfactory arrangements with T. C. Brown, prevent a sale of the lands, under the mortgage or deed of trust before 1 January, 1922. Defendants, answering said allegation, say that it was mutually understood and agreed by and between plaintiff and defendants that plaintiff was to execute deed to T. C. Brown for ten acres of the land, described in the contract or option, at $200 per acre; that said sum, the purchase price of the said ten acres, was to be credited by T. C. Brown upon his notes, and that said T. C. Brown was to carry the balance due on said notes until 1 January, 1922; that T. C. Brown consented to this arrangement, and agreed to accept the purchase price of ten acres of said land, at $200 per acre, as a payment on his notes and to carry the balance until 1 January, 1922; that although J. F. Whedbee and wife, and defendants tendered deed to T. C. Brown on 2 January, 1921, in accordance with this agreement, the said Brown refused to accept the same and comply with his agreement; defendants deny that the consideration for the extension of the contract or option was as alleged in the complaint.

On 5 February, 1921, T. Gillam, trustee, after advertisement, sold the lands described in the deed of trust, under the power of sale contained therein; at said sale, T. C. Brown was the last and highest bidder for the said lands in the sum of $9,000, this being about the amount due on his notes secured in the mortgage and deed of trust from J. F.

Whedbee; thereafter the said trustee conveyed the said lands to said T. C. Brown, who immediately entered into possession of the same, under the deed from said trustee. Plaintiff then rented the said lands from T. C. Brown for the remainder of the year 1921, paying Brown $300 as rent for same, and thus remained in possession of the said lands during the remainder of the year 1921.

Plaintiff alleges that by reason of the failure of defendants to comply with their agreement, which was the consideration of the extension of the contract or option, he suffered damages, first, in that he was deprived of the possession of the lands until 1 January, 1922, and second, in that his equity of redemption was foreclosed prior to 1 January, 1922. Plaintiff alleges damages in the sum of $3,500 and demands judgment that he recover this sum of defendants.

The issues submitted to and answered by the jury are as follows:

1. Did the defendants by a valid contract agree to and with the plaintiff, J. F. Whedbee, to make an arrangement under which the said Whedbee could remain in possession and hold title to his equity in the land described in the pleadings during the year 1921, as alleged in the complaint? Answer: "Yes."

2. If so, did defendants fail to keep and comply with their said contract as alleged? Answer: "Yes."

3. What was said land fairly and reasonably worth 2 January, 1922? Answer: "$12,000."

4. What damages, if any, is plaintiff entitled to recover of defendants, Ruffin, Tripp and McKeel? Answer: "$1,300."

Defendants excepted to the judgment upon this verdict and appealed to the Supreme Court, assigning errors.

Gillam & Davenport and Murray Allen for plaintiff.
Craig & Pritchett and Stanley Winborne for defendants.

CONNOR, J. Defendants assign as error the admission of testimony of witnesses as evidence that the consideration for the extension of the contract or option was as alleged in the complaint. The consideration recited in the endorsement on the contract, signed by plaintiff and his wife, is one dollar. Defendants contend that parol evidence was not admissible or competent to show another or different consideration than that recited in the contract, for that thereby it was sought to vary, contradict or add to the written instrument. This contention is based upon a misconception of the applicability of a well-settled principle of the law of evidence to the facts of this case. In *Price v. Harrington,* 171 N. C., 132, *Clark, C. J.,* cites and approves a statement of the law, taken from the opinion of this Court in *Deaver v. Deaver,* 137 N. C., 243, as follows: "Where the payment of the consideration is necessary

to sustain the validity of the deed or the contract in question, the acknowledgment of payment is contractual in its nature and cannot be contradicted by parol proof; but where it is to be treated as a receipt for money, it is only prima facie evidence of payment and the fact that there is no payment or that the consideration was other than expressed in the deed may be shown by oral evidence." See, also, *Pate v. Gaitley,* 183 N. C., 262, in which *Justice Stacy* says that the admission of this character of evidence is not at variance with the rule against changing or adding to the terms of a written instrument by parol, nor is it prohibited by the Statute of Frauds.

Nor can the assignment of error, that the parol agreement, as alleged, was within the Statute of Frauds, which provides that no action shall be brought to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement or some memorandum or note thereof be in writing (C. S., 987), be sustained. It is not alleged that defendants promised or agreed to pay the notes of plaintiff, and thereby release plaintiff from liability on these notes.

His Honor instructed the jury as follows: "The measure of damages in cases of this sort, that he should recover back what it cost him to stay in possession the following year, and that according to the evidence was $300, which amount both sides agreed to be correct. In addition to that, if the land was worth more money twelve months after the Gillam sale than it brought at the Gillam sale, the difference between these two amounts, and what it cost him to stay in possession, would be your answer to the fourth issue. The burden is on the plaintiff to show by the greater weight of the evidence what damages he sustained. If your answer to the third issue should be that the land was not worth any more than it was when Gillam sold it, then your answer would be what sum you find. Both sides will admit that it was $300, that being the sum it took him to stay there. Suppose the land was worth $11,500? What would be his damage? It would be the difference in the value of the land at the end of the 12 months and what it sold for at the sale, plus the $300 that it cost him to stay in possession that year."

To this instruction as to the rule for the measure of damages, defendants excepted and assign same as error.

If defendants had fully performed the contract which the jury has found they made with plaintiff, plaintiff would have (1) retained possession of the lands, under the title he owned at date of contract during the remainder of the year 1921, and (2) he would have held his equity in the land during the year 1921, and thus on 1 January, 1922, would have had the right by paying his indebtedness secured by

his mortgage and deed of trust, to redeem the lands. As a result of the breach of this contract by the defendants, plaintiff lost possession of said lands during the remainder of the year 1921, and lost the right to redeem the same on 1 January, 1922. Plaintiff is, therefore, entitled to recover of defendants a sum of money which will fully and adequately compensate him for all loss which resulted from the breach of the contract.

It is admitted that after losing possession under the title which he owned at date of contract with defendants, as a result of their failure to comply with same, plaintiff rented the lands from the purchaser at the foreclosure sale, and thus remained in possession until 1 January, 1922. This cost plaintiff $300. Manifestly, he is entitled to recover this sum of defendants, as one element, at least, of his damages. There is no error in the instruction with respect to this element of damages.

Plaintiff was further entitled to recover a sum of money to compensate him for the loss of his right to redeem the lands, by paying his indebtedness secured by the mortgage and deed of trust on 1 January, 1922. His Honor instructed the jury that for this loss he was entitled to recover the difference between the amount which the lands brought at the foreclosure sale on 5 February, 1921, and the amount the lands were fairly and reasonably worth on 1 January, 1922, as found by the jury. An equity of redemption in lands is worth the difference between the amount of indebtedness for which the lands are liable, and their market value, but defendants, in this case, had not contracted with plaintiff that the lands, if sold on 1 January, 1922, would bring the amount which the land was worth on that date. The jury has found only that defendants, by their contract, promised and agreed that plaintiff should "hold title to his equity in the land during the year 1921." This plaintiff lost by the defendants' failure to comply with their promise, and it is only for this loss that plaintiff is entitled to recover. The money value of this right which plaintiff lost is the difference between the indebtedness, consisting of principal and interest, on 1 January, 1922, and the amount which the lands would have brought on said date, sold for cash, under the power of sale, contained in the mortgage or deed of trust. This is not necessarily the same as the difference between what the lands brought on 5 February, 1921, and the fair and reasonable worth of the land on 1 January, 1922. The fair and reasonable worth of the lands, may and should be considered by the jury, but there are many other facts and circumstances determining the amount which lands sold at a foreclosure sale will bring. As *Justice Allen* in *Newby v. Realty Co.*, 180 N. C., 51, says: "The market value of the lands, when the lands could be reasonably sold under the contract, will be material, but not controlling, and other circumstances,

such as the size of the land, the opportunity to secure purchasers, the condition of the money market, may properly be considered."

There is error in the instruction as to the rule for the measure of damages for the loss of the right to redeem the lands on 1 January, 1922. The jury having found that defendants by a valid contract agreed to and with plaintiff that they would make an arrangement by which plaintiff could hold title to his equity in the lands during the year 1921, and that defendants failed to keep and comply with this contract, plaintiff is entitled to recover of defendants, the value of the right thus lost by plaintiff. Plaintiff lost the right to pay his indebtedness and redeem the land, or the right to the difference between such indebtedness—principal and interest—on 1 January, 1922, and the amount which upon competent evidence the jury shall find the lands would have brought if sold on 2 January, 1922, under the power of sale contained in the mortgage or deed of trust.

There must be a new trial in order that the damages which plaintiff is entitled to recover may be ascertained, in accordance with the rule as to measure of damages herein approved.

New trial.

T. C. BROWN v. J. B. RUFFIN, S. W. McKEEL AND F. F. TRIPP.

(Filed 11 March, 1925.)

1. Deeds and Conveyances—Mortgages—Deeds in Trust—Title.

Where the defendants have received from the plaintiff a certain sum in consideration of which the former were to convey to the latter a certain number of acres of land at a stated price by a specified time, and have tendered their deed as agreed upon and the plaintiff refused to accept the same and pay the purchase price on the ground that this land was included in a larger acreage covered by a mortgage and therefore the defendants could not convey a good title, it may be shown that the plaintiff held the mortgage and had agreed to credit the proceeds of the sale of the lands thereon, raising a necessary issue for the consideration of the jury.

2. Pleadings—Issues—Statutes.

Where the answer raises new matter controverted by reply, it raises an issue for the jury to determine, C. S., 582 (2), and where it involves the sole defense it is error for the trial court to refuse an issue submitted thereon by the defendant.

3. Deeds and Conveyances—Registration—Statute of Frauds.

The defendants contracted upon a valid consideration to convey to plaintiff the fee-simple title to lands embraced in a larger boundary, upon which plaintiff held a deed in trust, and the defendants held a

contract to convey from the mortgagor, duly signed by him and his wife, for the ten acres, upon payment of the purchase price within a certain time which was extended by an unrecorded endorsement, and within the time specified in the contract between the plaintiff and defendants, the defendants offered the plaintiff a deed executed in proper form by the mortgagor and his wife and by the defendants without joinder therein by their wives. *Held*, the deed tendered was sufficient without the joinder of the defendants' wives and the extension endorsed upon the contract between the mortgagor and the defendants did not require registration.

4. Deeds and Conveyances—Statute of Frauds.

An agreement that the mortgagor apply the proceeds of sale of a part of the mortgaged lands upon his secured note, and an extension of time for the payment of the purchase price of lands, are not required to be in writing by the Statute of Frauds.

APPEAL by defendants from *Bond, J.*, at August Term, 1924, of BERTIE.

On 11 June, 1920, defendants in consideration of $500 paid to them by plaintiff, contracted and agreed in writing, to convey to plaintiff on or before 2 January, 1921, by a general warranty deed, vesting in him a good, merchantable title thereto, a certain parcel of land, containing ten acres more or less, to be surveyed and platted, upon the payment by plaintiff to defendants of the purchase price of $200 per acre. Plaintiff alleged and offered evidence tending to prove that on 2 January, 1921, he was ready, willing and able to pay said purchase price and that he demanded deed in accordance with the said contract; plaintiff further alleged that defendants failed to convey him the said land, in accordance with their contract.

At date of contract between plaintiff and defendants, J. F. Whedbee was the owner in fee and in possession of two adjoining tracts of land, one containing 80 acres, the other 30 acres. The ten-acre parcel of land described in the contract was a part of and was included within the boundaries of the 80 acre tract. Both tracts were encumbered by a mortgage and a deed of trust executed by J. F. Whedbee and wife, securing the payment of notes payable to plaintiff. On 24 April, 1920, J. F. Whedbee and wife had agreed in writing to sell and convey both tracts of land to M. L. Whedbee upon the payment of $13,000 in cash on or before 1 January, 1921. This contract or option was duly recorded on 12 May, 1920. On 11 May, 1920, M. L. Whedbee, by an endorsement thereon signed by him, had transferred and assigned this option to the defendants, J. B. Ruffin, S. W. McKeel and F. F. Tripp. This assignment was not recorded. On 8 December, 1920, for value received, J. F. Whedbee and wife, by an endorsement upon the original contract, signed by them, had extended the option to 1 January, 1922. This endorsement was recorded on 8 December, 1920.

On date of contract between plaintiff and defendants, namely, 11 June, 1920, and on 2 January, 1921, plaintiff was the owner of the notes secured by the mortgage and deed of trust covering both said tracts of land. On 2 January, 1921, plaintiff and the three defendants, with J. F. Whedbee and wife, met at Ruffin's office when and where a deed for the ten acres of land, as surveyed and platted, executed by J. F. Whedbee and wife and by the defendants, was tendered to plaintiff. Defendants are married men but their wives did not sign the deed tendered.

Plaintiff declined to accept said deed, contending that same did not convey to him a good, merchantable title to the ten acres of land because of the outstanding mortgage and deed of trust. The two tracts of land were thereafter sold by Mr. Gillam, the trustee named in the deed of trust, to secure notes held by the plaintiff. At said sale plaintiff was the purchaser, and thereafter the trustee conveyed both said tracts of land to the plaintiff who is now the owner and in possession of the same. Plaintiff has brought this action to recover of the defendants damages for breach of contract, alleging his damages in the sum of $500, the amount paid to defendants by plaintiff as consideration for the contract.

Defendants in their further answer to plaintiff's complaint, allege "that it was agreed by and between both plaintiff and defendants that plaintiff should be given a deed for the ten acres of said land at the sum of $200 per acre and that instead of paying cash for same he would credit the purchase price of the ten acres of land on the claims that he held against the land and that he would then carry the balance of the indebtedness, either for the defendants if they desired to take a deed to themselves for said lands, or for any person to whom they might sell the same; that in accordance with the above proposition of the said plaintiff, the defendants executed and delivered to the plaintiff an option covering the said ten acres of land as set out in the complaint; that the defendants then went to work and had the said land surveyed and platted, and a deed prepared to the plaintiff for the said ten acres of land as agreed and then and there the plaintiff refused to accept same; that the defendants have at all times been ready, able and willing to comply with each and every part of their agreement with the plaintiff but that plaintiff refused to accept the deed and abide by his agreement with the defendants." These allegations are denied by the plaintiff in his reply.

His Honor submitted issues, which with the answers of the jury are as follows:

1. Are defendants indebted to plaintiff as alleged in the complaint? Answer: "Yes."

2. If so indebted, then in what sum? Answer: "$500 with interest thereon since 11 June, 1920."

In apt time, defendants tendered the following issue and asked that same be submitted to the jury: "Did the plaintiff agree to purchase the land described in the complaint at the sum of $200 per acre and credit the same on the indebtedness and carry the balance of the debt then held by him on said lands?" To the refusal of the court to submit this issue defendants excepted, and assign same as error.

In apt time and in writing, defendants requested the court to charge the jury as follows: "That if you find from the evidence that at the time the defendants executed the option to the plaintiff, the plaintiff held or controlled all of the encumbrances then on the land covered and described in the option and agreed to join with the defendants in making a good deed and title for the same; and that at the time the plaintiff demanded a deed of the defendants for said lands and they tendered the same to him, he then held or controlled all encumbrances against the said land and refused to accept the deed and release the lands from the encumbrances so that defendants could make him a good title to the same, then I charge you that the plaintiff is not entitled to recover of the defendants and you should answer the issue 'No.'" To the refusal of the court to give this instruction, defendants excepted and assign same as error.

There are other exceptions of the defendants upon which assignments of error are based. Upon the verdict rendered by the jury there was judgment in favor of the plaintiff and against the defendants. Defendants excepted to the judgment and appealed to the Supreme Court.

Winston & Matthews for plaintiff.
Craig & Pritchett and Stanley Winborne for defendants.

CONNOR, J. The execution of the contract or option, as alleged in the complaint, is admitted in the answer. It is not denied that plaintiff demanded of the defendants a deed for the ten acres of land, described in the contract, in accordance with its terms. Nor is it denied by the plaintiff that defendants tendered to him, in accordance with such demand, a deed for the said land, executed by J. F. Whedbee and wife, and by the defendants. Plaintiff contended that this deed did not convey to him a good, merchantable title to said land, for the reason that said ten acres of land was a part of and was included within the boundaries of a larger tract of land, which was encumbered by a mortgage and deed of trust executed by J. F. Whedbee and wife, securing notes then unpaid and outstanding. Defendants admit the truth of this contention of plaintiff.

In their answer, however, defendants allege that the notes secured by the mortgage and deed of trust were owned and controlled by plaintiff at the date of the contract, and also on the day the deed was tendered to him. They further allege that at the execution of the contract it was agreed by and between plaintiff and defendants that instead of paying the purchase price of the land in cash, plaintiff would credit the same upon his notes; that at the date the deed was tendered to plaintiff, defendants were ready, able and willing to comply with this agreement, and that plaintiff refused to accept the deed and credit the purchase price of the land in accordance with this agreement, thus releasing the ten acres from the mortgage and deed of trust. This allegation was denied by plaintiff in his reply.

An issue was thus raised by the new matter in the answer, controverted by the reply; C. S., 582, subsec. 2. The issue thus raised is material to the defense relied upon by defendants to plaintiff's cause of action. Indeed, it was vital, for it involves the sole defense set up by defendants in the pleadings to the right of plaintiff to recover in this action. There was error in refusing to submit the issue tendered by defendants, or at least an issue involving the matters relied upon by the defendants, and alleged in their answer.

"A cause of action or defense should not be tried upon the issue of damages merely, where objection is made, but a separate issue should be submitted and the issue as to damages left to embrace that subject alone." *Carter v. McGill,* 168 N. C., 507. The failure to submit the issue tendered by defendants, or an issue involving the matters relied upon by defendants in defense of plaintiff's cause of action, did not afford defendants opportunity to present these matters to the jury. "When a material defense is pleaded, it is proper for the court to submit an issue on it." *Owens v. Phelps,* 95 N. C., 286.

The deed executed by J. F. Whedbee and wife and the defendants was sufficient to convey to plaintiff a good title to the land, subject only to the encumbrances held by plaintiff. The contract made by J. F. Whedbee and wife, and M. L. Whedbee provided that upon payment by M. L. Whedbee, his heirs or assigns of the purchase price for the lands described therein on or before 1 January, 1921, J. F. Whedbee and wife would convey said lands, which included the ten acres, to said M. L. Whedbee, his heirs or assigns. By its express terms, the contract was to be null and void, if M. L. Whedbee, his heirs or assigns failed to demand deed and pay the purchase price before 1 January, 1921. M. L. Whedbee's rights under this contract had expired on 2 January, 1921, and it is immaterial that his assignment of his rights under the contract to defendants was not recorded. It is also immaterial whether

the extension of the contract to 1 January, 1922, was valid or not. J. F. Whedbee, the owner of the land, signed the deed and his wife joined him. If the assignment to defendants by M. L. Whedbee, and the extension by J. F. Whedbee and wife, were valid, and defendants had an equity in the land, it was not necessary, in order to pass a good title to the land that their wives sign the deed. *Power Corp. v. Power Co.*, 168 N. C., 219. The only valid objection to the deed tendered plaintiff, was that the land was encumbered by a mortgage and deed of trust, securing claims owned and controlled by plaintiff. Plaintiff could not avail himself of this objection, as a justification for refusing to accept the deed as tendered, if he had agreed to credit the notes owned by him, and secured by the mortgage and deed of trust with the purchase price of the ten acres, and defendants were willing, when they tendered the deed, that the purchase price should be so credited by the plaintiff.

There is no law requiring that such an agreement on the part of plaintiff, with respect to the application of the purchase money, and the release of the land from the mortgage and deed of trust, should be in writing. There was evidence tending to establish the agreement as alleged by defendants in their answer, and the refusal of the court to give the instruction requested by defendants was error. See *Stevens v. Turlington*, 186 N. C., 191.

There must be a new trial. An appropriate issue, involving the matters alleged in the answer in defense of plaintiffs cause of action must be submitted the jury. If competent evidence, tending to establish the truth of the allegation is offered, the jury should be instructed by the court upon the law arising thereon.

New trial.

IN THE MATTER OF THE WILL OF E. J. STEPHENS.

(Filed 11 March, 1925.)

1. Wills—Caveat—Undue Influence—Evidence—Appeal and Error.

Upon the trial of a caveat to a will upon the issue of undue influence, it is not required that the evidence upon the affirmative of the issue be direct, for such may be inferred from circumstances tending to show the affectionate relationship between the testator and certain of his children by a former marriage whom he had omitted from benefits, and had given his entire estate for life to his second wife with remainder to two of the children of that marriage, his being under the full care of his second wife during the latter years of his life when the will was written, and the weakened condition of his mind that would tend to subject him to her influence, with circumstances tending to show she had exercised such

influence with the effect of causing him to make a will he would not otherwise have made; and the rejection of such evidence by the trial judge is reversible error.

2. Same—Admissions of Wife of Second Marriage.

Where a testator has devised his estate to his second wife for life, with remainder to two of his children by that marriage in exclusion of those of his first marriage, by will made while living with her, the issue of the first marriage being grown and living in their own separate homes, evidence of admissions of the second wife relative to the question of her undue influence in procuring the will goes to show the validity of the will itself, and may be received as evidence against the interests of her children.

APPEAL by caveators from *Barnhill, J.*, and a jury, at September Term, 1924, of HARNETT.

The facts and assignments of error will be set forth in the opinion.

Young, Best & Young, Baggett & McDonald and Charles Ross for caveators.

W. P. Byrd and Clifford & Townsend for propounders.

CLARKSON, J. The exceptions and assignments of error of caveators are as follows:

"1. That his Honor erred in excluding the testimony offered by the caveators as to the admission of Mrs. E. J. Stephens, second wife and widow of the alleged testator (hereafter denoted as testator) who with her two youngest children were principal devisees and legatees, as to the weakened mental condition of her husband and her alleged undue influence over him, as set forth in the exceptions.

"The substance of this testimony being that John Stephens, son of testator, was ordered away from his father's home by his stepmother; that Mrs. Stephens said she was going to take charge of her husband's business and see what became of the rest of his property; that Mrs. Stephens told witness that there had a great change come over Mr. Stephens during the past several years, 'We could handle him, do anything we wanted to, and he would give up to us. . . . Anything we asked him to do he would go ahead and do it; . . . we could manage him any way we wanted to; that Mrs. Stephens told the witness her husband had lost money, but she would see what became of the rest of it; that he did not have sense enough to look after his business, was not like he used to be, could be led into anything; that Mrs. Stephens made unfavorable comments about the children of the former marriage, stating among other things, that she would not permit them to know of his death and burial if she could prevent it; that Mrs. Stephens told

witness that her husband's mind had considerably failed and that she and her son, Joe, had to watch him and look after him, that he was not capable of attending to business; all of which evidence was duly offered by the caveators and excluded by his Honor.

"2. That his Honor erred in directing a verdict in favor of the propounders on the issue of undue influence, having stated at the conclusion of the caveator's evidence as set forth in the 12th exception, 'That he would instruct the jury that there is no sufficient evidence to justify them in answering the issue as to undue influence in favor of the caveators, and that it would be their duty to answer it in favor of the propounders'; and again in his charge to the jury as set forth in the 13th exception, stated: 'Now, gentlemen, you come to consider the third issue, which is: Was the execution of the said paper-writing procured by undue influence? The court instructs you that there is no sufficient evidence in this case to justify you in answering that issue "Yes," and in finding that any person exerted any undue influence upon the deceased in executing his will, so it would be your duty to answer that issue "No," upon the evidence in this case.' "

On the record in this Court, the only contest is over the exceptions and assignment of error on the issue "Was the execution of said paper-writing procured by undue influence?"

The caveators charge that the execution of the will of E. J. Stephens was procured by undue influence on the part of his second wife, Civil Ann Stephens. E. J. Stephens, by his first wife, had seven children—five were living and two dead at the time of his death. One daughter, Maggie Lenora Byrd, married John W. Byrd—both were dead and left five children. Both Byrd and wife were dead at the time the will was executed on 31 March, 1921. E. J. Stephens died 6 January, 1924. By his second wife he had three children.

E. J. Stephens' entire property was left to his wife and the two youngest of her children. The land willed, when first purchased by E. J. Stephens, was almost all in woods. The boys by the first wife cleared up about 100 acres of the land and worked on the farm until the first piece purchased was paid for. E. J. Stephens married his second wife, Civil Ann Stephens, the fall after his first wife died. The boys worked on the land until they were about 19, 20 and 21 years old and left. Some lived not far from him. The relationship between E. J. Stephens and all of his children at the time of his death was good. It was in evidence that E. J. Stephens had about 450 acres of land when he died, worth about $100.00 an acre, for which he paid about $3.00 an acre. There was evidence to show "a change in his mind and body in the last 8 or 10 years. He was easily influenced," not that way before.

George A. Wicker, a neighbor of E. J. Stephens for 42 years, testified: "I do not think from my association with him for the last three or five years that he had mental capacity to know his property, his people, his relations, and had mental capacity sufficient to make a will, knowing the effect that the will would have upon his family, on 31 March, 1921."

It was in evidence that the second wife would often speak to her husband about the Byrd children "they did not care anything about him," and tried to prevent him from going to see them. She spoke about his son Will, saying "Will moved back to this county because his father was getting old and would soon die and he wanted to get a part of his property."

Sarah McLean, a half-sister to E. J. Stephens, testified that "he spoke affectionately of his different children," etc. She further said: "After he was taken down sick, witness visited him in his home; while there he stated he had made his will and if he ever got able to travel he was going to change it. Witness told him he could get someone to come to his house and fix it for him. He never said what way he wanted to change it. Mrs. E. J. Stephens and her daughter, Mollie, were present in the room, but neither made any response when the question of changing the will was mentioned."

The will substantially leaves all his real and personal property to his second wife for life and the remainder to her two youngest children, Joseph S. Stephens and Mary Jones Stephens; 50c to the heirs of his dead daughter, Maggie Lenora Byrd; to his other six living sons 50c each, including Cleveland C. Stephens the oldest child by his second wife, who was not living with his father. The second wife and her two youngest children lived with E. J. Stephens. The testator was much older than his wife.

There was evidence on the part of the propounders that on 29 July, 1914, the testator made and executed a will, this being written in the office of the witness, Walter P. Byrd, in the town of Lillington, and was witnessed by the same witnesses that witnessed the will offered for probate; that in this will his property was devised exactly as in the will propounded for probate with the exception that in the last will he made provisions for the disposition of property acquired since the writing of the first will, giving the after-acquired property to his wife for life, and then to his son, Joe.

There was evidence on the part of the propounders tending to show that on 13 March, 1921, that he came up to the auditor's office in the county courthouse, by himself, and asked A. M. Shaw, the executor named in the first will, to procure his will which was done, and thereupon he directed A. M. Shaw to rewrite the will of 1914, disposing of his property as in said former will with the exception of devising his

after-acquired real estate to his wife for life and then to his son, Joe, and in accordance with said instruction said A. M. Shaw prepared the last will which is the paper-writing propounded for probate; that thereupon E. J. Stephens called in the same witnesses who had witnessed his will before and requested them to witness his present will; that the same was left in the hands of A. M. Shaw, who was named as executor in the second will as well as in the first.

There was evidence on the part of Dr. W. C. Melvin and J. W. Halford to the effect that they were well acquainted with the deceased during his life time, and that in their opinion he was up to a few days before his death, a man of sound mind and with sufficient intelligence to make a will, knowing the effect of the same.

There was further evidence on the part of Marvin Wade, J. W. Byrd, and N. W. Parker, and others, to the effect that the deceased during all his life was a man of strong mental capacity; that he was a man of good business judgment, was successful in the management of his own affairs, and a man of strong purpose and firm and unyielding in his convictions.

The court below charged the jury, in part, as follows: "Now, gentlemen, you come to consider the third issue, which is 'Was the execution of said paper-writing procured by undue influence.' The court instructs you that there is no sufficient evidence in this case to justify you in answering that issue 'Yes,' and in finding that any person exerted any undue influence upon the deceased in executing this will so it would be your duty to answer that issue 'No' upon the evidence in this case."

The proposition for us to decide is: Was the evidence excluded competent and, if competent, was it, with the other evidence in the case, sufficient to be submitted to the jury under the issue of "undue influence." We think the evidence excluded competent and the entire evidence on all the facts and circumstances of the case, should have been submitted to the jury.

The question of "undue influence" can be shown by direct evidence or by circumstantial evidence. A wide range of inquiry into the family relations is usually allowed.

In the case at bar, testator had eight living children at his death and children of a daughter who had predeceased him. His entire property was left to his second wife and her two youngest children—who were living with him when he died. The other children were left 50c each and all his grandchildren by his daughter 50c. We are not now considering testator's mental capacity to make a will, but we are considering whether there was any evidence of "undue influence" by his second wife.

"As the strength or weakness of mind of the testator and his susceptibility to influence are important in determining whether undue influence was exerted, the physical and mental condition of the testator, together with his age, is, under an issue of undue influence, a proper subject for consideration by the jury, the evidence tending to show such condition is admissible. However, evidence tending to show total mental incapacity cannot be received under an allegation of undue influence." 40 Cyc., p. 1156 (II).

In re Will of Mrs. Hardee, 187 N. C., p. 383, it is said: "In the first place, it should be observed that his Honor says the giving of the whole estate to one child, to the exclusion of other children, 'in the absence of some reasonable ground for such preference,' would constitute what the law calls an unnatural will (but he did not say this was an unnatural will), and such fact 'may be considered, with the other evidence in the case, as evidence upon the question of mental capacity and undue influence.' See *In re Burns' Will,* 121 N. C., 338; *In re Worth's Will,* 129 N. C., 228, and *In re Mueller's Will,* 170 N. C., 30. In a previous portion of the charge, the jury had been instructed upon this point as follows: 'If you are satisfied that she made an unreasonable disposition, but are not satisfied that she was lacking in testamentary capacity, or that she was unduly influenced, that cannot affect you in any way. You would disregard the question of reasonableness or unreasonableness, because, as I have already said, she had a right to make any disposition she saw fit, if she had capacity and was not unduly influenced.'"

The evidence on the part of the propounders was that the first will was made 29 July, 1914, and the second 31 March, 1921, and they were practically the same, except that some after-acquired property testator gave to his wife for life and then to his son Joe.

Allen, J., In re Mueller's Will, 170 N. C., p. 29, writes fully on the controlling influence, and says: "As said *In re Everett's Will,* 153 N. C., 85: 'Experience has shown that direct proof of undue influence is rarely attainable, but inferences from circumstances must determine it.' It is 'generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence.' It is 'said to be that degree of importunity which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act. It is closely allied to actual fraud; and, like the latter, when resorted to by an adroit and crafty person, its presence often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, and the more helpless and secluded the victim, the less plainly defined are the badges which usually denote it. Under

such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be looked for, the situation of the party taking benefits under the will towards the one who has executed it, and their antecedent relations to each other, together with all the surrounding circumstances, and the inferences legitimately deducible from them, furnish, in the absence of direct evidence, and often in the teeth of positive testimony on the contrary, ample ground for concluding that fraud or undue influence has been resorted to and successfully employed. *Grove v. Spiker,* 72 Md., 300.' 18 A. and E. Anno. Cases, 412."

In 40 Cyc., p. 1155 (b) it is stated: "Where the grounds of objection to the validity of a will are fraud and undue influence, the evidence is permitted to take a wide range and it is declared that every fact and circumstance, no matter how little its probative value, which throws light on these issues, is admissible. The range of inquiry may cover not only the provisions of the will itself and the circumstances surrounding its execution, but also the mental condition of the testator, the motive and opportunity of others to unduly influence him, his relations with persons benefited by or excluded from the will, and the acts and declarations of such persons. Although none of these matters, standing alone, may be sufficient to establish the issues, yet taken together they may have that effect. Of course evidence which throws no light whatever on the question whether fraud or undue influence was exerted, and which is wholly immaterial and irrelevant, should be excluded, as should also evidence which is too remote in point of time to furnish any reasonable ground of inference that the testamentary act was effected by undue influence."

Testator left his property to his second wife, Civil Ann Stephens, and her two youngest children, and propounders contend if the evidence is competent and the entire evidence sufficient to be submitted to the jury, the declarations of Civil Ann Stephens tending to show undue influence should not bind her two children. The testator, Civil Ann Stephens and their two children were all living together in the same house.

The instant case is in many respects like *Mullen v. Helderman,* 87 N. C., 471. *Smith, C. J.,* said, at p. 472: "Upon the trial, and after the testimony was heard, the proof of formal execution and sufficient mental capacity in the deceased was not controverted, but conceded by the contestants, who resisted the probate upon the ground of undue influence exerted over the mind and volition of the deceased, by his wife, in procuring the making of the instrument in the sole interest of herself and her own children, to the exclusion of the children of the deceased by a former marriage, and in the impairment of that freedom essential

to the validity of a disposition in a testamentary act. . . . (p. 477). But we prefer to sustain the ruling upon the ground of identity of interest among the beneficiaries and its common origin in an act by which that of each is secured, and when the mother bears to her children a relation not unlike that of agent to principal, and admitting the rule that when the latter claims the benefit of what the former has done without previous authority, he must submit to the conditions and attending incidents of the act itself."

But propounders contend that this evidence was incompetent to bind the two children, and rely on *Linebarger v. Linebarger,* 143 N. C., p. 229. In the *Linebarger case,* the alleged testator gave almost his entire estate to his wife, Caroline Linebarger, for life, remainder to two of his sons, being the youngest, Hosea and Marvin Linebarger. There was no competent evidence that Marvin or Caroline Linebarger used any undue influence with the alleged testator. The question in the case, on this aspect, was whether Hosea's declarations regarding his conduct for his own benefit should be used against them and defeat their interest in the alleged will. The court said that it could be used only against Hosea. In the *Linebarger case,* and in this case, there was no proof of conspiracy—common design—no joint action among the parties. In the present case, will the alleged declarations of the mother, Civil Ann Stephens, affect the two children's interest in the will? The relationship existing between the parent and two children, the alleged undue influence exerted by the mother is the source naturally from which she and the two children would be enriched. We think this alleged undue influence exerted by the mother, under the facts and circumstances of this case, affect not only the mother but her two children, and goes to the validity of the entire will, and as said by *Smith, C. J.,* in the *Mullen case, supra:* "And admitting the rule that when the latter claims the benefit of what the former has done without previous authority, he must submit to the conditions and attending incidents of the act itself."

In this case the mother was the agency through which the alleged testator was induced to favor his two youngest children, all living under the same roof, and exclude those who had gone out in life from the "old homestead."

The case is not free from doubt, but, on account of the peculiar relationship existing between the parties, if the mother exerted undue influence on the testator, under the facts and circumstances of this case, it went to the validity of the entire will.

From a careful review of the entire record and the law, we think there should be a

New trial.

DAVID HOWELL, BY HIS NEXT FRIEND, MARY PARKER v. UTILITY MANUFACTURING COMPANY.

(Filed 11 March, 1925.)

1. Negligence—Evidence—Nonsuit—Employer and Employee—Master and Servant.

In an action to recover damages by an employee for a personal injury alleged to have been received through his employer's negligence, there was evidence tending to show that his employment was changed to the dangerous one of assisting at a saw table operated by electricity, without experience or instruction; that the edge of the saw was only visible above the table through a narrow slit that had become worn permitting pieces of the sawed product to fall beneath with the sawdust, which the plaintiff, 18 years of age, removed, and was informed by his superior or vice-principal that this was right, and to continue to do so when the saw became clogged, and that soon thereafter on the same day, the plaintiff was injured by his hand being drawn to the saw by a piece of wood that had fallen beneath the saw table that he was attempting to remove to relieve the clogged condition of the saw. *Held*, a motion of judgment as of nonsuit was properly denied. *Mathis v. Mfg. Co.*, 140 N. C., 531, cited and distinguished.

2. Same—Issues—Contributory Negligence—Assumption of Risks—Appeal and Error.

Held, further, under the evidence in this case, it was not reversible error for the court to withdraw from the consideration of the jury the issue of assumption of risks and submit the question of the defendant's liability upon the issues of defendant's negligence, and the plaintiff's contributory negligence. *Pressly v. Yarn Mills*, 138 N. C., 410, cited and applied.

APPEAL by defendant from *Barnhill, J.*, at October Term, 1924, of WAYNE.

Civil action to recover damages for an alleged negligent injury, sustained by plaintiff while in the employment of the defendant.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered by them in favor of plaintiff. From the judgment rendered thereon, defendant appeals, assigning errors.

Hugh Dortch and Dickinson & Freeman for plaintiff.
Langston, Allen & Taylor for defendant.

STACY, J. The defendant's chief assignment of error, or the one most strongly urged on the argument and in its brief, is based on the exception addressed to the refusal of the court to grant its motion for judgment as of nonsuit, made at the close of plaintiff's evidence. The defendant offered no testimony.

Viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion of this kind, the following facts may be taken as established, or as reasonable inferences to be drawn from the testimony of the several witnesses:

The plaintiff, a young man about 18 years of age at the time of his injury, was employed by the defendant as a laborer in its veneer plant at Goldsboro, N. C. He was first assigned to work at the dry kilns, and after being so employed for about three weeks, was directed by the foreman of the factory to report for work at the ripsaw and to do whatever the operator of this machine instructed him to do. He had never before worked at a machine of this kind, though he had seen it running, and was given no warning as to the dangers incident to its operation, or instructions as to how his work should be done. He was simply informed by the foreman that he was to assist the operator of the machine, who would show him what to do.

The ripsaw referred to is a circular saw about 12 inches in diameter and is operated through a slit in a table, the surface of the table being approximately 5 feet square. A small portion of the saw extends above the table, while the remainder is below. The part of the saw beneath the table cannot be seen from above and is about 2½ feet from the edges of the table. The saw is set on an axle, operated by electricity and, when in use, revolves very rapidly. The slit in the table permits the saw to revolve, with a part of the blade extending above the table, and the surface of the table affords a platform over which the material to be cut is fed to the saw and then borne away. The slit is intended to afford only sufficient space for the saw to revolve freely. The northern side and western end of the slit had been worn away or cut out by some friction, enlarging it to such an extent as to permit small strips, as well as sawdust, to fall through and under the table and clog up the machine from time to time.

The first two days the plaintiff worked at this machine, the operator was engaged in sawing large pieces of veneered lumber into equal parts. No strips, therefore, were cut off, and the only refuse around the machine was sawdust which would pass through the slit in the table. This would not cause an accumulation in the course of a day sufficient to interfere with the operation of the machine. At the end of the day the plaintiff would clean out the sawdust which had accumulated under the table.

On plaintiff's third day the work at this machine was slightly changed. Instead of feeding the machine so as to cut the boards into pieces of equal size, they were sawed so as to cut from one edge of the boards a very narrow strip of only a fraction of an inch in width. Due to the worn and enlarged size of the slit, the strips, which should have

moved across the table, fell through the slit and clogged up the machine. Observing this fact, the plaintiff glanced under the table and seeing the strips piled up, started to remove them. The operator, seeing the plaintiff thus engaged, said: "That is right son," which was understood and intended as an instruction to him to keep the machine cleared of strips. Fifteen or twenty minutes after this instruction, the same condition arose and the plaintiff undertook to remove the strips, when one of them, being caught by the rapidly revolving saw, jerked plaintiff's hand into the blade of the saw and injured him severely.

Upon these, the facts chiefly pertinent, we think the case was properly submitted to the jury. The decision in *Mathis v. Mfg. Co.*, 140 N. C., 531, is not at variance with our present position, for there, as pointed out by the present *Chief Justice* in *Howard v. Oil Co.*, 174 N. C., 651, no immediate negligent direction from a vice-principal was given to mislead the plaintiff to his hurt, as was done in the instant case, according to the jury's finding.

"It is well recognized that, although the machinery and place of work may be all that is required, liability may, and frequently does, attach by reason of the negligent orders of a foreman, or boss, who stands towards the aggrieved party in the place of vice-principal." *Howard v. Oil Co., supra; Beck v. Tanning Co.*, 179 N. C., 123; *Thompson v. Oil Co.*, 177 N. C., 279. Speaking to the question in *Holton v. Lumber Co.*, 152 N. C., 68, *Clark, C. J.*, said: "Where one having authority to give orders to another, who is inexperienced, gives a negligent order, which a reasonably prudent man would not give, and the servant is injured in attempting to obey said order, and the giving said order was the proximate cause of his injury, the servant is entitled to recover," citing a number of authorities.

During the trial, the court announced that it would submit an issue on assumption of risk, but later withdrew it from the consideration of the jury, and allowed the question to be determined on the issue of contributory negligence. This cannot be held for reversible error on the present record. It is the established rule in this jurisdiction that the doctrine of assumption of risk, in cases where it is applicable, does not extend to and include risks and dangers incident to the employer's negligence. *Wallace v. Power Co.*, 176 N. C., 558. And speaking to the question of a separate issue in *Pressly v. Yarn Mills*, 138 N. C., 410; the present *Chief Justice*, said:

"In *Hicks v. Mfg. Co., ante*, 319, the Court has held that while the employee assumes all the ordinary risks incident to his employment, he does not assume the risk of defective machinery and appliances due to the employer's negligence. These are usually considered as extraordinary

risks which the employees do not assume, unless the defect attributable to the employer's negligence is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks. This is, in effect, referring the question of assumption of risk, where the injury is caused by the negligent failure of the employer to furnish a safe and suitable appliance, to the principles of contributory negligence; but it is usually and in most cases desirable to submit this question to the jury on a separate issue as to assumption of risk, as was done in this case. When the matter is for the jury to determine on the evidence, it may be well to submit this question to their consideration on the standard of the prudent man, in terms as indicated above. The charge on the third issue substantially does this, and the language used is sanctioned by the authorities." See, also, *Hall v. Chair Co.*, 186 N. C., 469.

A careful perusal of the entire record leaves us with the impression that the case has been tried in substantial accord with the law as heretofore declared in our decisions; and on the exceptions, as presented, the verdict and judgment must be upheld.

No error.

J. ELRAMY v. J. A. ABEYOUNIS AND AB JOSEPH.

(Filed 11 March, 1925.)

1. Process—Summons—Service—Copies—Seals—Statutes.

The purpose of C. S., 476, 479, in requiring the seal of the clerk of the court to a summons issued to be served outside of the county, is to evidence the authenticity of the summons, and its omission from the copy alone becomes immaterial where it is in all other respects a replica of the original and the defendants could not have been prejudiced by the lack of information concerning the action they were called upon to defend.

2. Judgments—Default—Excusable Neglect—Clerks of Court.

Where the principal on a note has been duly served with summons and he has failed to file an answer within the statutory time, relying upon an agreement with the surety on the note to file a joint answer: *Held*, no excusable neglect has been shown, and the clerk, being without authority to extend the time, a judgment by default is properly entered by him.

APPEAL by the defendant Joseph from *Midyette, J.*, at October Term, 1924, of PITT.

The plaintiff alleged that he and Joseph had been engaged in the mercantile business in Greenville under the firm name of "The Economy

Store" and on 16 July, 1924, Joseph purchased the plaintiff's interest in the business, agreeing to assume the firm's existing indebtedness and to pay the plaintiff $500. For the payment of this sum ($500) Abeyounis became Joseph's surety.

The allegations were admitted with exception of the suretyship of Abeyounis and the demand for payment.

Summons was issued 22 August, 1924, returnable 5 September, and was served on the defendant Joseph 25 August. On 29 September, 1924, the clerk rendered judgment against Joseph, who, on 17 October, made a motion based upon his affidavit to set aside the judgment on the ground of excusable neglect; on the ground that the copy of the summons delivered to him by the sheriff of Union County did not bear the seal of the Superior Court of Pitt County; also on the ground that as the answer was filed on 20 September, the clerk was without power to render judgment on 29 September.

The defendant's motion was denied and he appealed to the judge, who found additional facts as follows: The original summons was issued under the seal of the court; and the copy delivered to the defendant, while not impressed with the seal, purported to have been issued under the hand and seal of the court, and the defendant was not misled or prejudiced by the omission of the seal from the copy; a copy of the complaint was served with the summons; the defendant, who lived in Union County, went to New York after service of the summons, but returned several days before the time for answering had expired; while in New York he saw his codefendant Abeyounis who agreed upon his return home to file the necessary answer, but after his return he made no effort to engage counsel or to file an answer until the allotted time had passed; he (Abeyounis) was never served with summons and as to him a nonsuit has been taken; five days after the time for answering had expired the defendant's attorney filed or attempted to file a joint answer for him and Abeyounis; because the answer was not duly filed the cause was not transferred to the civil issue docket; on 20 September the plaintiff's attorney notified the clerk that an answer had not been filed within the time prescribed and that the plaintiff was entitled to judgment by default final; the defendant alleged that he had a meritorious defense.

Upon the facts the court adjudged:

(a) That said judgment by default against the defendant, Ab Joseph, was properly entered according to the course and practice of the courts.

(b) That the omission of the impression of the seal of the court upon the copy of the summons left with the defendant, Ab Joseph, was not of the substance and did not tend, in any way to mislead or prejudice the defendant, he having been notified of the time and place when and where he was to file answer.

(c) That no excusable neglect has been shown upon the part of the defendant, Ab Joseph, in failing to file answer within the time required by law; but, on the contrary, said neglect is found to have been inexcusable.

It was therefore ordered and adjudged that the defendant, Ab Joseph's motion to set aside judgment be denied, and that the plaintiff recover as provided in the judgment of the clerk of the Superior Court of Pitt County, dated 20 September, 1924.

G. E. MIDYETTE, *Judge.*

Louis W. Gaylord for plaintiff.
Julius Brown and Ward & Grimes for defendants.

ADAMS, J. The summons is served by the delivery of a copy thereof to the defendant, and if addressed to the sheriff or other officer of a county other than that from which it is issued it must be attested by the seal of the court. C. S., 476, 479. In this case the original summons bore the proper seal and the copy purported to have been attested in like manner. The copy included every material part of the original except the seal, the omission of which, not affecting the substance of the writ, did not impair the efficacy of the service or in any way mislead or prejudice the defendant. In affixing the seal the object is to evidence the authenticity of the summons, but the seal is not a part of the summons in the sense that its impress upon the copy is essential to the validity of the original. *Vick v. Flournoy,* 147 N. C., 209; 21 R. C. L., 1325 (73); *Lyon v. Baldwin,* L. R. A., 1917, ch. 148 and annotation 154; 32 Cyc., 460.

For several days after he had been served with summons the defendant remained at his home in Monroe without filing his answer or consulting an attorney. He then went to New York and there had a conference with Abeyounis who conducted a mercantile business in Pitt County. Abeyounis promised upon his return home to file an answer to the complaint and the defendant relied upon this promise. It is contended that the failure to file the answer was due to the defendant's excusable neglect, and as he had a meritorious defense the judgment should have been set aside. When the conference took place in New York Abeyounis had not been served with process. Indeed, he has never been served with process, or otherwise brought into court. His interest was diametrically opposed to that of the defendant. It was evidently his purpose to say nothing, to await judgment by default against the defendant and thereby to escape liability. In this enterprise he was successful. It is not difficult to perceive that the defendant in intrusting his business to one whose interest in the litigation was adverse to his own did not exercise such

diligence as a man of ordinary prudence should have exercised under the circumstances. In this respect the present case is easily differentiated from *Nicholson v. Cox,* 83 N. C., 49; *Sikes v. Weatherly,* 110 N. C., 131, and *Nash v. Treat,* 30 Anno. Cas., 1913 ed., 752. His Honor, we think, very properly held that no excusable neglect had been shown. *Morris v. Ins. Co.,* 131 N. C., 212; *Pepper v. Clegg,* 132 N. C., 312; *Osborn v. Leach,* 133 N. C., 428; *Shepherd v. Shepherd,* 180 N. C., 494.

A copy of the complaint was served with summons and five days after the time for filing an answer had expired the defendant's attorney deposited in the clerk's office a paper purporting to be the joint answer of the defendant and Abeyounis. As the clerk had no power to extend the time for filing the answer (*Lerch v. McKinne,* 187 N. C., 419) and no other order authorizing such extension was shown the purported filing of the paper did not deprive the plaintiff of his right to judgment. Neither *Cahoon v. Everton,* 187 N. C., 369, nor *Roberts v. Merritt, ante,* 194, is authority for the defendant's position that the plaintiff treated the answer as filed and waived his right to a judgment.

The judgment is

Affirmed.

CITIZENS SAVINGS BANK & TRUST COMPANY v. JAMES W. WHITE AND MARY WHITE, HIS WIFE, W. R. SAULS AND R. W. LAMB, TRADING AS SAULS & LAMB AND E. D. SKINNER.

(Filed 11 March, 1925.)

1. Bills and Notes—Negotiable Instruments—Due Course—Mortgages—Statutes.

Defendants, payees of a note, endorsed the note secured by mortgage on lands duly recorded to plaintiff in due course for value before maturity, and thereafter the equitable owners of the land sold and conveyed the same to another for value. *Held,* in the absence of agreement to the contrary, the endorsement of the note by the payee to the plaintiff carried the mortgage security, C. S., 3033, and the mortgagee held the legal title in trust for the plaintiff under the terms of the mortgage; and under a decree of sale by the court, with all parties at interest before the court, it becomes immaterial whether the plaintiff had no right to exercise the power of foreclosure.

2. Same—Estoppel—Cancellation—Parties—Privies.

An equitable estoppel will not operate upon strangers thereto, and under the facts of this case: *Held,* the holder in due course of a note secured by mortgage was not estopped by the representations of the mortgagee that the mortgagor of lands had an unencumbered title therein, or the subsequent cancellation of the mortgage, when the mortgage secur-

ing the note had been duly executed and registered and the representation of the mortgagee was made without knowledge or consent of the holder of the note.

APPEAL by defendant Skinner from *Midyette, J.*, at October Term, 1924, of CRAVEN.

The plaintiffs alleged that on 29 November, 1918, the defendants James W. White and his wife executed to Sauls & Lamb their note in the sum of $850, due and payable one year after date, with interest from date at six per cent, and secured the payment thereof by a mortgage on ten acres of land; that the mortgage was duly recorded and the note endorsed to the plaintiff for value by Sauls & Lamb; and that thereafter White and his wife conveyed said land to the defendant Skinner.

White and his wife denied their alleged execution of the note and mortgage and admitted their conveyance of the land to Skinner for $1,000. They alleged that Skinner paid the purchase price ($1,000) to Sauls & Lamb who retained $795, the amount due them and paid the remaining $205 to the defendant White. They denied that the plaintiff was the holder of the note in due course.

Sauls & Lamb admitted receiving $1,000 from Skinner, but alleged that it was to be applied in payment on the amount due them by White on an open account.

The jury's answer to each of the following issues was "Yes":

1. Did the defendant J. W. White execute the note sued on in this action?

2. Did the defendant Mary White execute the note sued on in this action?

3. Did the defendant J. W. White execute and acknowledge the mortgage sued on in this action?

4. Did the defendant Mary White execute and acknowledge the mortgage sued on in this action?

5. Did the defendant R. W. Lamb tell E. D. Skinner at or before Skinner took a deed for it, that there were no encumbrances on the land?

6. Did E. D. Skinner pay R. W. Lamb one thousand dollars for J. W. White on the land?

7. Did the plaintiff bank become the holder of the note before maturity and for value?

8. Did the bank acquire said property without any notice of defect, if there was one?

Thereupon the defendant Skinner tendered a judgment awarding the plaintiff a recovery against all the defendants except himself of the amount due on the note and adjudging that Lamb's representation to Skinner that there was no encumbrance on the land and the acceptance

by Sauls & Lamb of the purchase price and their failure to convey to the plaintiff by registered conveyance the title held by them as mortgagees worked an equitable estoppel upon them and the plaintiff and adjudging, further, that the mortgage be canceled.

The court declined to sign this judgment, but entered judgment in behalf of the plaintiff for the face of the note and interest and decreeing a foreclosure of the mortgage in default of payment. The defendant Skinner excepted and appealed.

Moore & Dunn and Whitehurst & Barden for plaintiff.
R. A. Nunn for defendant.

ADAMS, J. In the note sued on—executed by James W. White and Mary E. White to Sauls & Lamb—there is the clause, "This note is secured by mortgage on real estate in Craven County." By proper endorsement of the payees the plaintiff became a holder of the note in due course; but as the mortgage was not transferred or assigned the legal title to the mortgaged property remained in the mortgagees. In these circumstances the plaintiff held the note without notice of any infirmity in it or any defect in the title of the payees, and in the absence of an agreement to the contrary the security followed the note. C. S., 3033; *Jones v. Ashford,* 79 N. C., 173; *Miller v. Hoyle,* 41 N. C., 270. The mortgagees held the legal title in trust for the benefit of the plaintiff who, as holder of the note, was vested with an equity to have the land sold under the mortgage and the proceeds applied in payment of the debt. *Hyman v. Devereux,* 63 N. C., 624, 629; *Williams v. Teachey,* 85 N. C., 402; *Kiff v. Weaver,* 94 N. C., 274; *Jenkins v. Wilkinson,* 113 N. C., 532; *Baber v. Hanie,* 163 N. C., 588; *Stevens v. Turlington,* 186 N. C., 191.

It is immaterial that the plaintiff had no right to exercise the power of sale in the absence of a proper transfer of the mortgaged property by the mortgagees, because all interested parties were before the court when the decree of foreclosure was made. *Weil v. Davis,* 168 N. C., 298; *Bank v. Sauls,* 183 N. C., 165.

But the appellant contends that these principles are not applicable in the instant case for the reason that before making the purchase he was assured by one of the mortgagees that there was no encumbrance upon the land and that he paid the purchase price to the mortgagees at the request of the mortgagor and accepted the deed upon this assurance. In support of this position he relies chiefly on *Bank v. Sauls, supra.* There it appeared that the defendant J. L. Sauls had executed his promissory note for $6,000 to Sauls & Lamb and had secured its payment by a mortgage on land in Craven County, the mortgage having been

duly registered; that the mortgagees had thereafter obtained a loan of $4,000 from the First National Bank of Kinston and had delivered the notes and the mortgage to the bank as collateral security, but that the mortgage had not been assigned; that sometime thereafter the defendant Sauls had conveyed the same land to Lafayette King and his wife, by whom a deed of trust had been executed to Dunn, trustee, to secure the notes for the purchase money. It appeared, further, that Sauls & Lamb, mortgagees, had canceled the record of the first mortgage in accordance with the statute (C. S., 2594 (1); and that after such cancellation they had obtained a loan of $8,500 from the Peoples Bank of New Bern by placing as collateral security for such loan the notes executed by King and his wife and secured by the deed of trust to Dunn. It was shown also that the mortgage had been canceled without the permission or knowledge of the First National Bank of Kinston.

The court held that as the legal title to the land conveyed by the mortgage to Sauls & Lamb had never been divested by a transfer or assignment of the mortgage to the First National Bank of Kinston the cancellation of the registration by the mortgagees was effective and that the Peoples Bank of New Bern was thereby protected. In the opinion it is said: "The Peoples Bank of New Bern had the records of the county examined and, finding therein the mortgage to Sauls & Lamb properly canceled by the mortgagees, was absolutely protected in the loan made to the holders of the notes secured by the King deed of trust."

In that case and in *Guano Co. v. Walston,* 187 N. C., 667, there was a proper cancellation of the registered instrument; but not so in the case before us. The registered mortgage was constructive notice to all who were interested in the mortgaged property or dealt in reference to it with the parties of record. C. S., 3311; *Smith v. Fuller,* 152 N. C., 7.

Sauls & Lamb, mortgagees, did not join in the conveyance executed to Skinner by J. W. White, mortgagor, and his wife; but the appellant contends that Lamb's alleged false representation had the effect of canceling the mortgage. He rests this contention upon the doctrine of equitable estoppel, for he does not claim a formal cancellation either at common law or under the statute.

If it be granted that Sauls & Lamb as between themselves and Skinner are estopped by Lamb's representation, concerning which we express no opinion, it does not necessarily follow that the plaintiff's equity of foreclosure is thereby defeated. The rule is that only parties and privies to the representation relied on are affected by an estoppel in *pais.* It is not suggested that the plaintiff was a party to the communication between Skinner and Lamb or that it had any knowledge of the transaction between them; and as to alleged deceit it can hardly be

insisted there was any privity between the plaintiff and the mortgagees. Bigelow says: "In the law of estoppel one person becomes privy to another (1) by succeeding to the position of that other as regards the subject of the estoppel, (2) by holding in subordination to that other. . . . Thus, to give an illustration of privity by succession, an assignee is not estopped by judgment against his assignor in a suit by or against the assignor alone, instituted after the assignment was made, though if the judgment had preceded the assignment the case would have been different." Estoppel, 158.

The same principle is stated in 21 C. J., 1182: "A person in privity is bound by an estoppel because he comes in after the fact creating the estoppel by succession or representation to the original title or interests. . . . The general rule is that a grantee will not be estopped by any act, conduct, declaration of his grantor of which he has no notice or which is subsequent to his conveyance."

Since the plaintiff held the note as an innocent purchaser for value and was vested with an equitable right to demand a sale of the mortgaged land, the legal title to which the mortgagees held in trust for his benefit, and, moreover, had no knowledge of the alleged fraud we are of opinion that the equitable estoppel relied on by the defendant is not effective against the plaintiff and that his Honor was correct in declining to sign the judgment tendered by the defendant.

We presume it will readily be conceded that *Stevens v. Turlington*, 186 N. C., 191, is not decisive of the question presented here; and in *Finance Co. v. Cotton Mills Co.*, 187 N. C., 233, it is said that evidence of an unwritten release of the mortgage would become material only in the event the jury should find that the plaintiff was not the holder of the note in due course. In our case this contingency is met by the verdict of the jury. We find

No error.

D. L. HERRING v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 March, 1925.)

1. Railroads—Rules—Waiver.

By permitting its shippers to accumulate bales of cotton upon its platform, in spaces thereon assigned to them, for a long period of time, a railroad company waives a rule it has promulgated that no liability for fires thereon will attach to it unless and until the cotton has been offered to and accepted by it for shipment, and its bill of lading accordingly issued, though notice of this rule has remained posted on the platform in question.

2. Railroads—Negligence—Proximate Cause—Fires—Burden of Proof.

Evidence that the plaintiff's cotton was destroyed by fire while on the defendant railroad company's platform at night; that half an hour before the fire a freight train was stopped near the platform, with a caboose car attached, whereon was a fire in the stove for cooking; that live coals were on the track beneath this car on an inflammable right of way, with the wind blowing towards the platform, is sufficient to take the issue of defendant's negligence to the jury, with the burden of proof on plaintiff, permitting plaintiff to recover, if the negligence is found by the jury to be the proximate cause of plaintiff's damage.

3. Same—Instructions.

Where there is evidence tending to show only that the plaintiff's cotton on the defendant's platform was set fire to and destroyed by fire set out negligently from the defendant's caboose car, and no evidence that it was caused by fire set out by the locomotive attached to the train, it is not reversible error, as tending to confuse the jury in its deliberations, for the trial judge to read by way of analogy, so far as it would extend, opinions of the Supreme Court on the question of the defendant's liability for setting out sparks from its locomotive, with instructions that properly confined the analogous cases to the law involved in the instant case.

4. Same—Rights of Way.

Where the issue is presented as to whether the defendant railroad company negligently set out fire on its foul right of way, which was communicated to and destroyed the plaintiff's property, a definition that defined the right of way as coextensive with the defendant's right to use the land for railroad purposes, and not confining it to its actual present use, is correct.

5. Instructions—Interpretation — Railroads—Negligence—Fires—Appeal and Error.

An instruction to the jury will be given effect in its connected and related parts as a whole; and *held*, under the facts of this case, it is not objectionable as making the defendant railroad company liable for negligence and as an insurer for cotton of its customer stored on its platform for accumulation to a sufficient number of bales for sale and shipment, and which, at the time, had not been tendered to the defendant for shipment or accepted by it therefor, etc.

6. Appeal and Error—Damages—Verdict—Interest.

Where the issue of the amount of damages has been presented to the jury for determination and the amount practically agreed upon depending upon the question as to the defendant's negligence, it is not thereafter open to the defendant, for the first time after verdict, to contend that interest had erroneously been included by the verdict.

APPEAL from *Daniels, J.*, and a jury, at September Term, 1924, of SAMPSON.

The main contentions of plaintiff is set out in a part of his complaint, as follows:

"That on account of the negligence and carelessness and want of due care on the part of the defendant as set out above in negligently main-

taining a foul and trashy right of way by leaving its passenger engine near said platform with the fire still burning in its furnace and by negligently removing the ashes from said engine and live coals and throwing the same on their said trashy and foul right of way near said cotton platform, and by locating the eating car on the freight train within a few feet of said cotton platform and negligently permitting the stove in said eating car to be lighted and used for cooking purposes and by maintaining a defective flue without a spark arrester, and by permitting sparks to escape from said flue, and by permitting the shifting of their freight engine on their said track near said cotton platform where the plaintiff's cotton was stored, which engine by the defendant's negligence was emitting live sparks of fire and the defendant by inviting the plaintiff and their other customers to store their cotton on their cotton platform on their right of way within a few feet of said engine and by the defendant's failure to exercise due care for the plaintiff's cotton thus situated for shipment, that on account of the negligent conduct on the part of the defendant, fire escaped from the defendant's said engine and live coals and ashes from said fire box as aforesaid, ignited the foul and trashy right of way and was communicated thus to said cotton platform and burnt up fifty-eight bales of cotton belonging to the plaintiff, and the plaintiff was damaged in the sum of $5,909.97."

The contentions of plaintiff were denied *in toto* by defendant.

The issues submitted to the jury by the court below and their answers thereto, are as follows:

"1. Was the plaintiff's cotton burned by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damage is the plaintiff entitled to recover? Answer: '$5,909.97, with interest from 13 October, 1922, up to date.'"

Judgment was duly rendered in accordance with the verdict.

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The other material facts and assignments of error will be considered in the opinion.

Faircloth & Fisher, Fowler & Crumpler, H. E. Faison and Butler & Herring for plaintiff.

Rountree & Carr and A. McL. Graham for defendant.

CLARKSON, J. On 13 October, 1922, between 9 and 9:30 o'clock at night, the plaintiff, a cotton buyer, had 58 bales of cotton, for which he paid $5,909.97, burned. The cotton was on the defendant's covered shed or platform, on which it received freight for shipment, in the town of Clinton. This cotton was sold on the morning of 13 October, to one J. B. Wilson, who lived at Warsaw, at 22⅝ per pound, and it was to have been shipped to the purchaser the next morning, over defend-

ant's road. The defendant, during the cotton season, permitted the official cotton-weigher for the town of Clinton to have scales located in the middle of the platform for accommodation, where cotton purchased by the various cotton buyers of the town of Clinton was weighed. Certain cotton buyers had sections on the railroad platform to put their cotton. Plaintiff had a section numbered, which would hold about a hundred bales, reserved for his cotton. Plaintiff had been shipping there, using scales and platform about 7 years. The weigher, after weighing the cotton, had the one he had hired to roll the cotton and place it in his section. The platform where the cotton was stored came up near the box cars that hauled the cotton. The cotton on the platform was within 20 feet of the railroad and on defendant's right of way. A few bales had been there since August, most of it from one to three weeks. Plaintiff was allowed to keep the cotton there until he had enough to fill an order, and testified that "Nobody asked me to take that cotton off the platform . . . There was an understanding that I would ship the cotton when I got an order for it or found a purchaser. Some cotton was sitting there in the section that had been assigned to me to accumulate cotton on. I did not want to sell it as the prices were going up. I was not trying to find a purchaser. I accumulated it and paid for it. It was already sold but not delivered. I did not have a bill of lading for it and it was not insured. . . . I saw cotton blowing around. Those wads were put on top of the bale, and the wind must have blown them off, just small bunches of cotton. Pretty dangerous condition it looked to me. . . . The cabin and cars were right there where the cotton burned."

Ross McAlop, testified for plaintiff in part: "The night of the fire I was staying at my mother's, 35 or 40 yards from the fire. I still live there. The premises around the platform from the side of the railroad were in bad condition. There was a cab sitting there. I discovered some ashes between the railroad tracks and it was live coals, smoking a little bit. There was some fire coming out of the railroad cab that was sitting there; and there was some people in their making right smart of fuss, laughing and enjoying themselves. This was on the side by the mule pen, up towards the warehouse. The cab was on a work train. I suppose the hands cooked and ate on the cab. That was somewhere about twenty feet from the platform as near as I can guess. From the edge of the cab to the edge of the platform was about four and a half feet I guess. The platform was covered with cotton. It was somewhere after 9 or close to 10. It was about thirty minutes before the fire broke out. I was up at Henderson Boykin's house about a half mile from the railroad when the fire broke out. I went to the fire. The wind was whipping both ways when I came up and then switched that

way and then the wind changed and carried it both ways. The wind was blowing from across the railroad track and another time blowing another way. There were live coals in the little ashes that I spoke of. It was on the south side of the platform right in the center of the railroad track. About four or five feet from the platform. There was some old scrap cotton that had blown out between the railroad track and the cotton platform, and some scrap hay that had been pulled out of the box. The weather was dry and windy."

Chester Faircloth (colored), testified for plaintiff: "I live in town. I saw the cab the night before the fire. It was not far from the cotton platform, I think it was on the main line; did not notice it particularly. I passed along there and noticed fire coming out of the stove flue where the flue would T. The fire was coming out both ways when I went along there, a blaze of fire coming out of both sides of the flue. Somebody was in there laughing and talking. I did not notice whether that right of way was clean or foul, that day, that night or the day before. There would always be scattered cotton there. The cab was about thirty or forty feet from the cotton platform. The cotton platform that night was full of cotton. I saw this about thirty minutes before the fire alarm."

Plaintiff's evidence tended to show that the cotton was ignited by sparks, or cinders, from the flue of the caboose or train hands' eating car, and from live coals and ashes on the track put there from the engine—all near the cotton. The right of way was foul and trashy with inflammable material, the wind was blowing from the flue and live coals and towards the cotton.

The record shows that some fifty witnesses testified in the court below. We have only given such evidence as we think material to pass on the assignments of error made by defendant.

The defendant had caused a notice to be posted at the platform, as follows: "All persons are hereby forbidden to place cotton or other property upon the right of way or premises of this company unless the same is tendered for shipment with full shipping instructions given to the agent of the company at the time such property is so placed; the company will assume no responsibility or risk of any kind for the property so unlawfully placed upon its premises without its consent, but the same will be at the full risk and care of the owner."

The defendant's first assignment of error to the charge of the court below, is as follows: "Now, if the company gave this notice and posted it, but permitted the buyers and cotton weigher to use it as they had been doing theretofore, then that would be what is known in law as a waiver of the notice to take off or obtain bills of lading, and would not affect the rights of the plaintiff in this case, and if you are satisfied

that in spite of this notice, the railroad company did permit buyers and the cotton weigher to use this platform in the manner testified by all the witnesses, then you will find that was a waiver of requirement to move or obtain bill of lading, and if you do so find, then you will go to the other phases of the case. . . . I charge you, upon all the testimony, if you find the facts to be as testified by the witnesses, in reference to the use of the platform, and this notice, that there was a waiver by the defendant of the requirement to obtain bill of lading, or remove the cotton, and an implied consent that the platform should be so used."

The defendant contends that it "had a perfect right to make and promulgate this rule and to insist upon its being complied with." In this we agree, but defendant further contends that there was sufficient evidence that ought to have been submitted to the jury that defendant had not waived the requirements of the rule. In this we cannot agree. From a careful reading of the entire evidence, we think the charge of the court below correct, and this assignment of error cannot be sustained.

It is well settled law that railroad companies, in the conduct of their business, have a perfect right to make and promulgate reasonable rules and regulations. To be binding, they must be properly promulgated and in full force and effect—a living rule—and not revoked or abrogated by other inconsistent rules and regulations or orders. With knowledge or acquiescence of the master, either express or implied that they have been habitually violated, they are ordinarily regarded as a dead rule, waived, abrogated or revoked. *Hinnant v. Power Co.*, 187 N. C., 299; *Tisdale v. Tanning Co.*, 185 N. C., 501; *Fry v. Utilities Co.*, 183 N. C., p. 288; *Whitehurst v. R. R.*, 160 N. C., 2; *Smith v. R. R.*, 147 N. C., 610; *Bordeaux v. R. R.*, 150 N. C., 531; *Haynes v. R. R.*, 143 N. C., 165; *Biles v. R. R.*, 139 N. C., 532, same case 143 N. C., 78. On all the evidence, we think the rule was waived by the defendant. It was so far as this plaintiff's rights were concerned, a dead rule.

The defendant's second assignment of error is in regard to the charge of the court below, as follows: "I have instructed you not to consider any allegation of negligence by reason of sparks from the engine, but the rule laid down by our courts, even if there had been any sparks from the engine, is as follows: I am reading this as a direction to you, although I have told you that you cannot consider any sparks from the engine, but you will apply this law to the evidence, if you find there was any fire that escaped from the caboose." Then the court below laid down the rule of liability in regard to "sparks or cinders from an engine" and read the rule as laid down by *Walker, J.*, in *Aman v. Lumber Co.*, 160 N. C., 373. Further in the charge, the court below said: "There-

fore, I charge you that you cannot hold this defendant in any manner for any sparks coming from the locomotive, and igniting any trash or anything of that sort . . ."

Defendant contends that there was no evidence of any sparks from the engine and the court so held, but the defendant further contends that the court below applied the rule of "sparks and cinders from an engine" to sparks from the flues of the caboose stove. We think this in the charge later on was eliminated as the court does not in the direct charge require defendant to have spark arresters in connection with cook-stoves in cabooses. It is not necessary for us to decide in this case. We must take the charge as a whole and not disconnectedly. Taking the entire charge complained of, we do not think it was confusing, as contended by defendant, nor do we think this aspect material or prejudicial. The reading of the authority was mainly for the purpose of explanation and laying down the general principles of law as decided by this Court in partial analogous cases. The jury is presumed to be men of sufficient intelligence, judgment and sense to draw the distinction and could not have been misled. The court below clearly and correctly charged the jury so there could be no misunderstanding, as follows:

"If you should find by the greater weight of the testimony, the burden being upon the plaintiff, that the defendant permitted the cotton to be and remain on its platform near its railroad track, that samples of cotton were stuck on the bales and that there was cotton waste upon the said platform and around the said platform as to be easily ignited, and these samples caught from sparks or fire from the flue of the caboose car and fire was thereby communicated to the plaintiff's cotton and destroyed the same, you will answer the first issue 'Yes,' with the qualification that that inflammable matter must have been there long enough for the railroad company to have known of its presence and to have had an opportunity to remove it.

"If you find by the greater weight of the evidence, the burden being upon the plaintiff, that the defendant permitted cotton to be and remain on its platform, near its railroad track, and permitted samples of cotton and waste cotton and other inflammable matter to be and accumulate upon, under and around its platform, or its right of way, and that such waste cotton and other inflammable matter caught fire from sparks from the flue of the caboose car, or from fire from ashes and live coals left upon the track by the defendant's servants or agents, and the cotton was destroyed as the direct consequence of the same, you will answer the issues 'Yes,' unless you are satisfied of one of these propositions by the greater weight of the evidence, you will answer the issue 'No.' If you are not satisfied by the greater weight of the evidence that sparks were emitted from the caboose flue upon the cotton waste or foul matter

upon the right of way, and burned over it and destroyed the plaintiff's cotton, then you will disregard that contention from your consideration.

"And if you are not satisfied by the greater weight of the evidence that the fire that burned the cotton came from such coals and ashes, if you find there were any upon the right of way, then you would disregard that allegation of negligence. If you are satisfied by the greater weight of the evidence that sparks did come from the ashes or coals on the tracks but are not satisfied by the greater weight of the evidence that that set fire to and burned the cotton, then you would answer the issue 'No.' There must not only be negligence on the part of the defendant, as I have defined it, but this negligence must be the proximate cause of the plaintiff's injury. You will have to find that there was negligence in regards to the coals or negligence in regards to sparks from the caboose—then, in addition to that, you will have to find that the right of way was foul, and fire from one of these sources or the other was communicated to a foul right of way and destroyed the plaintiff's property, before you can answer the issue 'Yes.' Unless you are satisfied of this, as I have recited, by the greater weight of the evidence, you will answer the issue 'No.'

"You will remember that negligence or wrong-doing is never presumed against any man, and when property is destroyed by negligence, that places upon the complainant the burden to prove negligence and liability. The mere fact of a fire furnishes no inference of negligence, but in addition to the fire, there must be shown by the greater weight of the evidence, on the part of the plaintiff, that the defendant was negligent and that negligence was the proximate cause of the injury, before you can answer the first issue 'Yes.'"

Defendant's third assignment of error is in regard to the charge as to what constitutes a railroad's right of way: "The term 'right of way,' as applied to a railroad company, means a way over which the company has a right to pass in the operation of its trains, and the ordinary signification of the term when used to describe land which a railroad company owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for its purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located. It includes not only the strip of ground upon which the main line is constructed, but, as well, all ground necessary for the construction of sidetracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations necessary to accomplish the object of its incorporation."

It will be noted that this definition is the exact language and taken from 22 R. C. L., p. 848, part of par. 100. The court then goes on and quotes the general rule approved by *Allen, J.*, in regard to "sparks and

cinders from engine," in *Denny v. R. R.*, 179 N. C., p. 534: "The defendant is not required to keep its right of way absolutely clear and clean of all matters whatsoever that may be ignited, nor is it liable because of an accumulation of combustible matter on the right of way, likely to be the cause of injury, if there through some other agency than its own, and for so short a time that the defendant had no notice of its presence, express or imputed from length of time, and no opportunity to remove it. It must, however, exercise due care and precaution to avoid injury to the property of others, and to that end must not permit grass and other combustible matter to accumulate or remain on its right of way in such quantity and of such character 'as are liable to be ignited by sparks and cinders from its engine,' cause injury, and so dangerous that it may reasonably be anticipated that injury will occur to adjacent landowners from fires originated thereon from engines being operated on it."

The court then goes on and defines negligence, and says further: "In order that there may be no misunderstanding in your minds about the duty of the defendant, that having the cotton upon its platform, baled in the usual way, of itself, would not constitute a violation of its duty, to have its track free from foul matter, such cotton being there intended for shipment in the ordinary course of business, and in such large quantity that, it is contended, its warehouse could not accommodate it, the quantity varying from time to time, and permitting it to be there, baled and awaiting shipment, would not be a violation of its duty in that respect. Nor could it be held on account of the mere fact of the presence of the cotton there to violate its duty to maintain a clean right of way or clean premises. It would be liable only if the premises and right of way were permitted to become foul in the sense which I have defined, with samples of cotton permitted to lay there and cotton around the platform and premises likely to be ignited, and in order to constitute negligence, this inflammable matter must have existed there long enough for the railroad company to know, or so long that it could have known it in the exercise of reasonable and proper care, that it was there and constituted such a menace to property likely to be ignited and burn property there." This assignment of error cannot be sustained.

The fourth assignment of error cannot be sustained. This part of the charge must be construed with that already given—and the part which followed.

Defendant contends that the charge of the court makes defendant an insurer. We cannot so hold, but, on the contrary, the court in defining negligence bases defendant's liability squarely on negligence and that such negligence must be the proximate cause of the injury.

The court clearly charged: "Under the evidence in this case, I charge you that the defendant cannot be held in any manner as a common carrier or insurer of the property of the plaintiff, the cotton never having been delivered to the defendant or accepted by it for shipment, and therefore you will disregard any question of the defendant being insurer or being responsible for the cotton, because it was on this platform. I charge you further that there is no evidence to show that the locomotives of the defendant were defective or negligently operated, nor that the fire that burned the cotton escaped from either of them, and you are not authorized to find the defendant negligent by reason thereof, and are instructed not to do so."

The defendant relies on *Shields v. R. R.*, 129 N. C., p. 5. In that case the Court says: "The defendant company was liable if grass and other inflammable material, negligently left upon its right of way, was ignited by sparks from its engine, for any damage to adjacent landowners caused by the spreading of the fire. 8 A. & E. Enc., 14; *Black v. Railroad,* 115 N. C., 667. . . ." The Court goes on and says further: "If the plaintiff had placed combustible matter on defendant's right of way and the fire had originated in that, and destroyed the plaintiff's house and peanuts, it would seem that, in that case, he could not recover; and defendant cited authorities tending to show that he could not. But this question is not presented by the facts agreed and we do not pass upon it."

The defendant contends if the right of way was foul and trashy, and the plaintiff used the platform in his business and produced an inflammable condition, then the plaintiff should not be allowed to recover. We do not think this question presented from the facts. The entire charge on this aspect placed the responsibility on defendant only in regard to the loose scattered cotton and trash, the foul and inflammable condition that defendant negligently permitted on the right of way. There was no evidence that plaintiff put any inflammable matter on defendant's right of way.

The case of *Maguire v. R. R.,* 154 N. C., 384, cited by defendant is no authority in the present case. In the *Maguire case* it was held in general "When the evidence raises no more than a mere conjecture as to defendant's negligence, it is error to submit the case to the jury." *Brown, J.,* in that case distinctly says: "In *Black's case, supra* (115 N. C., 670), the following language was used in charging the jury: 'You must first ascertain whether or not the fire was occasioned by fire or sparks from the engine. The burden of proof is on the plaintiff to show this. If the plaintiff has not shown it, that ends the case, and you should answer the first issue "No." If you find the fire was occasioned by fire or sparks from the engine, then you must go on further and

inquire whether or not the defendant company has been negligent and whether or not the damage to the plaintiff has been approximately caused by such negligence. If so, you should answer the first issue "Yes." ' On appeal, this instruction was approved."

The *Black case* was tried in the court by *Brown, J.*, then on the Superior Court bench, and his charge was approved by *Burwell, J.*

There was sufficient evidence in the present case to be submitted to the jury.

We do not think the fifth assignment of error prejudicial or reversible error, in regard to the court's charge in allowing interest. It was in evidence, uncontradicted, that plaintiff had paid 21.60 a pound for the cotton and had sold it for 22⅝. The plaintiff in his complaint demanded judgment only for the cost price of the cotton $5,909.97 damages, with interest. Defendant in its answer admits that the plaintiff "made a claim for the loss of said cotton" and that defendant refused to pay same. The cause seems to have been fought out on the idea that if plaintiff was entitled to recover at all it was for the sum demanded and interest. Defendant asked for no prayer for instruction. Under the facts and circumstances of this case, the assignment of error cannot be sustained.

The case was tried out by an able and painstaking judge. The jury has found for the plaintiff, and, in law, we can find

No error.

GEORGE ALMER HARRIS AND HENDERSON LOAN & REAL ESTATE COMPANY v. ISABELLA CARTER AND W. T. CARTER, HER HUSBAND; EMMA CARTER AND J. R. CARTER, HER HUSBAND, AND LANDIS MOTOR COMPANY.

(Filed 18 March, 1925.)

Judgments—Consent—Boundaries—Estoppel—Roads—Highways.

In a suit to correct a deed for mutual mistake, a judgment was entered, by the consent of the parties, fixing one of the boundaries to the land as a certain public highway, which road was later changed by the State and county authorities so as to leave a strip of land between the old and the new road, upon which the plaintiff built a house and made certain other improvements, the value of which would be impaired by the discontinuance of the old road as an outlet to the new one: *Held*, the defendants are equitably estopped from obstructing the old road and denying the old road as a boundary to their lands, the doctrine applying only as to the parties and privies to the former suit.

APPEAL by defendants from *Bond, J.*, at Fall Term, 1924, of VANCE.

On 11 February, 1889, John W. Vaughan conveyed to Robert Crozier

whose only heirs are the *feme* defendants, a lot described as follows: "Begin at a stone, William Finch's corner, on west side of the railroad, and run along railroad S. 27½ W. 200 feet to a stone; then N. 62½ W. 258 feet to a stone; then N. 27½ E. 67 feet to a stone in Kittrell's line; thence E. 290 feet to the beginning."

On 1 October, 1891, Robert Crozier and wife executed a deed for said lot to George H. Harris, father of the plaintiff George Almer Harris, but in a suit instituted in the Superior Court of Vance County in 1907, by the heirs at law of George H. Harris against the heirs at law of Robert Crozier this deed was reformed and it was adjudged and decreed by consent that the incorporation in the descriptive part of the deed from Robert Crozier and wife to George A. Harris dated 1 October, 1891, of boundaries that include any land on the west side of the said county road was the result of a mutual mistake of the parties thereto and of the draftsman thereof, and the same was reformed, corrected, and limited to a conveyance of only so much and such part of said land as lies between and is bounded by the right of way of the Raleigh and Gaston Railroad, the county road leading from Henderson to Middleburg, and the land owned in 1891 by Allgood.

The defendants introduced a deed from John W. Vaughan to Mrs. D. Y. Cooper, dated 25 January, 1882; a deed from D. Y. Cooper and wife to W. N. Ellington dated 7 April, 1884; and a deed from Ellington to Robert Crozier, dated 13 June, 1893, each conveying another lot adjoining Crozier's.

There was evidence tending to show that on the lot were a dwelling and a storehouse fronting the main street toward town, and that the plaintiff had been in possession of the lot for seventeen years. The lot at the north end fronts on the State highway, but it is necessary to use the old road or the railroad right of way to get to the new road in the other direction.

The old road was widened on the west side in 1912, by order of the county commissioners and on 6 June, 1921, they made the following entry on their minutes: "On motion duly seconded, we accept the highway, without any changes, so far as Vance County is concerned, entering the county at Tar River Bridge, passing through Henderson to the Warren County line, as per map exhibited. Also the following notice given: N. C. Highway Commission, Raleigh, N. C., Dear Sirs: We the Board of County Commissioners of Vance County, in regular session, this the 6 June, 1921, approve the system of highway for Vance County as authorized by the map posted by you at the courthouse door here 4 May, and respectfully ask that you take over these roads at your earliest convenience."

The engineer of the Highway Commission testified: "As far as we were concerned the road was closed when we opened the new road . . . It was stated that the old road was covered by a deed owned by the Carters, and Mr. Rodgers, the claim engineer, told the Carters and their attorney, Mr. Hicks, that the old road went back to the original property owner, as the State would not use it any more and the Carters claimed that they were the property owners. This was considered an asset going to them in reducing the amount they claimed. . . . We did not attempt to pass on any one's title—we just said the road went back to the original owners. . . . There is no direct communication between the store and the new road except over the old road. Not all the front of the Harris property is cut off from the new road. The front of the store is cut off but I am not certain about the dwelling."

There was evidence that the value of the plaintiff's lot would have been reduced one-half or more if the road had been closed up.

On 18 September, 1923, the defendants leased the strip between the new highway and the plaintiffs' land to the Landis Motor Company as a filling station site including a part of the old road; and the action is prosecuted to restrain the erection of such station.

R. S. McCoin, J. H. Bridgers and Thomas M. Pittman for plaintiffs.
Hicks & Son and Perry & Kittrell for defendants.

ADAMS, J. Robert Crozier, father of the defendants, acquired title to the lot in question on 11 January, 1880. The county road, represented on the plat as the "old road," extended through this lot; and it appears from the decree reforming the deed executed by Crozier to George H. Harris that the lot conveyed to Harris lies between and is bounded by the railroad's right of way, the county road, and the land owned by Allgood. It will be noted that the county road—"the old road"—is thus made one of the boundary lines of the plaintiff's lot. It does not definitely appear when this road was established, but the public acquired an easement in it and in the absence of evidence to the contrary we assume that the title in fee remained as it was before the road was opened and rests finally in the defendants. The general rule is that when the owner of land lying on both sides of a public road conveys the land on one side the boundary is the line extending along the middle of the road, but the rule must be applied in the light of the intention of the parties. It is not necessary to determine the question of intention in this instance. If the defendants are concluded by a legal appropriation of the land covered by the old road they have no right to interfere with the plaintiff's reasonable use of his property.

The old road extended over land conveyed by Vaughan to Crozier in 1880 and was used as a public road from that time until the date of the change made by the Highway Commission in 1922. The method by which the easement was originally acquired—whether by dedication or the exercise of the power of eminent domain—is not clearly disclosed by the record. In any event the defendants contend that the old road has been abandoned and that the defendants as the owners of the fee may appropriate the road to their own use.

Summarized, the argument of the defendants is this: the alteration of the public road by the construction of a part of it in a different place where it will serve the same purpose was to this extent a discontinuance of the old road; that the road was taken over by the Highway Commission and altered; and that this was an implied vacation or discontinuance of the old road.

We fail to find in the record any express order vacating the old road. Certainly the conversation of the engineer with the defendants cannot be construed as an order of the commission for whom he was at work. It was at most a mere expression of his opinion, for he stated that he did not attempt to determine the question of title. And the minutes of the county commissioners, offered in evidence, were simply an approval of the highway system for Vance County, entered of record before the roads were actually taken over.

The defendants cite 37 Cyc., 174; 15 A. & E., 404; *Bradberry v. Walton,* 94 Ky., 167, as authority for the position that the alteration of an existing road operates as a discontinuance of such portions of the old road as are not embraced within the limits fixed for the new one. An examination of the authorities has failed to disclose any decision to this effect under facts similar to those in the record before us. Neither secs. 3846 and 3846j nor *Honeycutt v. Comrs.,* 182 N. C., 321, is decisive as to this position.

We deem it unnecessary, however, definitely to pass upon this point, for there is another principle by which the controversy may be determined. Dedication may be established against the owner of the soil by showing that he has sold lots describing them as bounded by a street or road. The authorities to this effect are numerous. 1 Elliott on Roads and Streets, 3 ed., sec. 128, and cases cited; *Herold v. Investment Co.,* 14 L. R. A. (N. S.), 1067; *Douglass v. Land Co.,* 37 L. R. A. (N. S.), 953, and note; *Green v. Miller,* 161 N. C., 25; *Haggard v. Mitchell,* 180 N. C., 255.

True, such dedication may be found most frequently in case of streets, parks, and other open spaces within municipal corporations; but the underlying principle is that of common law dedication operating by way of estoppel in *pais* rather than by grant. 1 Elliott, *supra,* sec. 125.

The lot in suit is outside the corporate limits but adjacent thereto and the old road is a continuation of the main street of the city. The principle upon which we base our decision is that of equitable estoppel.

The deed from Robert Crozier to George H. Harris conveyed through mistake the entire lot described in the deed from Vaughan to Crozier. In 1907, the mistake was corrected by a decree of the Superior Court, in which by consent of parties it was adjudged and decreed that the defendant Isabella Carter was the owner of so much of said land as was situated on the west side of the old road and that the conveyance to Harris should be limited to such part of the lot as was bounded by the railroad right of way, the old county road, and the land owned by Allgood. We do not say that the conveyance of the lot to Harris, in which it is described as bounded by the road necessarily constitutes a common law dedication; but we are of opinion that by virtue of the consent decree, the boundary of the defendants' lot and of the lot conveyed to George H. Harris, and the buildings erected and the business conducted there, the defendants are equitably estopped from obstructing the old road and thereby seriously impairing the value of the plaintiff's lot and interfering with the business conducted thereon.

It is important to remember that the controversy is confined to the parties plaintiff and defendant. Apparently the public is not interested. Neither the Highway Commission nor the board of county commissioners is a party. We conclude only the parties and those in privity with them.

We find

No error.

FRED ALSTON v. NANCY ALSTON.

(Filed 18 March, 1925.)

Verdict—Polling Jury—Reversal of Verdict—Appeal and Error.

After a jury has rendered its verdict upon the evidence, without indication by any of the jurors of any dissatisfaction therewith, and have been discharged from further consideration of the case, and have mingled with those upon the outside of the panel, it is reversible error for the trial judge to ask them if they had not made a mistake in their answer to an issue, poll them, and reverse the issue in accordance with their answer to his question.

APPEAL by plaintiff from *Horton, J.*, at August Term, 1924, of FRANKLIN.

Plaintiff alleges two causes of action for divorce—one that the defendant has committed adultery (C. S., 1659), and the other that the plaintiff's life has been endangered by the cruel and barbarous treatment of the defendant (C. S., 1660).

Defendant files answer denying the allegations of the complaint, and sets up, by way of cross action, two causes for divorce: (1) that plaintiff has maliciously turned the defendant out of doors; and (2) that plaintiff has offered such indignities to the person of the defendant as to render her condition intolerable and life burdensome.

Upon the issues thus joined, and which were supported by evidence, the following verdict and record appear in the case:

"1. Were the plaintiff and defendant married? Answer: 'Yes.'

"2. Has plaintiff been a resident of the State for two years next prior to the bringing of this action? Answer: 'Yes.'

"3. Did the defendant, Nancy Alston, commit adultery as alleged in the complaint? Answer: 'No.'

"4. Did the defendant by cruel and barbarous treatment endanger the life of the plaintiff? Answer: 'Yes.' (Later changed to 'No.')

"5. Did the plaintiff maliciously turn the defendant out of doors as alleged in the answer? Answer: 'Yes.'

"6. Did the plaintiff offer such indignities to the person of the defendant as to render her condition intolerable and life burdensome? Answer: 'Yes.'"

"The jury, about noon, returned a verdict, answering the first and second issues, 'Yes,' the third, 'No,' the fourth issue, 'Yes,' the fifth and sixth issues, 'Yes'; and the jury was discharged. At the opening of the evening session of the court, his Honor had the jury called into the box, and asked them if they had not made a mistake in answering the fourth issue, 'Yes.' Each of the jurors stated that they ought to have answered that issue, 'No.' Plaintiff objected and excepted to the examination of each and every juror by his Honor, because after the return of the verdict and discharge of the jury, the case was ended, and calling the jury back and allowing them to reverse themselves was contrary to the practice and procedure of the court."

From a judgment against the plaintiff awarding the defendant alimony and counsel fees, and retaining the cause for further orders, plaintiff appeals.

W. M. Person for plaintiff.
Wm. H. and Thos. W. Ruffin for defendant.

STACY, C. J., after stating the case: It is the position of the plaintiff, appellant, that the court acted without authority in reassembling the jury, after its discharge, and permitting a change in the verdict which had previously been rendered. The record fails to disclose the reason for this procedure, as the evidence was amply sufficient to support the verdict. In fact, the evidence was all one way as to the alleged treatment of the plaintiff by the defendant. According to the plaintiff's

testimony, the defendant deliberately threw boiling water on him in August and inflicted such serious injuries as to confine him to his room for three or four months or until nearly Christmas thereafter. Defendant admitted throwing boiling water on plaintiff about an hour after they had had a fight in the month of August.

There was no suggestion from any member of the jury that the verdict, as rendered and accepted by the court, did not represent the actual finding of the jury, nor was it suggested that the same should be corrected to make it speak the truth or show what the jury had really done. It will be observed that after the jury was reassembled and asked if it had not made a mistake in answering the fourth issue "Yes," each of the jurors stated the issue "ought to have been answered, 'No.'" But they do not say that such was the original agreement of the jury and that the issue was answered "Yes" by mistake or inadvertence. The effect of what took place, therefore, was, not to correct an error in the verdict, as sanctioned by *Lumber Co. v. Lumber Co.*, 187 N. C., 417, but to impeach the verdict, as rendered, and to return a different verdict. This procedure was disapproved in *Mitchell v. Mitchell*, 122 N. C., 332.

It is possible that no real harm has resulted from the irregular procedure in the present case, but we cannot approve, as a precedent, the practice of recalling the jury and allowing a change to be made in the verdict, after separation and over objection, when an opportunity has intervened, as it had here, for the operation of outside and undue influences on the minds of the jurors. *Wright v. Hemphill*, 81 N. C., 33.

His Honor might have declined to accept the verdict when it was first rendered, or he could have set it aside and retired the case; but on the record, as now presented, the plaintiff must be awarded another hearing, and it is so ordered.

New trial.

CHANDLER & RAGLAND v. JOHN MARSHALL.

(Filed 18 March, 1925.)

Evidence—Declarations—Mortgages—Claim and Delivery—Res Gestæ—Hearsay.

Where, in claim and delivery for two mules by the mortgagor under an unregistered mortgage, the defendant claims as a purchaser from the deceased mortgagor, evidence by the plaintiff as to what the deceased mortgagor had subsequently said tending to establish the plaintiff's claim is not part of the *res gestæ*, and is incompetent as hearsay.

CHANDLER *v.* MARSHALL.

APPEAL by defendant from *Horton, J.*, at August Term, 1924, of FRANKLIN.

Civil action in claim and delivery, tried upon the following issues:

"1. Are the plaintiffs, Chandler and Ragland, the owners and entitled to the possession of the two mules in controversy? Answer: 'Yes.'

"2. What was the value of said mules at the time of the seizure in claim and delivery? Answer: '$75.00.'"

Judgment on the verdict for plaintiffs, from which the defendant appeals, assigning errors.

Wm. H. and Thos. W. Ruffin for plaintiffs.

W. M. Person for defendant.

STACY, C. J. This is an action in claim and delivery, instituted by plaintiffs to recover, as mortgagees or by virtue of an unregistered retained-title contract, the possession of a pair of mules, sold by plaintiffs to one George Burnett, now deceased. On the trial, defendant contended that he had purchased the mules from George Burnett, for value and without notice of the plaintiffs' lien, and gave evidence to this effect.

Over objection, the plaintiffs were allowed to offer the testimony of two witnesses, tending to show what George Burnett had said to them on different occasions, and subsequent to the transaction, in regard to the alleged sale of the mules to the defendant. D. P. McKinne, a witness for the plaintiffs, testified to a conversation with the deceased in which he was informed that the mules had only been rented or hired to the defendant and that no sale of them had been made. A like conversation was detailed by the widow of the deceased. This evidence was incompetent as hearsay and should have been excluded. *Barker v. Ins. Co.*, 163 N. C., 175; *McCurry v. Purgason*, 170 N. C., p. 466.

Speaking to a similar question in the case of *Matthis v. Johnson*, 180 N. C., p. 133, *Walker, J.*, said: "The testimony of K. A. Robinson was properly excluded, because he proposed to speak solely of a statement, not only of a third person, but of a person who had since died, which was made to him. This was hearsay and incompetent, it having none of those safeguards required by the law for the maintenance of truth."

And in *Printing Co. v. Herbert*, 137 N. C., 317, the holding of the Court is quite accurately stated in the second head-note, as follows: "In an action to recover possession of a printing press sold by plaintiff by conditional sale, which passed into the hands of a publishing company as an alleged innocent purchaser, declarations of the deceased buyer are inadmissible to show that he received value from the publishing company."

There was error in the admission of this evidence as above indicated. It was no more than statements, given by the witnesses, of what they profess to have heard the deceased say. This is not the kind of evidence to be sanctioned by our courts of justice, for the determination of the rights of litigants. *Satterwhite v. Hicks,* 44 N. C., 105; 22 C. J., 199. It could not be competent as a part of the *res gestæ;* the conversations were had long after the alleged transaction. A new trial must be awarded; and it is so ordered.

New trial.

THE FEDERAL LAND BANK OF COLUMBIA v. J. B. BARROW AND M. J. BARROW, HIS WIFE, ET ALS.

(Filed 18 March, 1925.)

1. Bills and Notes—Banks and Banking—Payment—Cashier's Check—Collection—Negligence—Burden of Proof.

Where the defense to an action by a bank upon an unpaid check given for a partial payment upon one of a series of mortgage notes is the negligence of the plaintiff bank in not having used a course of collection wherein the check would have been promptly presented to the drawee bank and paid, the burden is on the defendant relying thereon.

2. Same—Evidence—Nonsuit—Questions for Jury.

In an action by plaintiff land bank to recover upon certain notes given by a borrower, secured by mortgage on the amortization plan for default in payment of one of its notes in the series wherein, under the terms of the transaction, all of the notes became due and payable, there was evidence tending to show that under instructions of the plaintiff the defendants obtained a cashier's check for the full amount of the payment of the note then due, which the plaintiff was to accept as payment, and, owing to the plaintiff's negligence, the check reached the bank of its issuance after it had suspended payment: *Held,* two issues of fact were raised for the jury—one, whether the plaintiff had agreed to accept the cashier's check in absolute payment; and the other, whether the plaintiff had negligently selected for the cashier's check a delayed course of collection that prevented the check reaching the bank of its issuance before payment had been there suspended; and a motion as of nonsuit was properly denied.

3. Courts—Discretion—Motion to Set Aside Verdict—Appeal and Error.

A motion to set the verdict aside as being against the weight or credibility of the evidence is to the sound discretion of the trial judge; and in the absence of an abuse of this discretion, is not reviewable on appeal.

APPEAL by plaintiff from *Midyette, J.,* at September Term, 1924, of CRAVEN.

On 9 October, 1919, plaintiff loaned to defendants, J. B. Barrow and wife, the sum of $5,400, and defendants on same day executed and

delivered to plaintiff, their note by which they promised to pay to plaintiff the principal sum of $5,400, with interest at 5½ per cent, in 34 annual installments, each in the sum of $351 due on 1 December, of each succeeding year, thereby providing for the payment of principal sum and interest on the amortization plan. In order to secure payment of said note, by installments as provided therein, defendants on said day, by mortgage, duly executed and recorded, conveyed to plaintiff a tract of land, situate in Craven County, N. C., fully described therein. It is provided in both note and mortgage that upon default in the payment of any one of the annual installments, by which said note was payable, the whole principal sum, with accrued interest, shall become due and payable at once.

Plaintiff alleges that the installment due on 1 December, 1923, was not paid, and that because of such default, the whole principal, with accrued interest became due and payable, at date of such default; that plaintiff is the owner and holder of said note and there is now due on the same the sum of $5,165.10, with interest at 5½ per cent from 1 December, 1922. Plaintiff demands judgment that it recover of defendants, J. B. Barrow and wife, the sum of $5,165.10 with interest from 1 December, 1922, and prays that the court appoint a commissioner to sell the land conveyed in the mortgage and that out of the proceeds of said sale, the indebtedness due by said defendants to plaintiff be paid.

Defendants deny that there was default by them in the payment of said installment, and that the note, secured by said mortgage is now due; they allege that said installment has been paid. Defendants allege that prior to 1 December, 1923, they were instructed by plaintiff to purchase a cashier's check or money order for the amount due on said installment and to remit same in payment of said installment; that complying with said instructions, defendants, on 30 November, 1923, purchased of the Bank of Vanceboro, at Vanceboro, N. C., its cashier's check for $351, payable to the Federal Land Bank of Columbia, and forwarded same at once by registered letter to plaintiff in payment of installment due on 1 December, 1923; that plaintiff received said cashier's check in payment of said installment and thereafter sent to defendants, through the mail, a receipt acknowledging payment of amount due on said installment.

Defendants further allege that plaintiff negligently failed to send said cashier's check promptly to Bank of Vanceboro, for payment; that if plaintiff had promptly sent said cashier's check which was in its hands on 3 December, 1923, to Bank of Vanceboro it would have been paid.

Defendants further allege that plaintiff negligently sent said cashier's check to the Murchison National Bank of Wilmington, N. C., on 4

December, 1923; that said Murchison National Bank on 6 December, 1923, forwarded said check to the Federal Reserve Bank at Richmond, Va., and that said Federal Reserve Bank on 7 December, 1923, sent said check to Bank of Vanceboro, at Vanceboro, N. C., at which bank it was received by mail, on Saturday, 8 December, 1923; that on Monday, 10 December, 1923, Bank of Vanceboro sent its draft on the National Bank of New Bern, N. C., to the Federal Reserve Bank at Richmond, Va., in payment of said cashier's check which was thereupon marked "Paid," by the said Bank of Vanceboro, the drawee of said check. This draft was forwarded by Federal Reserve Bank to National Bank of New Bern, which refused payment of same. A receiver for Bank of Vanceboro was appointed on 13 December, 1923. Defendants allege that if plaintiff had sent the cashier's check direct to Federal Reserve Bank at Richmond, instead of the Murchison National Bank at Wilmington, it would have been presented to Bank of Vanceboro in time for the draft on the National Bank of New Bern to Federal Reserve Bank at Richmond in payment of same, to have reached National Bank of New Bern on 9 December, 1923, when it would have been paid out of the deposits of the Bank of Vanceboro with said National Bank of New Bern.

Plaintiff in its reply, denied the allegations contained in the answer, in defense of plaintiff's cause of action.

The issues submitted to the jury, with the answers thereto, were as follows:

1. Was plaintiff's failure to get the $351 installment payable to it by defendant, Barrow, 1 December, 1923, due to its own negligence? Answer: Yes.

2. Did the plaintiff bank instruct the defendant, Barrow, to send them a cashier's check or money order in payment of the indebtedness? Answer: Yes.

From judgment in accordance with the verdict of the jury in favor of defendants, plaintiff appealed, assigning errors based upon exceptions—first, to the refusal of the court to allow plaintiff's motion for judgment at the close of all the evidence; second, to the court's refusal to charge the jury as requested by the plaintiff; third, to the submission of the second issue; and, fourth, to the refusal of the court to set aside the verdict and grant a new trial.

R. A. Nunn for plaintiff.
D. L. Ward for defendants.

CONNOR, J. Defendants admit in their answer the execution of the note as alleged in the complaint. As a defense to plaintiff's cause of

action, upon this note, defendants plead payment of the installment due on 1 December, 1923. They thereby assumed the burden upon the issues raised by the pleadings and submitted to the jury. *Ellison v. Rix,* 85 N. C., 80. At the conclusion of the evidence offered by defendants, plaintiffs moved for judgment upon the admissions in the pleadings, contending that the evidence offered by defendants was not sufficient to sustain affirmative answers to the issues. The motion was denied, and plaintiff excepted. Plaintiff then offered evidence, and at the conclusion of all the evidence renewed its motion for judgment. The motion was again denied by the court, and plaintiff excepted. Assignments of error, based upon these exceptions, are discussed together in the brief filed for plaintiff. These assignments of error present for review by this Court his Honor's holding that there was sufficient evidence to be submitted to the jury upon the issues.

It is admitted that on 3 December, 1923, plaintiff received, at Columbia, S. C., through the mail, a letter from defendant, J. B. Barrow, enclosing a cashier's check, dated 30 November, 1923, for $351, issued by the cashier of the Bank of Vanceboro, N. C., and payable to the order of Federal Land Bank of Columbia; that said cashier's check was sent by defendants to plaintiff in payment of installment due on said note 1 December, 1923, and was accepted by plaintiff; that the letter from defendant, with which the cashier's check was enclosed, was returned to defendant, stamped with the words, "Federal Land Bank, Paid, December 3, 1923, Columbia, S. C."; that the letter, enclosing remittance, stamped, showing the date of its receipt by plaintiff, and payment by the remittance, is the only receipt which plaintiff sends to its customers for payments made on notes; that this letter, so stamped, was received by defendants at Vanceboro, N. C., on 4 December, 1923.

Defendant J. B. Barrow testified that he received a letter from plaintiff a few days prior to 30 November, 1923, instructing him to send cashier's check or money order in payment of installment to be due on 1 December, 1923, and that in compliance with this instruction he purchased and sent to plaintiff, by registered letter, a cashier's check for the amount due. Defendants offered in evidence the cashier's check of the Bank of Vanceboro, dated 30 November, 1923, for $351, payable to Federal Land Bank of Columbia, marked "Paid, December 10, 1923."

There was evidence that the cashier's check was received by plaintiff at Columbia, S. C., on 3 December, 1923, and presented for payment to Bank of Vanceboro, N. C., on Saturday, 8 December, 1923; that check was sent by plaintiff to the Murchison National Bank of Wilmington, N. C., by mail, and received by said Murchison National Bank on Thursday, 6 December, 1923; that check was sent by Murchison National Bank to the Federal Reserve Bank at Richmond, Va., and

received by said Federal Reserve Bank on Friday, 7 December, 1923; that check was sent by said Federal Reserve Bank to Bank of Vanceboro, N. C., and received by said Bank of Vanceboro on Saturday, 8 December, 1923; that on Monday, 10 December, 1923, Bank of Vanceboro sent its draft, including the amount of said cashier's check, and in payment of same, on the National Bank of New Bern, N. C., to Federal Reserve Bank at Richmond, Va., and thereupon marked said cashier's check "Paid, December 10, 1923"; that Federal Reserve Bank sent the draft of Bank of Vanceboro, which it had received in payment of the cashier's check, to the National Bank of New Bern on 11 December, 1923; that payment of this draft was refused by National Bank of New Bern, and that on 13 December, 1923, a receiver was appointed for Bank of Vanceboro, and that the draft of Bank of Vanceboro, payable to Federal Reserve Bank of Richmond, on National Bank of New Bern, has not been paid; that plaintiff has not received payment of said cashier's check.

There was evidence that from 3 December to 13 December, 1923, the Bank of Vanceboro had on deposit with the National Bank of New Bern, each day, a sum of money largely in excess of the amount of the cashier's check; that if cashier's check had been presented on either of these days to Bank of Vanceboro it would have been paid; and that Bank of Vanceboro, up until 11 or 12 o'clock of the morning of 13 December, 1923, paid all checks or drafts presented to it for payment.

There was evidence that if plaintiff had sent cashier's check direct to Bank of Vanceboro for payment, or had sent it direct to Federal Reserve Bank at Richmond for collection, or if Murchison National Bank had sent the cashier's check direct to Bank of Vanceboro for payment, it would have been paid in cash or by draft which would have been paid, and that plaintiff would thus have received payment for said cashier's check.

There was evidence to the contrary, offered by plaintiff, but upon this assignment of error, only evidence sustaining the affirmative of the issues is to be considered. The assignments of error are not sustained. There was no error in refusing the motion of plaintiff.

In apt time, plaintiff, in writing, requested the court to charge the jury upon the first issue as follows:

"That if the jury should find by the greater weight of the evidence that the Federal Land Bank of Columbia received the check of the cashier of the Bank of Vanceboro, 3 December, 1923, and sent it to the Murchison National Bank of Wilmington, 4 December, and the Murchison National Bank sent it to the Federal Reserve Bank of Richmond, 6 December, and the Federal Reserve Bank sent it to the Bank of Vanceboro, 7 December, and the Bank of Vanceboro sent its draft to the Fed-

eral Reserve Bank, 10 December, and the Federal Reserve Bank sent the draft to the National Bank of New Bern, 11 December, the first issue should be answered 'No.' "

This request for special instruction was refused by the court, and plaintiff excepted. Plaintiff assigns refusal to give this instruction as error.

The acceptance by plaintiff of the cashier's check, sent by defendants in payment of the installment due on 1 December, 1923, although not in itself a discharge of defendants' liability unless and until same had been actually paid by the Bank of Vanceboro, imposed upon plaintiff the duty of exercising due diligence in presenting the cashier's check for payment to the Bank of Vanceboro. If the check was not paid when presented to the Bank of Vanceboro, and the giving of a worthless check was not payment, the loss does not fall upon defendants unless plaintiff fully performed this duty and exercised due diligence in presenting the check. The loss resulting from failure to perform this duty must fall on plaintiff if the failure of plaintiff to secure payment of said check was due to negligence of plaintiff. 21 R. C. L., 66, sec. 65.

"It is well settled that, in the absence of an agreement to the contrary, a check or promissory note of either the debtor or a third person, received for a debt, is merely conditional payment—that is, satisfaction of the debt if and when paid; but that acceptance of such check or note implies an undertaking of due diligence in presenting it for payment. And if he from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment." *Dille v. White,* note, 10 L. R. A. (N. S.), 541.

When plaintiff received the cashier's check, on Monday, 3 December, 1923, in payment of defendants' indebtedness, it elected to send same to Murchison National Bank, at Wilmington, N. C., for presentation to Bank of Vanceboro, with knowledge that the Murchison National Bank would, according to its custom, send same to Federal Reserve Bank at Richmond, Va., and that said Federal Reserve Bank would send same by mail to Bank of Vanceboro for presentation; this course was pursued, according to the evidence, because it saved trouble and expense. If plaintiff had sent check direct to Bank of Vanceboro for presentation and payment, it would have received a "quicker response." There is evidence from which the jury could find that if the cashier's check had been sent direct, either by plaintiff or by Murchison National Bank, it would have been paid. Whether it was due diligence to adopt the course which plaintiff did adopt, was for the jury, upon all the evidence, to determine, and there was no error in the refusal of the court to instruct the jury that as a matter of law the course adopted was due diligence,

although there was no delay due to negligence in presenting the check for payment according to the course adopted.

If plaintiff, or the Murchison National Bank of Wilmington, N. C., had sent the cashier's check, drawn upon the Bank of Vanceboro, direct to said drawee bank for payment, this would have been "due diligence." Public Laws 1921, ch. 4, sec. 39. The holding of this Court, in *Bank v. Floyd,* 142 N. C., 187, and in *Bank v. Trust Co.,* 172 N. C., 345, that "It is negligence in a bank having a draft or check for collection to send it directly to the drawee, and this is true, though the drawee is the only bank at the place of payment," is thus abrogated by the express provisions of the statute. See *Malloy v. Fed. Reserve Bank,* 281 Fed., 1003. "The failure of the payer bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor, provided such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument."

Where there are two or more courses which a bank may pursue in presenting for collection a check or draft upon another bank, and there is evidence from which a jury may find that the selection of one course caused loss or damage to the owner of the check or draft, or to one who is interested in the presentation of said check or draft because of liability therefor which would not have been sustained if another course open to said bank had been pursued, it is for the jury to determine, upon all the facts and circumstances which they may find from the evidence, whether the course pursued was negligent or not, in accordance with the standard of the prudent man.

The second issue submits to the jury the facts upon which defendants rely in their answer for a defense to plaintiff's cause of action. The allegation that defendants were instructed by plaintiff to purchase a cashier's check or money order for the purpose of remitting the amount due on the installment is denied in the reply. There was no error in submitting the second issue.

Upon this issue the court charged the jury as follows: "If the jury is satisfied by the greater weight of the evidence, with the burden on the defendant, that the plaintiff bank entered into a contract with the defendant Barrow, under the terms and conditions of which it was expressly agreed that the defendant Barrow should send the plaintiff bank a cashier's check for $351 in full payment of the instrument then due, and that the plaintiff bank would accept said cashier's check in full payment thereof, whether paid or not paid, and should further find that the defendant Barrow sent the plaintiff bank a cashier's check for $351, which was received by them and accepted by them in full pay-

ment and discharge of the installment then due, you will answer the second issue 'Yes'; otherwise, you will answer it 'No.'"

There was no exception to this instruction. It is a clear and full statement of the law applicable to the facts, which the jury might find from the evidence. "The fact that a check or draft was received in absolute payment may be established by showing an express agreement to that effect, or by showing such circumstances as will satisfy the mind that such was the understanding of the parties at the time the check was taken. Whether a check is given and accepted as absolute payment is a question of fact to be determined by the jury on the evidence presented." 21 R. C. L., p. 64, sec. 63.

The refusal by the court of the motion to set aside the verdict, assigned as error, was within the discretion vested in it by law, and is not reviewable in this Court, upon the facts appearing in this record.

The Federal Reserve Bank of Richmond, to which the cashier's check was sent for presentation to Bank of Vanceboro, accepted the draft of the Bank of Vanceboro on the National Bank of New Bern in payment. This draft was not paid. In *Malloy v. Federal Reserve Bank,* 281 Fed., 997; 291 Fed., 763; 264 U. S., 160; 68 L. Ed., 617, it is held that "a Federal reserve bank, to which a check was forwarded for collection, and which accepted from drawee bank in payment of check the drawee bank's worthless check on a third bank, was liable to payee for losses sustained, since the bank had no authority to accept the draft instead of money in payment of the check, and since the acceptance of the draft as payment released the drawer." It is also held that "banks must be presumed to have dealt with each other with respect to a statute of the State in which a check was deposited for collection, defining the rights and liabilities of banks to which checks are forwarded for collection." The question as to whether and, if so, to what extent the law as thus declared has been modified or altered in this State by Public Laws 1921, ch. 4, sec. 39, and Public Laws 1921, ch. 20, is not presented in this case. Under the first statute cited, the sending of the cashier's check by the Federal Reserve Bank of Richmond, Va., to the drawee bank for collection was "due diligence," and the failure of the drawee bank to account for same did not render the forwarding bank liable to the owner of the check, the forwarding bank having used due diligence in other respects.

Under the second statute cited, the cashier's check, forwarded to the bank on which it was drawn for collection, by the Federal Reserve Bank of Richmond, was payable, at the option of the drawee bank, in exchange drawn on the reserve deposits of drawee bank, and the Federal Reserve Bank could not require payment in any other medium than

such exchange. The validity of this latter statute has been sustained by the Supreme Court of the United States in *Farmers & Merchants Bank v. Federal Reserve Bank,* 262 U. S., 649; 67 L. Ed., 1157. See, also, same case, 183 N. C., 546.

Plaintiff cannot recover in this action, not because there was lack of due diligence on its part or on the part of the Murchison National Bank or the Federal Reserve Bank with respect to the collection of the check, but because the jury has found upon competent evidence that the course adopted by plaintiff for collection of check was, under all the facts and circumstances, negligent—that is, in violation of its duty to defendant to exercise due diligence in collecting same, and that this negligence was the proximate cause of plaintiff's loss. The jury has also found, upon competent evidence, and under instruction not excepted to, that plaintiff instructed defendants to send cashier's check in payment of the indebtedness. Defendants, having complied with this instruction, are discharged from liability for said indebtedness.

Judgment affirmed. There is

No error.

ACME MANUFACTURING COMPANY v. PETER MCQUEEN.

(Filed 25 March, 1925.)

1. Judgment—Pleadings—Default and Inquiry—Damages.

Where the court renders judgment by default for the want of an answer, and inquiry for the unliquidated damages, the plaintiff is at least entitled to nominal damages, and evidence tending to show a complete defense is not admissible.

2. Partnership—Principal and Agent—Choses in Action—Collections—Misappropriation of Funds—Presumptions—Instructions—Appeal and Error.

In an action against the surviving partner to recover for collections made by the partnership from its fertilizer purchasers under a contract making the partnership the agents of the plaintiff for the sale of the fertilizer, collect from its customers and apply the proceeds on the partnership notes given to the manufacturer, the evidence tended to show that the firm had collected moneys from some of its customers at various times and had not paid these collections to plaintiff under the contract, and that others had paid direct to plaintiff: *Held,* the extent of defendant's liability for wrongful conversion is to be measured by the value of the property actually converted, plus interest from the time of conversion, and it was error to shift the burden of proof to defendant on plaintiff's *prima facie* case. This was still a question for the jury, with the burden of the issue on plaintiff.

3. Same—Interest.

And, under the evidence in this case, *held further*, reversible error for the trial judge, in his instructions, to fix a time for the running of interest in accordance with plaintiff's evidence alone, the transactions running through a period of time, with evidence also to show that collections had been made at various times during that period.

APPEAL by defendant from *Grady, J.*, at October Term, 1924, of NEW HANOVER.

Civil action, tried upon the following issues:

"1. What was the value of the fertilizer delivered by plaintiff to the defendant for sale by defendant on plaintiff's account? Answer: '$2,995.17.' (By consent.)

"2. What was the value of the fertilizer so delivered to the defendant that was wrongfully and intentionally converted by defendant to his own use? Answer: '$2,995.17, with interest.'

"3. What is the amount paid to date by defendant to plaintiff on account of fertilizers previously converted by defendant to his own use? Answer: '$100 on 15 October, 1917; $200 on 29 October, 1917; $200 on 10 December, 1921; $1,006.70 on 1 September, 1923; $100 on 1 March, 1924.'" (By consent.)

Judgment on the verdict for $2,995.17, "with interest from 28 December, 1915, together with the costs of this action, to be taxed by the clerk," less the credits found in answer to the third issue. Execution to issue against the person if not paid as provided by law. Defendant appeals, assigning errors.

C. D. Weeks and J. G. McCormick for plaintiff.

E. K. Bryan and K. O. Burgwin for defendant.

STACY, C. J. It will be observed from the verdict that the first and third issues were answered by consent, leaving only the second issue to be determined by the jury. This issue imports liability to arrest. *Coble v. Medley,* 186 N. C., 479.

Early in 1915 the plaintiff entered into a contract with the partnership firm of Tatum & McQueen, under the terms of which the said firm became the agent of the plaintiff for the sale of certain fertilizers. The defendant, Peter McQueen, is the surviving partner of said firm; the other partner, O. J. Tatum, having died prior to the institution of this suit. The action is to recover the amount of certain collections, or choses in action, alleged to have been made or received by the defendant as plaintiff's agent, and wrongfully converted to his own use. There is no dispute as to the value and amount of the fertilizers shipped under the contract and the payments received by plaintiff from time to time. These are fixed by the first and third issues, which were answered by

consent. The real controversy between the parties arises over the question as to what sum or amounts have been collected or received by the defendant as plaintiff's agent and wrongfully appropriated to his own use, and from what date or dates should said sum or sums bear interest. The contract contains the following stipulation: "And all of the above-mentioned goods, as well as all notes and accounts and all other proceeds therefrom which may at any time be in your possession, are to be held by you, as our agent, in trust for the payment of your note or notes to us."

The defendant having failed to appear and answer the complaint filed by the plaintiff in this cause, there was a judgment by default and inquiry entered at the December Term, 1917, in which it was adjudged "that the plaintiff recover of the defendant the value of said choses in action, with interest on the same from the time of their conversion, and that this cause be retained in order that a writ of inquiry may be set down and heard as to the amount of damages sustained by the plaintiff by reason of said conversion." The present appeal is from the trial had upon the execution of this writ of inquiry.

Plaintiff's right to recover at least nominal damages, on its cause of action alleging a wrongful conversion of its property, is established by the judgment of default and inquiry entered at the December Term, 1917. *McLeod v. Nimocks,* 122 N. C., 438. Speaking to the question, in *Blow v. Joyner,* 156 N. C., 140, it is said: "The authorities are very generally to the effect that where a complaint has been properly filed, showing a right of action for unliquidated damages, a judgment by default and inquiry establishes plaintiff's right of action, and that he is entitled at least to nominal damages. *Osborn v. Leach,* 133 N. C., 428; 2 Black on Judgments, sec. 698; 23 Cyc., 752; 6 Enc. Pl. and Pr., 127. And in this State it is further held that such a judgment concludes on all issuable facts properly pleaded, and that evidence in bar of plaintiff's right of action is not admissible on the inquiry as to damages," citing authorities for the position.

In dealing with the question of damages and the burden of proof on the second issue, the trial court instructed the jury as follows:

"Now, gentlemen of the jury, the burden is upon the plaintiff, Acme Manufacturing Company, to satisfy you by the greater weight of the evidence as to the amount and value of the fertilizers actually delivered to defendant under the contract; and if the plaintiff has offered evidence here which satisfies you by its greater weight that fertilizers were delivered to the defendant under this contract, and the amount thereof, and you find that fact to be true, then the burden would shift to the defendant, McQueen, and it would be his duty to satisfy you by the greater weight of the evidence as to what was done with this particular fer-

tilizer that he bought from the plaintiff, and what loss, if any, he has sustained by reason of his failure to make collection. In other words, it would be his duty to render an account of his trust.

"The defendant has not offered any evidence in this case at all, and, therefore, I charge you as a matter of law that if you find from this evidence, and by its greater weight, the burden being upon the plaintiff, that these four notes, aggregating $2,995.17, were made for fertilizers shipped and delivered to the defendant under the contract which has been offered in evidence, and that he received those fertilizers, then it would be your duty to answer this second issue '$2,995.17, with interest.' "

This instruction forms the basis of one of the defendant's exceptive assignments of error. We think the exception is well taken and that the instruction must be held for error.

His Honor was doubtless misled by what was said in *Guano Co. v. Southerland,* 175 N. C., 228, touching the subject of the burden of proof, but that case is quite unlike the present one. There the willful and deliberate conversion of certain property to the partnership business, by one member of the firm, was not seriously disputed. The question at issue was whether knowledge of the transaction was imputable to the other and surviving partner, who alone was being sued. The trial court instructed the jury that, the property having been wrongfully converted by one of the members of the partnership to the firm's business, the law would presume that the other partner had knowledge of it, requiring him to come forward with evidence to show the contrary, if he would escape liability from such conduct. This instruction was approved and was clearly correct under the facts of that case. The question of knowledge was peculiarly within his own information. *Hosiery Co. v. Express Co.,* 184 N. C., 478. But the point at issue here is quite a different matter. The extent of the defendant's liability under the second issue and under the default judgment is to be measured by the value of the property, or choses in action, wrongfully converted by the defendant. This must be shown by the plaintiff, and the date or dates of such conversion or conversions must be found by the jury, where the plaintiff is demanding interest, as it is here, on the value of the property so converted, and from the time of its conversion. *McLeod v. Nimocks, supra.* The plaintiff is not simply asking for a judgment on the contract, but it is also seeking to establish the defendant's liability in tort for the wrongful conversion of its property. *Organ Co. v. Snyder,* 147 N. C., 271; *Boykin v. Maddrey,* 114 N. C., 90.

There is evidence appearing on the record tending to show, not only certain wrongful conversions by the defendant, but also the approximate dates thereof—making out a prima facie case for the plaintiff—but this

did not shift the burden of proof to the defendant. See *Speas v. Bank,* 188 N. C., p. 529, where the matter is fully discussed. It was still a question for the jury on the plaintiff's evidence. *McDowell v. R. R.,* 186 N. C., 571; *Cox v. R. R.,* 149 N. C., 117. It does not follow as a matter of law, though the jury would have been warranted in so finding from the evidence in the case, that the defendant wrongfully and intentionally converted the fertilizers, or the collection from sales thereof, to his own use, simply because he offered no evidence on the hearing. He took the risk of an adverse verdict in failing to do so, but that is all. *Speas v. Bank, supra; White v. Hines,* 182 N. C., 275. In this respect there was error in the charge.

It was in evidence that some of the fertilizers were shipped directly from the plaintiff's factory to customers of the defendant, on orders from the defendant; and, while under the contract, the defendant bound himself to pay for such shipments, he would not be liable for same in tort, unless collections were made therefor and wrongfully converted to his own use. This was the question at issue on the trial. In *Guano Co. v. Southerland, supra,* the plaintiff was aided by a presumption of law imputing to one partner knowledge of the firm's business and what was done by the other partner in furtherance of that business, but in the present case there is no presumption of conversion arising from the evidence—only a permissible inference to that effect. Herein lies the distinction between the two cases. But as the default judgment, rendered herein, established the plaintiff's right to recover, at least nominal damages, on its action for conversion, the controversy reduced itself to a question of fact as to what should be the jury's answer to the second issue. The above instruction, we think, was prejudicial to the defendant in view of the evidence appearing in the case.

Again, we find nothing on the record which would seem to warrant his Honor in fixing 28 December, 1915, as the date from which the alleged misappropriations or the value of the properties converted should draw interest. This was a matter for the jury. *Bond v. Cotton Mills,* 166 N. C., 20. True, the answer to the second issue is "$2,995.17, with interest," but the date is not specified. Conceding that the plaintiff's evidence tended to establish 28 December, 1915, as the date from which interest might properly be allowed, still the date was important, the interest running, as it does, over a long period of time, and this was a matter for the jury to determine. *Harper v. R. R.,* 161 N. C., 451.

The remaining exceptions are not likely to be presented on another hearing, and we shall not consider them now.

For error in the charge, as indicated, there must be a new trial, and it is so ordered.

New trial.

EDISON T. HICKS, ADMR. C. T. A. OF W. HAL MANN, v. C. B. KEARNEY, W. H. RUFFIN, TRUSTEE; J. M. ALLEN, AND MATTIE W. WILLIAMS.

(Filed 25 March, 1925.)

Mortgages—Statutes—Limitations of Actions—Constitutional Law.

The conclusive presumption of the payment of a debt secured by mortgage, etc., after fifteen years, as against creditors or purchasers (Public Laws 1923, ch. 192), is prospective in its effect. Const. of N. C., Art. I, sec. 10.

APPEAL by plaintiff from *Horton, J.*, at August Term, 1924, of FRANKLIN.

On 26 October, 1903, W. Hal Mann executed to Mrs. M. E. Williams two promissory notes—the first for $250, payable 25 April, 1905; the second for $300, payable 25 April, 1906—each bearing interest from date; and to secure their payment he executed to Mrs. Williams a mortgage on real property in the town of Louisburg. He failed to pay the notes, and at his request J. M. Allen advanced the money due Mrs. Williams and took her assignment of the notes and mortgage. On 15 December, 1919, W. Hal Mann, in consideration of $4,000 (part cash, part in deferred payments), conveyed this mortgaged lot to C. B. Kearney, subject to certain encumbrances, and left in the hands of W. H. Ruffin, as trustee under a deed of trust executed by Kearney, purchase-money notes to the amount of $1,000 to secure the payment of said encumbrances.

Soon after the execution of the deed to Kearney, W. Hal Mann went to Florida, thence to New York, where he died in 1921, leaving a will, in which he gave all his property to his niece, Martha Elizabeth Conway, of Syracuse.

J. W. Mann qualified as administrator of W. Hal Mann, in Franklin County, on 16 September, 1921, and held the position until 11 December, 1923, when he resigned. About this time W. Hal Mann's will was probated in Franklin County, and thereafter Edison T. Hicks qualified as his administrator with the will annexed.

After W. Hal Mann had left the State, Allen advertised for sale the property embraced in the Williams mortgage, and C. B. Kearney, alleging that the notes and mortgage were barred by the statute of limitations, for the purpose of restraining the sale, instituted an action, in which the following judgment was entered at the November Term of 1923: C. B. Kearney v. J. M. Allen, transferee, and Mattie E. Williams, mortgagee. This cause coming on to be heard before Hon. T. H. Calvert, judge presiding, it is now, by consent of all parties, ordered and adjudged that the plaintiff be nonsuited of his action. It is further ordered and adjudged that the restraining order heretofore issued herein

be and the same is hereby dissolved, and that the money or securities deposited with W. H. Ruffin be applied to the payment of the note and mortgage executed by W. Hal Mann to Mattie E. Williams and assigned to J. M. Allen to the extent of the balance due upon the same, and the costs of this action, and that the remainder thereof be paid to the personal representative of W. Hal Mann. T. H. Calvert, judge presiding. W. H. Yarborough, attorney for defendants. C. B. Kearney, plaintiff."

The object of the instant suit is to cancel the notes and mortgage assigned to Allen, on the ground they are barred, and to have the notes held by W. H. Ruffin, trustee, turned over to the plaintiff. The issues were answered as follows:

"1. Are the notes of 1903, held by the defendant, J. M. Allen, barred by the ten-year statute of limitations? Answer: 'No.'

"2. Are the notes of 1903, held by the defendant, J. M. Allen, barred by the statute of limitation set out in chapter 192, Public Laws 1923, as alleged in the reply? Answer: 'No.' "

Upon the verdict it was adjudged that the amount collected by W. H. Ruffin on the notes deposited with him be paid to the plaintiff, and that the plaintiff pay to J. M. Allen the amount of his notes, to wit, $412, with interest from 2 December, 1907, less $50 paid 30 August, 1915, upon surrender of said notes; the residue, after payment of costs, to be applied in the due course of administration. The plaintiff appealed.

T. T. Hicks & Son for plaintiff.
W. H. Yarborough for defendant.

ADAMS, J. When the consent judgment of 1923 was rendered, the situation was this: W. Hal Mann had executed the notes and the mortgage to Mrs. Williams and had sold his equity of redemption to Kearney, who had paid a part of the purchase price and had executed certain purchase-money notes, which were secured by a deed of trust. It had been agreed between them that W. H. Ruffin should hold Kearney's notes for the purchase money to the amount of $1,000 to indemnify Kearney against possible loss arising out of encumbrances on the property. The notes and the mortgage had been assigned by Mrs. Williams to Allen, who had advertised the mortgaged property for sale. Kearney, in effect, had assumed the debt Mann owed Allen, and Mann, in effect, had agreed that Kearney should be primarily liable to Allen. Under these circumstances it was consented by the parties to the judgment that the money or securities deposited with W. H. Ruffin should be applied in payment of the remainder due on the notes and the mortgage executed by W. Hal Mann to Mrs. Williams and assigned to Allen.

The trial judge admitted the judgment in evidence, and instructed the jury as follows: "As to the second issue, the court charges you that

if you find from the evidence, and by its greater weight, that prior to 1 January, 1924, J. W. Mann, the duly qualified and acting administrator of W. Hal Mann, deceased, entered into an agreement with J. M. Allen and C. B. Kearney, under the terms of which the defendant, J. M. Allen, was allowed the amount of his notes out of the proceeds held by Ruffin, trustee, and Ruffin, trustee, authorized and directed to pay over out of said proceeds the amount of said notes, then it was not incumbent upon Allen to file an affidavit with the register of deeds under the statute of 1923; and if you so find from the evidence, and by its greater weight, you will answer the second issue 'No.' If you are not so satisfied, you will answer the issue 'Yes.'"

All the exceptions discussed in the plaintiff's brief converge in an assault upon the admissibility of the judgment and upon the instruction relating to it, and the question is whether either exception relied on by the plaintiff discloses reversible error. The exceptions are based chiefly on the contention that neither W. H. Ruffin, J. W. Mann, administrator, nor Mrs. Conway was a party to the action in which the judgment was entered, and that neither is bound by it; and, further, that no privity existed between the several administrators of W. Hal Mann. All the other exceptions relating to the second issue may be treated as correlated with these.

The plaintiff cites several authorities in support of his contention, but we think they are not controlling when considered in connection with the act of 1923. The material portion of this subsection follows: "The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debt secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered," etc. Public Laws 1923, ch. 192.

In plain and specific language it is said the conditions of the mortgage shall be conclusively presumed to have been complied with (if no affidavit is filed) as against creditors or purchasers for a valuable consideration from the mortgagor, etc. The plaintiff, as we understand, takes the position that he represents not only the interest of the testator, but of the creditors of the estate, and that those holding claims for funeral expenses, doctors' bills, and hospital charges are creditors within

the meaning of the act. Apart from the fact that these alleged creditors are not formal parties to the suit, and that it does not appear that the note in the hands of the trustee or the foreclosure of the deed of trust is necessary to the payment of their demands, the record shows that the testator died in the summer of 1921, and that the claims presented to the plaintiff arose before the act of 1923 went into effect. Neither of these debts could have been contracted on the faith of the statutory presumption unless the statute be given retroactive effect. We think it is not susceptible of such construction.

According to the verdict, the notes secured by the mortgage of 1903 were not barred by the ten-year statute of limitations. Allen, as assignee of the notes and the mortgage, therefore had the legal right of foreclosure when the debts in question were contracted. The act of 1923, though ratified 6 March, was to be in force from and after 1 January, 1924. If construed as relating back and giving to the hospital, the physicians, and the undertaker, as creditors of the testator's estate, rights which they did not have when the debts were contracted, it would be given retrospective operation, and this, we think, the Legislature did not intend. "There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they 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. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action, only that construction will be given it. Especially will a statute be regarded as operating prospectively when it is in derogation of a common-law right, or the effect of giving it retroactive operation will be to destroy a vested right or to render the statute unconstitutional." 25 R. C. L., 787; Black on Interpretation of Laws, 252. In *Greer v. Asheville,* 114 N. C., 678, it is said: "Unless the legislative intent to the contrary is made manifest by the express terms of the statute, or by necessary implication arising out of it, it will, as a rule, be held to operate prospectively only—never retroactively." And in *Lowe v. Harris,* 112 N. C., 473: "But the Legislature of North Carolina is restrained by Article I, section 10, of the Constitution of the United States, and Article I, sec. 17, of the Constitution of North Carolina, not only from passing any law that will divest title to land out of one person and vest it in another (except where it is taken for public purposes after giving just compensation to the owner), but from enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory. *Robinson v. Barfield,* 6 N. C., 391; *Butler v. Penn, supra; R. R. v.*

Nesbit, 10 Howard, 395; *Fletcher v. Peck, supra; Terrell v. Taylor,* 9 Cranch, 43; *Call v. Woodard,* 4 Wheat., 519." See, also, *S. v. Littlefield,* 93 N. C., 614; *Elizabeth City v. Comrs.,* 146 N. C., 539; *S. v. Pridgen,* 151 N. C., 651; *Jones v. Schull,* 153 N. C., 517; *Waddill v. Masten,* 172 N. C., 582; *Railway Co. v. Railroad Co.,* 166 U. S., 557; 41 Law Ed., 1114; *Shwab v. Doyle,* 258 U. S., 529; 66 Law Ed., 747.

In our opinion, the conditions of the mortgage are not conclusively presumed to have been complied with or the debt paid as against those who became creditors or purchasers of the mortgagor before the statute went into effect. It is immaterial that the suit was delayed until 3 January, 1924. The debts were contracted more than two years before that time. In this view of the case, all the exceptions relating to the matters involved in the second issue must be overruled. As to the first issue, we do not understand the plaintiff as insisting that there is reversible error. At any rate, none has been pointed out or discovered.

No error.

STATE v. MRS. T. E. MCAFEE.

(Filed 25 March, 1925.)

1. Criminal Law—Sentence—Suspended Judgment—Capias—Judgments Upon Condition.

A sentence imposed for the violation of the prohibition law confined the defendant for a definite period in the county jail, suspended for thirty days upon payment of costs by defendant, with *capias* to issue if the defendant was then found in this State, is not objectionable as a conditional judgment.

2. Same—Capias—Solicitor's Discretion—Discretion of Court.

Where sentence in a criminal action is suspended, with *capias* to issue in the discretion of the solicitor, that part of the judgment which leaves the issuing of the *capias* to the solicitor's discretion is without authority of law, and will be disregarded, the discretion to issue the *capias* remaining with the judge in term.

APPEAL by defendant from *Daniels, J.,* and a jury, at October Term, 1924, of LENOIR.

Defendant was charged in the recorder's court of the city of Kinston with "having a quantity of whiskey in her possession for the purpose of sale, by possession and receiving whiskey, by transporting whiskey." She was convicted in the recorder's court, and from the judgment appealed to the Superior Court. In the Superior Court she was convicted by the jury "of having possession of whiskey for the purpose of sale." The court below rendered the following judgment:

"It is adjudged by the court that the defendant, Mrs. T. E. McAfee, be confined in the common jail of Lenoir County for a term of fifteen months. Execution of sentence suspended, upon payment of costs, for thirty days; if thereafter the defendant be found within the State of North Carolina, capias shall issue to the sheriff of Lenoir or to any other county in the State, at the discretion of the solicitor, and upon apprehension the defendant shall be committed to serve the sentence imposed."

From the judgment rendered, defendant excepted, assigned error, and appealed to the Supreme Court.

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

Sutton & Greene and Joseph Dawson for defendant.

CLARKSON, J. The defendant attacks the judgment of the Superior Court, alleging that the judgment was itself conditional and came within the principle which prohibits conditional judgments. But it was in no sense conditional. The judgment itself was that the defendant be confined in the common jail of Lenoir County for a term of fifteen months. The execution of the sentence was suspended upon payment of cost for thirty days; then, afterwards, if she was found in the State of North Carolina, capias was to issue, at the discretion of the solicitor.

We do not think the court below had authority to give the solicitor discretion as to when the capias should issue. The issuance of the capias should be under the control of the court and should not be delegated. The court may direct the capias to issue *instanter* or at a definite or stated time, to be fixed in the order. In the present case the court below can order capias to issue.

A solicitor is the most responsible officer of the court and has been spoken of as "its right arm." He is a constitutional officer, elected in his district by the qualified voters thereof, and his special duties prescribed by the Constitution, Art. IV, sec. 23 (judicial department), "and prosecute on behalf of the State in all criminal actions in the Superior Courts, and advise the officers of justice in his district." It is said, in *Lewis v. Comrs.*, 74 N. C., p. 198: "A solicitor is *not* a judicial officer."

Walker, J., in *S. v. Vickers*, 184 N. C., p. 679, says: "The essential portion of the sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it shall begin to be inflicted. The sentence, with reference to the kind of punishment and the amount thereof, should as a rule be strictly exe-

cuted. But the order of the court, with reference to the time when this shall be done, is not so material. Expiration of the time without imprisonment is in no sense an execution of the sentence. *S. v. Yates,* 183 N. C., 753-758, citing cases. . . . It is manifest, then, we think, that if the judge had no authority to leave the time at which the capias should be issued to the discretion of the sheriff, that is no part of the judgment; and so, under the circumstances of this case, it may be enforced at any time for the full term upon an order of the court, as the defendant was in court, or upon the issuing of a capias by the clerk of the Superior Court under the direction of the judge, if he was not in court. It would be a mockery of justice if the defendant could, upon such slight departure from correct procedure, escape the lawful punishment for his crime." *S. v. Shepherd,* 187 N. C., 609.

The defendant had other exceptions and assignments of error, but none of them, we think, have merit.

For the reasons given, there is

No error.

THE WOLF COMPANY v. THE SMITH MERCANTILE COMPANY.

(Filed 25 March, 1925.)

1. **Contracts, Written—Fraud—Evidence.**

Where a corn-meal mill is the subject of a written contract of sale and purchase, and sought to be set aside for fraudulent representations of the seller in its procurement as to the quantity and quality of its daily output, the alleged fraud goes to the validity of the written instrument as a binding contract, and evidence is competent to sustain the allegations of fraud, irrespective of the written expressions of the agreement that would otherwise exclude it.

2. **Same—Damages—Election of Remedies.**

Where the defendant, in plaintiff's action to recover the purchase price of a corn-meal mill, attacks the validity of the contract itself for fraud, he may at his election rescind the trade, wherein he may recover the purchase price or such portion as he may have paid, or avail himself thereof as a defense in bar of recovery of the purchase price or a part thereof remaining unpaid, or he may hold the seller for the damages he may have sustained in consequence of the fraud.

3. **Same—Negotiations.**

Where the written contract of sale for a corn-meal mill is sought to be set aside for fraud in its procurement, evidence of verbal and written communications between the accredited representatives of the parties extending over the time inclusive, from the first to the last of those forming the negotiations leading up to the execution of the written instrument, is competent and not confined to those contemporaneous with the execution of the contract of sale and purchase.

4. Same—Damages—Evidence.

Where a written contract for the sale of a corn-meal mill has been vitiated for fraud, and in the seller's action to recover the balance of the purchase price the purchaser alleges damages arising from the former's fraudulent representations as to the daily capacity of the mill, etc., it is competent for the purchaser to show his loss by reason of the failure of the mill to come up to the seller's representations of its daily output, and his expenditures necessary to put it in operation to produce the results obtained.

5. Same—Measure of Damages.

In this case, *held*, the measure of the purchaser's damages upon the fraudulent representations of the seller of a corn-meal mill in the procurement of the contract was the difference between what the mill was actually worth and what it would have been worth if it had been as represented, with such additional damages as would have reasonably been foreseen by the parties at the time they made the contract, and which would naturally grow out of the failure of the seller's representations to be true.

APPEAL by plaintiff from judgment rendered by *Daniels, J.*, at October Term, 1924, of SAMPSON.

Action upon note, dated 10 November, 1921, due on demand, with interest from date, payable to plaintiff, execution of which by defendant is admitted. It is admitted that the consideration for said note is balance due on contract price for machinery sold to defendant by plaintiff, as a corn-meal mill, during the summer of 1920. Note sued on was given in renewal of original notes for purchase price of said machinery. Defendant, as a defense to plaintiff's cause of action, and by way of counterclaim, alleges that at time of purchase of said corn-meal mill plaintiff falsely and fraudulently represented to defendant that said corn-meal mill, when fully equipped, properly installed, and skillfully operated by a competent miller, would produce 200 bushels of good table meal per day of ten hours; that said mill, so equipped, installed and operated, produced only an average of 90 bushels of meal per day; and that by reason of said false and fraudulent representations, defendant sustained damages in the sum of $3,607.45. Defendant demands judgment that it recover of plaintiff damages in said sum.

The contract between plaintiff and defendant was in writing, signed by plaintiff and defendant on 12 November, 1920, and contains no representations or warranties with respect to the capacity of said mill or the quality of the meal it would produce. It contains the following clause:

"It is agreed and declared by the parties hereto that this agreement is the full, complete, final and only agreement between them, and embodies, embraces and merges all former understandings, agreements and contracts between them, oral or written, expressed or implied, of any

and every sort or kind, and that no contemporaneous agreement of any sort or kind exists between said parties which is not herein fully expressed or which was an inducement to the execution of this contract."

Plaintiff, in its reply, denied each and all the allegations set up as new matter in the answer by way of defense and as counterclaim, and demanded judgment that it recover of defendant the amount due on said note.

The issues submitted to the jury, with answers thereto, were as follows:

"1. What amount, if any, is defendant indebted to plaintiff? Answer: '$1,906.23.'

"2. Was the execution of the contract between plaintiff and defendant procured by the fraudulent representations of plaintiff, as alleged in the answer? Answer: 'Yes.'

"3. If so, what damages has defendant sustained? Answer: '$2,650.00.' "

Upon the foregoing verdict, judgment was rendered that defendant recover of plaintiff the sum of $743.77, with interest thereon from 20 October, 1924, and costs, and that defendant is the owner of the corn-meal mill described in the contract offered in evidence, freed and discharged of all claims or demand of plaintiff.

From this judgment plaintiff appealed, assigning errors based on exceptions to the admission of evidence during the trial. There were no exceptions to the instructions of his Honor to the jury.

Faircloth & Fisher for plaintiff.
Butler & Herring for defendant.

CONNOR, J. Defendant alleges that the contract by which plaintiff sold to it the corn-meal mill, for the purchase price of which the note sued on was given, was procured by fraudulent representations, as set out in the answer. It seeks to recover of plaintiff damages which it alleges it has sustained in consequence of such representations, and sets up such damages as a counterclaim to the note. Defendant relies upon the law as stated by *Justice Hoke* in *May v. Loomis,* 140 N. C., 352:

"Where a sale has been effected by an actionable fraud, the purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price or any portion of it he may have paid, or avail himself of the facts as a defense in bar of recovery of the purchase price, or any part of it, which remains unpaid, or he may hold the other party to the contract and sue him to recover the damages he has sustained in consequence of the fraud." 13 C. J., 395.

Plaintiff assigns as error, committed in the trial of this action, the admission by his Honor, over its objections and subject to its exceptions, of the testimony of witnesses offered by defendant as to statements made to the president of defendant company, prior to the execution of the contract, by the salesman of plaintiff company, contending that same were incompetent and inadmissible, for that they tended to contradict, add to, and alter the written contract between the parties. Defendant neither alleged nor offered to prove a warranty. It alleged fraudulent representations, made by plaintiff to procure the execution of the contract. The testimony offered was competent and admissible to establish the truth of these allegations, and the assignments of error are not sustained. *Machine Co. v. Feezer,* 152 N. C., 516; *Unitype Co. v. Ashcraft,* 155 N. C., 64; *Machine Co. v. Bullock,* 161 N. C., 3. "Where the execution of the contract is produced by fraud, a party is not bound by any clause precluding him from setting up false and fraudulent representations within a proper and reasonable time." 13 C. J., 394.

The learned counsel for plaintiff, in his brief filed in this Court, states that he is advertent to authoritative decisions of this Court holding that oral testimony of conversations contemporaneous with the execution of a contract in writing are admissible as evidence, where there are allegations of fraud in the procurement of the execution of the contract. He insists, however, that testimony of conversations had between the parties or their representatives offered as evidence of fraudulent representations a "considerable time" before the execution of the written contract are not admissible. In this case the negotiations resulting in the sale of the machinery were begun in the summer of 1920; the machinery was shipped by plaintiff to defendant in October, 1920; the written contract was executed 12 November, 1920; the mill was installed during December, 1920, and operations begun 1 January, 1921. Defendant's evidence was to the effect that the fraudulent representations were made when the negotiations were begun. The admissibility of the testimony is not dependent upon the time when the oral representations were made, with respect to the date of the signing of the written contract. The conduct of the parties, their words and deeds throughout the entire treaty may be shown to the jury upon the issue of fraud. *Knight v. Houghtalling,* 85 N. C., 17.

Plaintiff also assigns as error the admission of evidence, over its objections and subject to its exceptions, tending to show damages resulting from the fraudulent representations alleged, and the amount of such damages. The testimony that if the mill had had a daily capacity of 200 bushels, as represented, defendant would have made a profit of from $200 to $250 per month, whereas, with a daily capacity of only 90 bushels, it could not operate the mill without loss, was competent to

sustain the allegation that defendant had been damaged. The testimony that defendant spent over $1,700 in the necessary equipment and installation of the mill was competent as tending to show the amount of damages sustained, there being evidence that such expenditures were not only necessary, but were in the contemplation of the parties at the time the sale was made. The contract price of the machinery sold to defendant by plaintiff was $3,239.28; the amount spent by defendant for freight, lumber, belts, and labor in equipping and installing the mill was $1,774.63, making the total cost of the mill to defendant $5,013.91. Without these additional expenditures, the machinery sold to defendant by plaintiff would have been worthless to defendant. There was evidence that the mill, when completed, fully equipped and properly installed, was worth only about one-half what a mill with the capacity to produce 200 bushels of meal per day would have been worth. Upon the third issue the court instructed the jury as follows:

"Ordinarily, in an action of this sort, where this kind of defense is set up and it is insisted that defendant has been injured by the fraudulent conduct of plaintiff, the measure of damages is the difference between what the machinery was actually worth and what it would have been worth if it had been as represented, with such additional damages as would be reasonably foreseen by the parties at the time the contract was entered into, and which naturally grew out of the failure of the representations to be true. The purpose of the law is to give the defendant, if entitled to damages at all, such damages as will compensate him for the actual loss sustained, which could have been reasonably foreseen by the parties at the time the representations were made."

There was no exception to this instruction. It is a correct statement of the law applicable to facts which the jury could find from the evidence. There was no error in the admission of the testimony as evidence, and the assignment of error is not sustained.

There was no error in the admission of the letters from defendant to plaintiff, and from plaintiff to defendant in reply. They were competent as evidence upon the second issue, as tending to show not only that representations were made as to the capacity of the mill, but also that plaintiff knew that the representations were false. In its letter dated 8 November, 1921, defendant wrote to plaintiff as follows: "We cannot pay these notes. As heretofore advised, this mill was bought under guaranty to grind from 12 to 15 bushels per hour of whole corn, and with cracker attachment the output was guaranteed to be increased not less than 25 per cent. This should have yielded a daily output on 10 hours run of approximately 200 bushels. We were never able to get the mill to turn out over half this amount." In reply, plaintiff, in its letter dated 10 November, 1921, says: "We note what you say with

reference to the capacity of the mill, and in reply would state that we have thousands of such mills in operation, and they are giving entire satisfaction and doing just exactly what they are represented to do. All that the machinery required is proper handling, and it will do just exactly as represented."

Plaintiff by its appeal presents to this Court for review only assignments of error made upon exceptions taken during the trial to matters of law or legal inference. There was competent evidence tending to sustain the allegations in the answer. The charge of the learned and careful judge who presided at the trial was without error. The judgment is affirmed. There is

No error.

STATE v. CLIFTON DICKERSON.

(Filed 25 March, 1925.)

1. **Criminal Law—Spirituous Liquor—Evidence—Impeachment—Escaping Arrest.**

Where the prosecuting witness has seen several men whom he identifies as those illicitly operating a whiskey still, for which only one was put upon trial, it is competent for the State to show by his evidence that the others had fled arrest as an explanation to repel the inference of animus towards the defendant on trial that would otherwise have a tendency to discredit the testimony of the witness.

2. **Same.**

Evidence of the flight of the offender, after violating a criminal statute, cannot have the effect of impeaching the character of an alleged accomplice who remains for arrest, and who upon the trial denies any connection with the offense for which he was charged.

3. **Criminal Law—Evidence—Declarations.**

Declarations and acts of one on trial for a criminal offense, after the unlawful act has been committed, cannot be received in evidence against others charged as his accomplices or confederates in the commission of the crime.

4. **Witnesses—Evidence—Cross-Examination.**

Where the defendant is on trial for the illicit manufacture of whiskey, and there is evidence tending to show that others, among them his brothers, were also engaged with him therein, the fact that the defendant takes the stand in his own defense places his character in question, and a broad latitude is given to the cross-examination to impeach his character within reasonable grounds ordinarily within the sound discretion of the trial judge, and where the witness has testified that he did not know where his brother was on that occasion: *Held*, not error for the trial judge to permit the prosecuting attorney to ask him whether he wished to disclaim kin with his own brother.

5. Criminal Law—Witnesses — Evidence — Character — Cross-Examination—Statutes.

While under the provisions of C. S., 1799, the defendant in a criminal action may not be required to testify as a witness to matters that would tend to incriminate himself, yet when he voluntarily takes the stand he is subject to cross-examination upon circumstances that would tend to impeach his character.

6. Appeal and Error—Instructions—Evidence—Harmless Error.

As to whether testimony between the prosecuting witness and the defendant previous to the commission of the offense was competent under the facts of this case, *quere?* But if error, it was rendered harmless by the instruction to the jury that it was incompetent and not to be considered by them.

7. New Trials—Newly Discovered Evidence—Discretion of Court.

The refusal of a motion to set aside a verdict in a criminal case on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge, and its refusal, in the absence of an abuse of this discretion, is not reviewable on appeal.

APPEAL by defendant from *Daniels, J.,* and a jury, at January Term, 1925, of FRANKLIN.

The indictment charges the defendant in three counts:

1. With the manufacture and aiding and abetting in the manufacturing of intoxicating liquor.

2. Did keep and possess materials, substance and property designed for the manufacture of liquor, etc.

3. Did have and keep on hand intoxicating liquor for the purpose of being sold, etc.

The defendant plead not guilty to the charge. The jury returned a verdict of guilty. The court below rendered judgment. Defendant excepted, assigned errors, and appealed to the Supreme Court.

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

Thomas W. Ruffin for defendant.

CLARKSON, J. N. F. Britt testified, in part, as follows: "I am a Baptist minister and the pastor of Corinth Baptist Church, at Ingleside, Franklin County. I have been pastor for that church about five years; that I have known the defendants, Clifton Dickerson, Hurley Dickerson, Jesse Dickerson, John Holden, and Hubert Holden, for the time I have been pastor of the Corinth Baptist Church. Some time previous to 7 November, 1924, I discovered in some woods on the Franklin County poorhouse land two barrels of beer, which is the kind used in distilling liquor. In company with Bennett Faulkner, I

watched these two barrels of beer for three nights in succession, expecting some one to engage in manufacturing the stuff into liquor. On the night of 7 November, 1924, with Bennett Faulkner, I concealed myself in an open space of the woods, about sixty yards from the place where the two barrels of beer were standing. We went there about 7 o'clock and stayed until past 9. While we were there, a party of men came up to the still site and proceeded to begin operations. They set up the still nearer to me than I had expected. They cut wood and built up a fire, and by the light of the fire I recognized the parties mentioned, to wit, Hurley, Jesse, and Clifton Dickerson, John Holden and Hubert Holden. I saw Clifton Dickerson standing close by the fire, and pretty soon he came out near where I was lying and cut a sourwood bush about as big as my wrist, and I recognized it as being Clifton Dickerson for sure. After cutting down the sourwood bush, he took his axe and beat one end of it upon a stump, making a ladle out of it, and carried it back to the still, where it was used for stirring the beer in the kettle. I saw him cutting wood and moving about with the others. He stayed out near where I was, when cutting the bush down, about five minutes. I saw the still on the fire, and saw one of the men pouring the beer into the still. We remained there about two hours, and left the men operating the still."

F. Bennett Faulkner testified, in part, as follows: "I saw Clifton Dickerson cutting wood, and also saw him cut the sourwood bush and beat up the end on a stump to make something to stir the beer with. I saw him starting the fire. We stayed there about two hours, and left them operating the still."

Clifton Dickerson, defendant, testified, in part, as follows: "I am a married man, 25 years of age, and have three children. I live about 7½ miles from the place where Mr. Britt said I was distilling. I was not distilling and never have had any dealings with whiskey or been connected with it in any way. On the night of 7 November, 1924, I was at home, hanging tobacco in my pack-house. I was not at that still. Mr. Jack Goswick was with me from 6 o'clock that night until 12 o'clock. While we were hanging tobacco, Arch Higgs, an old colored man who worked with me, came by the pack-house about 9 o'clock that night while we were hanging tobacco. I have never been convicted of any violation of the law in court." Dickerson was corroborated by Jack Goswick and Arch Higgs.

Otha Hayes testified: "I had a conversation with Mr. Britt, the prosecuting witness of the State, in the presence of the defendant, Clifton Dickerson, and Mr. Britt stated to me at first that he saw Clifton Dickerson at the still, and then said he could not swear that he had seen him, but somebody else could."

Mr. Britt, recalled, testified: "That he did not tell Mr. Clifton Dickerson, in the presence of Otha Hayes, that he did not see him at the still, but told Mr. Dickerson that he had seen him at the still and would swear to it at the proper time."

Several witnesses testified to defendant's good character, and several witnesses testified to defendant's bad character for the last three years.

There were no errors assigned to the charge of the court below.

The defendant, Clifton Dickerson, sets up in his own behalf an *alibi*. If the evidence of himself and his witnesses are to be believed, he was not guilty. The issue before the jury, under the plea of not guilty, was whether Clifton Dickerson was at the still, doing the acts as testified to by the State's witnesses. The jury was satisfied of defendant's guilt, beyond a reasonable doubt, and found him guilty. Defendant contends that he should be granted a new trial, for errors committed on the trial in the court below.

The first group of assignments of error were to the following questions asked Mr. Britt, State's witness, and answers thereto:

"Q. Where are the defendants, Hurley Dickerson and Jesse Dickerson? Answer: 'They have run away.'

"Q. Where does Hurley Dickerson live? Answer: Witness answered that he lived near Ingleside."

We must get the setting of the case. Mr. Britt testified, without objection, that he knew Clifton Dickerson, Hurley Dickerson, Jesse Dickerson, John Holden, and Hubert Holden. They proceeded to begin operations—they set up the still. "They cut wood and built up a fire." Mr. Britt knew them all and recognized them by the light of the fire. The parties were not jointly indicted and tried, but only the defendant Clifton Dickerson was on trial. Mr. Britt was the main prosecuting witness. He had watched and was mainly responsible for the prosecution. The question would naturally arise, as Mr. Britt saw the others at the still, why was Clifton Dickerson alone indicted? To single out one to be prosecuted, without the others, would seriously affect the credibility of the testimony of Mr. Britt. The inquiry would be, what has become of Hurley and Jesse Dickerson? The prosecution wanted to explain the absence of men whom Mr. Britt saw operating the still and who should be indicted. To account for their absence it was necessary to show that they had fled. Where Hurley Dickerson lived was immaterial. We think the questions and answers admissible, under the facts and circumstances of this case. In fact, the whole contest between the State and the defendant was as to the identity of the defendant. Was he in the party? The fact that Hurley and Jesse Dickerson fled

was only a circumstance to be considered as to their guilt, and in no way affected the guilt of defendant. The fact that defendant stood his trial was, no doubt, used to show his innocence, and the ancient proverb called into play:

"The wicked flee when no man pursueth;
But the righteous are bold as a lion."

We cannot hold the questions and answers either erroneous or prejudicial. Flight is only a circumstance against the party who fled.

In *S. v. Case,* 93 N. C., 546, it is said: "In criminal cases every circumstance that is calculated to throw light upon the supposed crime is admissible. *S. v. Swink,* 19 N. C., 9. The fact that immediately after the discovery of a crime, the person charged with its commission flies (fled), is admitted as a circumstance to be considered by the jury. *S. v. Nat,* 51 N. C., 114. So it is held that if the prisoner, when arrested, attempts to make his escape, or attempts to bribe the officer to let him escape, the evidence is admissible. 11 Ga., 123; *Fanning v. State of Missouri,* 14 Mo., 386; *Dean v. Commonwealth,* 4 Grattan, 541; 26 Ia., 275."

In *S. v. Tate,* 161 N. C., 286, it is held: "But such flight or concealment of the accused, while it raised no presumption of law as to guilt, is competent evidence to be considered by the jury in connection with the other circumstances. 12 Cyc., 395; 21 Cyc., 941."

It is well settled in this State that no act, declaration or confession of one of the joint actors in a crime occurring after the crime has been completed—in other words, after the joint enterprise has ended—is admissible against any of the actors except himself. 2 Wharton Crim. Ev., secs. 699 *et seq.; S. v. Haney,* 19 N. C., 390; *S. v. Rumple,* 178 N. C., p. 717; *S. v. Connor,* 179 N. C., p. 752.

If Hurley and Jesse Dickerson had been on trial, their flight would only be a circumstance or some evidence to be considered by the jury in connection with other evidence and circumstances as to their guilt.

The other exceptions and assignments of error were to questions and answers on cross-examination, asked the defendant Clifton Dickerson. They are as follows:

"Q. Where was Hurley Dickerson and Jesse Dickerson that night? Answer: 'I do not know.'

"Q. Is Jesse Dickerson your brother? Answer: 'Yes.'

"Q. Have you got to the point that you do not want to claim kin with your brother, Jesse? Answer: 'No.'

"Q. Where does Jesse Dickerson live? Answer: 'He lives with my father.'

"Q. How far does your father live from the still site? Answer: 'About 7 miles.'

"Q. Where does Jesse Dickerson live? Answer: 'He lives near Henderson.'"

It will be noted that all these questions are asked defendant on cross-examination. The defendant was not bound to become a witness. C. S., 1799, is as follows:

"In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself."

When defendant became a witness, he was subject to cross-examination as any other witness. "When the prisoner went upon the stand as a witness in his own behalf he put his character in evidence, and was subject to impeachment. In *S. v. Cloninger,* 149 N. C., 572, the Court said: 'The accused, by becoming a witness in his own behalf, is liable to cross-examination to impair his credit like any other witness, and the cross-examination is not restricted to matters brought out on the direct examination.'" *S. v. Bailey,* 179 N. C., p. 728.

The cross-examination is not confined to matters brought out on the direct examination, but questions are permissible to impeach, diminish or impair the credit of the witness. These questions often take a wide range, but should be confined to questions within the bounds of reason—the materiality is largely left to the discretion of the court. The cross-examination here was largely an effort to impeach witness' credibility by connecting him with his relations who were alleged to be at the still. The State's evidence was direct and positive, that both Hurley and Jesse Dickerson were with the defendant, Clifton Dickerson, that night, working at the still. These questions put to the defendant when he was on the stand were legitimate cross-examination tending to contradict his direct testimony that he was not at the still that night and never had any dealings with whiskey or been connected with it in any way. The answers to the questions sustained defendant's contention, that he had nothing to do with the still. It was for the jury to say what version they believed.

The utility of cross-examination is bringing out, from the witness himself, facts to lessen his credit. The largest possible scope should be given, but this is left chiefly to the discretion of the trial court. "Throughout all the ensuing sorts of evidence, then, there is to be understood a general canon that on cross-examination the *range* of evidence that may be elicited for any purpose of discrediting is to be *very* liberal.' 2 Wigmore on Evidence (2 ed.), part of sec. 944.

The 17th exception is to the admission of evidence over the defendant's objection, which evidence was given by the defendant on cross-examination. The following question was asked by the solicitor:

"Q. Did Mr. Britt talk to you and tell you to stop distilling before 7 November? Answer: 'Mr. Britt talked to me sometime in October, and told me that he heard that I was in the whiskey business and had better stop. I told him that I was not in the whiskey business and had never been in it.'" In his charge his Honor withdrew this evidence and instructed the jury not to consider it.

We think if the testimony was error, it was nullified by the court below withdrawing its consideration from the jury. *S. v. Apple*, 121 N. C., p. 585.

The last exception was to the refusal of the court below to allow a motion to set aside the verdict of guilty and for a new trial on the ground of newly discovered evidence, as stated in the affidavit set out in full in the record. This was in the sound discretion of the court below.

This case was mainly one of identity. Defendant relied solely on an alibi. The defendant was found guilty beyond a reasonable doubt. It was a question of fact for the jury that we cannot deal with. In law, there is

No error.

SIMON GEDDIE v. N. A. WILLIAMS.

(Filed 1 April, 1925.)

1. Deeds and Conveyances—Grants—Boundaries—Issues—Instructions—Adverse Possession—Appeal and Error.

Where the controversy relates solely to the establishment of a certain dividing line of adjoining lands of the parties to the action, both claiming the same line called for in their deeds or grants, but differing as to its location upon the land, no issue of title is raised, and it is reversible error for the court to instruct the jury as to the evidence of adverse possession for twenty years by one of the parties beyond the line claimed by him, ripening his title thereto.

2. Same—Questions of Law—Questions for Jury.

What is sufficient to constitute a disputed boundary to adjoining lands in controversy is a matter of law for the court, but where the evidence is conflicting as to its location a question of fact arises, to be given to the jury under a charge as to the law involved in the issue.

3. Same—Evidence.

Where the controversy is solely to determine the location of the true dividing line between owners of adjoining lands in accordance with a boundary given in a deed or grant, the admission of evidence as to the adverse possession of one of the parties is harmless error as to the other party, under proper instructions.

4. Deeds and Conveyances — Grants — Boundaries — Possession — Evidence — Title — Instructions—Appeal and Error.

Where the plaintiff alleges his title to a boundary line given in his deed, and defendant admits plaintiff's title, but only denies the location of the line so given between his land and that of the plaintiff, evidence of defendant's possession may be received as tending to establish his contention as to the true location of the line at the time of plaintiff's deed or grant; and an instruction that this evidence is otherwise to be considered as establishing defendant's title by twenty years adverse possession to the land beyond the true location of the line is reversible error.

5. Pleadings—Issues — Statutes — Deeds and Conveyances — Grants—Boundaries.

Issues can only be raised by the pleadings (C. S., 580); and where the complaint alleges plaintiff's boundaries under the calls in his deed to the land in dispute, which the defendant admits, but denies the location on the land of an adjoining line as claimed by plaintiff, the only issue permissible without amendment is one as to the true location of this boundary.

6. Evidence—Issues—Boundaries—Nonsuit.

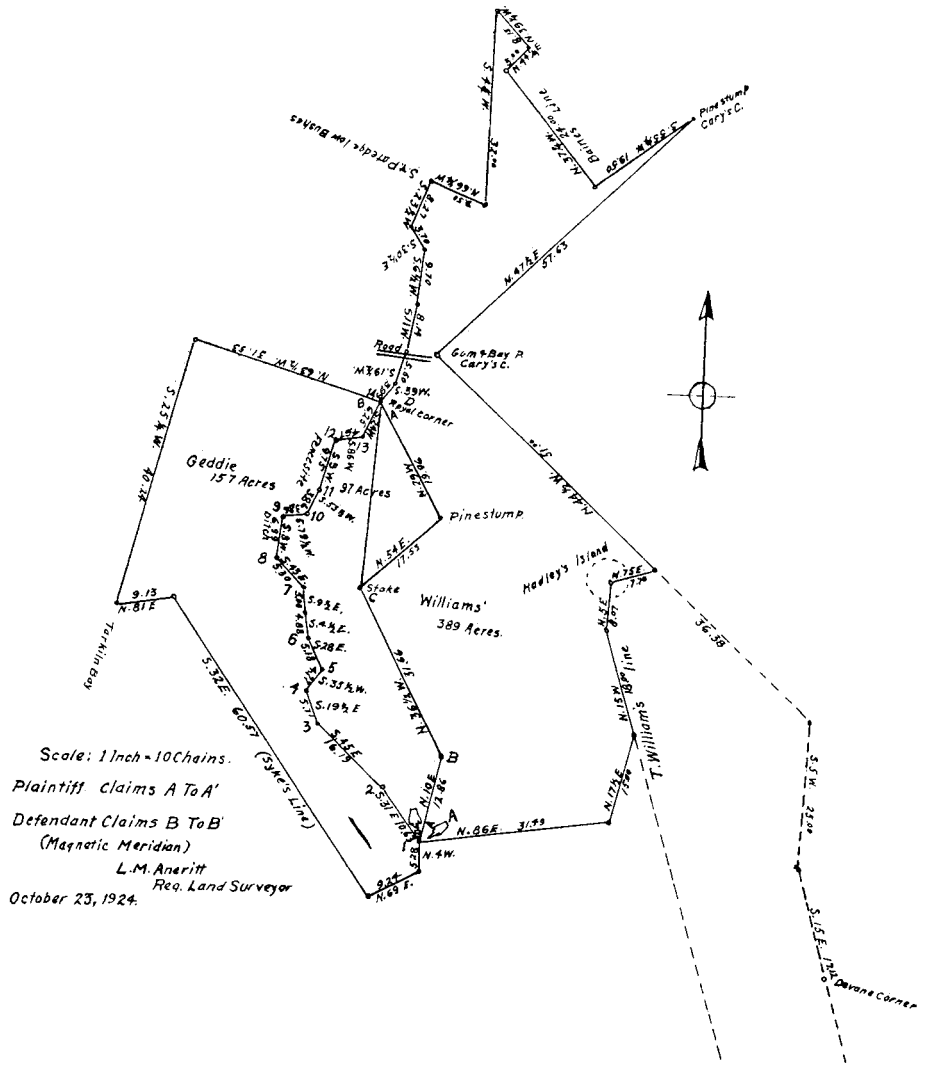
Where there is only an issue raised by the complaint and admission of the answer as to the true dividing line between plaintiff and defendant, as located by plaintiff's grant or deed, and there is evidence to support the plaintiff's contention, defendant's motion as of nonsuit thereon is properly denied. The statutory proceedings in processioning and the common-law doctrine of the writ of perambulation discussed by VARSER, J.

APPEAL by defendant from *Calvert, J.*, and a jury, at October Term, 1924, of CUMBERLAND.

The plaintiff alleged ownership and possession of a tract of land in Flea Hill Township, Cumberland County, describing the same by metes and bounds, giving his last call and the point from which it runs, as follows: "A small short-leaf pine, N. A. Williams' beginning corner of a 500-acre survey; thence as N. A. Williams' line of said 500-acre survey, with Great Creek, to the beginning."

The defendant admitted plaintiff's title and possession of the land, described by plaintiff, but "denied that plaintiff's line extends beyond the line of low bushes on the west side of Great Creek."

GEDDIE *v.* WILLIAMS.



The allegations of trespass and the denial of the same, became immaterial at the trial, and the court submitted, without exception, the following issue:

"Is the true dividing line between plaintiff and defendant the line marked A, B, C, D or the line marked, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14?"

These lines as indicated by letters and figures indicate the locations of the respective contentions of the parties, on the map filed in this case by the surveyor appointed by the court.

It further appears that the 500 acre N. A. Williams survey is contained in a grant to Nathan A. Williams, dated 6 February, 1880, and the line in this survey called for in plaintiff's allegations and chain of title is as follows: "Thence down the edge of Great Creek as the low bushes goes to the beginning." The grant called for a plot, but this plot was not in evidence at the trial.

The jury found with the plaintiff, that the true dividing line is as indicated on the map by the letters, "A, B, C, D."

S. C. McPhail, Bullard & Stringfield for plaintiff.
Dye & Clark for defendant.

VARSER, J. It appears from the record in this case, as well as from the oral argument, that there is no question of title involved in this controversy. The defendant expressly admits, in his answer, the first allegation of the complaint, which avers title and possession, subject only to the location of the "line of low bushes on the west side of Great Creek." Each muniment in the paper title of the respective parties calls for the same line, to wit: "The line in the Williams grant, or 500 acre survey, which runs down the edge of Great Creek as the 'low bushes goes,' to the beginning."

Since the point A, in plaintiff's contentions, is the same as 1, in the defendant's contentions, the location of this point is taken as admitted, and this is the beginning point of the line in controversy. Hence, the location of the dividing line is the sole province of the jury.

What the line is, is necessarily a question of law. *Tatem v. Paine,* 11 N. C., 64; *Burnett v. Thompson,* 35 N. C., 379; *Marshall v. Fisher,* 46 N. C., 112; *Hurley v. Morgan,* 18 N. C., 426; *Waters v. Simmons,* 52 N. C., 542; *Osborne v. Johnston,* 65 N. C., 22; *Clark v. Wagoner,* 70 N. C., 706; *Scull v. Pruden,* 92 N. C., 168; *Johnson v. Ray,* 72 N. C., 273; *Davidson v. Shuler,* 119 N. C., 584; *Jones v. Bunker,* 83 N. C., 324; *Redmond v. Stepp,* 100 N. C., 213; *Peebles v. Graham,* 128 N. C., 218; *Echerd v. Johnson,* 126 N. C., 409; *Rowe v. Lumber Co.,* 138

N. C., 465; *Sherrod v. Battle,* 154 N. C., 345; *Gudger v. White,* 141 N. C., 507; *Lumber Co. v. Bernhardt,* 162 N. C., 460; *Power Co. v. Savage,* 170 N. C., 625; *Brooks v. Woodruff,* 185 N. C., 288.

Where the line is, is a question of fact. *Tatem v. Paine,* 11 N. C., 64; *Burnett v. Thompson,* 35 N. C., 379; *Marshall v. Fisher,* 46 N. C., 112; *Hurley v. Morgan,* 18 N. C., 426; *Waters v. Simmons,* 52 N. C., 542; *Osborne v. Johnston,* 65 N. C., 22; *Clark v. Wagoner,* 70 N. C., 706; *Scull v. Pruden,* 92 N. C., 168; *Davidson v. Shuler,* 119 N. C., 584; *Jones v. Bunker,* 83 N. C., 324; *Redmond v. Stepp,* 100 N. C., 213; *Peebles v. Graham,* 128 N. C., 218; *Echerd v. Johnson,* 126 N. C., 409; *Rowe v. Lumber Co.,* 138 N. C., 465; *Sherrod v. Battle,* 154 N. C., 345; *Gudger v. White,* 141 N. C., 507; *Lumber Co. v. Bernhardt,* 162 N. C., 460; *Power Co. v. Savage,* 170 N. C., 625; *Brooks v. Woodruff,* 185 N. C., 288.

The issue submitted is only intended, as it appears from the record, to determine the true location of the dividing line between the Williams survey and the plaintiff's lands. The controversy waged around this one question. Several exceptions were taken by the defendant to the admission of evidence during the trial, and several of these appear to contain hearsay evidence relating to plaintiff's title to the lands; this was apparently harmless, because the question of title was not involved, and they may not occur again, hence we will not discuss them.

The trial court charged the jury as follows:

"If you find, from the evidence, that the defendant's grant goes to that line, and that he entered into possession of any part of the land covered by the grant, then he would be deemed in law to be in lawful possession of it all, as covered by the grant, up to the line marked from 1 to 14, inclusive, and you would answer this issue, line 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14; unless you so find, further, that the plaintiff and those under whom he claims, have been in the adverse possession for 20 years before bringing this action of the disputed area, under known and visible lines and boundaries that is, up to a known line and boundary, as alleged and contended for by the plaintiff, and shown on the map by the letters, A, B, C, and D." This same view is presented several times in the charge.

The latter part of this quoted instruction, as to adverse possession by plaintiff and those under whom he claims, appears to be error. The controversy was solely as to the true location of the dividing line, which, according to admissions of the parties, must be located wherever the line described as follows: "thence down the edge of Great Creek as the low bushes goes, to the beginning," is located.

This call necessarily relates to the date of the survey contained in the grant, to N. A. Williams, the defendant. The entry on which this

grant was issued, is dated 2 April, 1878, and the grant appears of date 6 February, 1880; consequently, the inquiry is as to the true location of this line, as it was on these dates.

The physical changes at this place that have occurred since the dates of the survey and grant do not enter into this call in the description in the grant. The call does not float with the changes in the waters, nor shift with the growth of bushes or trees incidental to later drainage or floods.

In *Lynch v. Allen,* 20 N. C., 62, *Gaston, J.,* says: "But it does not follow that because the river had deserted the bed in which it flowed when the deed was executed that the boundary of the land of the lessor of the plaintiff has shifted with it." *Wilhelm v. Burleyson,* 106 N. C., 382.

The instant case cannot involve any question of accretion, or avulsion, and the line is as the "low bushes goes," to be located by the jury at the dates of the entry and grant called for by plaintiff's allegations.

If this line is correctly located along the line of figures, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, then the plaintiff's allegation, as well as his paper title, fixes such line as the true dividing line, and he does not allege ownership to the east of this line. If, however, the line indicated on the map with the letters, A, B, C, and D, is the correct location of the true dividing line, then the plaintiff owns up to this line, according to the admission in defendant's answer. The adverse possession and the use of the lands in dispute, are both competent facts, material upon the question of the location of the dividing line, and if the instruction had allowed the same to have been considered only for this purpose, it would have been correct. When there is no question of title, adverse possession cannot be so used, or as set out in other parts of the charge. These instructions contain a correct statement of the law, as to constructive possession, and, also, as to adverse possession ripening title without color, in the abstract, but to allow adverse possession to extend the plaintiff's title, in the instant case, beyond the allegations in his complaint, constitutes error. Upon these instructions, the jury could have located the western boundary of the Williams 500 acre survey, where the defendant claimed its true location is, and, nevertheless, they could have found the dividing line to be located as claimed by the plaintiff, if they found that the plaintiff had had adverse possession of the disputed area for the requisite length of time, although, such a finding would have located the disputed area east of the plaintiff's eastern boundary set out in his complaint.

If the plaintiff desires to set up title to any part of the lands in dispute, which may be east of the location of the western line of the Williams survey, as finally located by the jury, it will be necessary

for him to ask for and obtain permission of the trial court to amend his complaint accordingly. If he does so amend, he can then use adverse possession, or any other mode of proving title, that the facts will sustain; but as the pleadings are now constituted, the issue of title does not arise.

Issues can arise only upon the pleadings. C. S., 580. *Fortescue v. Crawford,* 105 N. C., 30; *Wright v. Cain,* 93 N. C., 296; *Patton v. R. R.,* 96 N. C., 456.

Since there is no allegation in the complaint, which can suggest or support a claim, on the part of the plaintiff, that his eastern line is located east of the defendant's western line, as set out in the Williams 500-acre survey, then no issue could be submitted to the jury embracing such a claim, and the jury ought not to be instructed so as to permit them to locate the plaintiff's eastern line beyond the defendant's western line. In *Miller v. Miller,* 89 N. C., 209, it was held error to submit an issue not raised upon the pleadings, so in the instant case, it is equally erroneous to allow the issue to include land not claimed in the complaint.

The defendant presents by his exceptions a challenge to the correctness of the denial of his motions for judgment as of nonsuit. We do not think that there is any merit in this contention. There appears to be evidence tending to show that the true location of the line of low bushes along Great Creek, is where the plaintiff claimed, and other evidence tending to show that this line is located where the defendant claimed. The question of title is not involved and the burden is upon the plaintiff to show that the true location of this dividing line is where he claims it to be, and, in no event, upon this evidence could a nonsuit be properly entered.

In *Rhodes v. Ange,* 173 N. C., 25, the Court discusses controversies of this kind with much clearness. This latter case was instituted to procession land and to determine the dividing line between the lands of the parties. In the instant case, the action was originally begun in trespass, and the trespass was denied and the title admitted and the issue joined only as to the location of the dividing line between the parties. Hence, the trial runs itself into what is practically a processioning proceeding. A failure to note the distinction between a proceeding where the location of a line is solely involved, and one where the title is also involved has given rise to much of the confusion in this regard. In *Rhodes v. Ange, supra,* the Court says: "Our processioning act is similar in some respects to the 'writ of perambulation' at common law, which was sued out by consent of both parties, when they were in doubt as to the bounds of their respective estates, and was directed to the sheriff, who was commanded to make the 'perambulation' with a jury, and to set the bounds and limits between them in certainty. There

it was done by the consent of the parties, and when there was no dispute as to the title and none as to the right to occupy the adjoining tenements, while with us either of the adjoining proprietors, where a dispute as to the true dividing boundary has arisen, is entitled to have the land processioned, without the other's consent." Or he may institute his action, alleging title, as in the instant case, and if the answer admits the title, but joins issue upon the location of the dividing line only, the trial is conducted, then, in all practical aspects, in the same manner as in processioning proceedings in term time.

In *Jackson v. Williams,* 152 N. C., 203, the Court intimates that a technical motion for an involuntary nonsuit is not applicable to such a trial, when the only issue is as to the location of the dividing line. Without deciding whether a motion for an involuntary nonsuit in these cases will lie, we suggest that the better practice is to submit the issue to the jury, if any pertinent evidence is offered, but if the plaintiff offers no evidence, whatever, a verdict could be directed properly in favor of the defendant.

It is apparent that, in the old common-law proceeding, under the writ of perambulation, the line would be located because the jury, with the sheriff, went upon the premises and located it from such evidence, as appealed to their own senses. A failure to come to a decision was never expected, a determinative result was a practical certainty.

Inasmuch as this case goes back for a new trial, we suggest that the issue be framed as follows: "Is the dividing line between the plaintiff and the defendant located as the line marked on the map, as A, B, C, D, or as the line marked on the map as 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14?"

For the errors in the charge, as pointed out herein, we are constrained to hold that there must be a

New trial.

STATE v. C. W. STEWART AND ELMER STEWART.

(Filed 1 April, 1925.)

1. Grand Jury—True Bill—Twelve Jurors—Motion to Quash—Abatement.

The presence of the full number of the grand jury in finding a true bill under an indictment for murder is not necessary, and an endorsement thereon and finding by twelve thereof, or more, is sufficient, and a motion to quash under a plea in abatement on that ground is properly denied. C. S., 2333.

2. Courts—Evidence—Correction of Error.

It is competent for the judge, upon a trial for murder, to correct the admission of incompetent evidence, and withdraw it from the consideration of the jury, and so instruct them.

3. Trials—Courthouse—Statutes—View of Jury.

Upon a trial for murder, and at the request of the prisoners, the court permitted the jury to view the scene of the crime for the purpose of locating certain places and positions that had been testified to and, over defendant's objection, testimony of certain witnesses who had not theretofore testified: *Held*, the organization of the court at the place of the homicide is regarded as a continuance of the trial held at the courthouse, and not prohibited by C. S., 1443, prohibiting trials to be had elsewhere than at the courthouse; and under the facts of this case it is not reversible on appeal as error prejudicial to the defendants. The inherent power of the court in such instances discussed by ADAMS, J.

4. Murder—Evidence—Parties—Strangers.

Under the facts in this case, *held*, it was not error for the trial judge to exclude evidence that the deceased police officers had warrants for arrest of another person as well as of the prisoners on trial, for the purpose of showing animus against the deceased by another, and that he had committed the murder for which the prisoners were on trial.

5. Criminal Law—Conspiracy—Evidence—Instructions.

Where there is evidence tending to show that the prisoners on trial for murder had entered into a conspiracy to kill the deceased, an instruction is proper that each party to a criminal conspiracy is the agent of the other, and that an act in furtherance of the common design done by one of them is the act of all.

6. Murder—Circumstantial Evidence—Instructions.

Held, under the evidence on this trial for murder, the instruction of the court as to the requisites of circumstantial evidence was correct, and it was not error for him to refuse to give a requested prayer of defendants upon the same principle differently expressed.

7. Instructions—Evidence—Appeal and Error.

A requested prayer for instruction that presents a principle of law not sustained by the evidence in the case is properly refused.

8. Criminal Law—Homicide—Murder—Verdict—Polling Jurors—Recommendation for Mercy.

Where, upon the rendering of an adverse verdict to the defendants on trial for murder, their attorney requests the polling of the jury, and, acting in response to the judge's question to each of the jurors asked accordingly, they each responded guilty of murder whereof they were charged, and upon a second inquiry by the court, responded guilty of murder in the first degree: *Held*, the verdict was not objectionable as being too indefinite, and sentence thereon was properly imposed: *Held, further*, a recommendation for mercy was not properly to be considered as a part of the verdict.

APPEAL by defendants from *Grady, J.*, at September Term, 1924, of BRUNSWICK.

The prisoners were indicted for the murder of Leon George and Sam Lilly and upon conviction of murder in the first degree they appealed from the judgment pronounced thereon.

The State's theory was substantially as follows: On 29 July, 1924, between 4 and 5, afternoon, W. H. Russell saw the deceased Leon George and Sam Lilly, officers of the law, at the Chinnis store. They had a Ford touring car in which were a small whiskey still and an Airedale terrier. They took out the still, said they were on the trail of Elmer Stewart, and went away in the direction of Bob's Branch. Russell lived a half-mile from the Chinnis store and within fifty yards of the prisoners. After returning home he went to the Stewart house and told the prisoners what he had seen and heard. They inquired as to the still and the direction in which the officers had gone. Elmer Stewart then brought up a Dodge touring car and his father, C. W. Stewart, told him the buckshot shells were in his trunk and gave him a bunch of keys. In a few minutes they passed Russell's home in the Dodge car going towards the place where the dead bodies of the officers were afterwards found.

The officers after leaving the Chinnis store crossed over Bob's Branch and later in the afternoon were seen coming back by the home of David Hooper and passing down into the branch. In a few minutes the Hoopers and Fuller McFadden heard shots together with threats and profane language. In a few minutes thereafter the dead bodies of the two officers and the dog were found a few yards from the branch. George was in the front seat of the car, the dog on the back seat, and Lilly on the ground behind the car. All the buckshot were fired from the front, but the bullet in George's head entered from the right. The officers' car did not stop running until the guns fired; but after the firing had ceased another car was heard to turn around about 228 feet from the scene of the homicide. The car had U. S. cord tires and the track was followed into the Fuller McFadden road and thence to the prisoners' garage. On the edge of the road near the Ford car at an elevation of about 7½ feet and about 88 feet distant from the car was a trampled or standing place. Soon after the shots were heard the prisoners returned home, the elder carrying a gun and the younger two pistols. The buckshot found in the bodies of the deceased and the buckshot shells found on the ground where the shooting occurred were identical with those found in the Stewart garage.

After they returned home Elmer Stewart went away in a Ford truck and C. W. Stewart spent the night away from home. There was evidence that C. W. Stewart went to Amos Wallace's house the same night and made a confession of his guilt, reciting the various circumstances which

it is not necessary to set out in detail. Other evidence was offered tending to show incriminating remarks by C. W. Stewart.

The defense was a complete denial of the State's theory, and an alibi. The prisoners contended they had hidden a condenser on Fuller McFadden's land and on the afternoon in question had gone there to see whether it could be fitted to a certain apparatus used by Elmer Stewart in the swamp, and, finding that it could not, had left it in the woods. They denied having a gun or pistol; denied any admission or confession; and contested the truth of all the material evidence offered by the State. The exceptions are stated in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash, for the State.

John D. Bellamy, William M. Bellamy and David Sinclair for appellants.

ADAMS, J. Before their arraignment the prisoners filed a plea in abatement and moved to quash the indictment on the ground that the bill had been considered, passed upon, and approved by the grand jury when only thirteen of its members were present. This body, serving for a period of six months, had been impaneled and charged at a former term; but when the indictment was found five of the number were unavoidably absent. All who were present voted to endorse and return the indictment "a true bill." Afterwards two of the absent members came in, but took no part in finding the indictment or returning it into court.

There was no error in denying the motion to abate the prosecution. At common law the indictment was sufficient if twelve members of the grand jury assented. In *Rex v. Marsh,* 6 A. & E., 237 (112 Eng. Reports, 89), it is said: "It is sufficient that twelve found the bill. An indictment is 'an accusation found by an inquest of twelve or more upon their oath'; Co. Litt., 126 b. In 2 Hale's P. C., 154, it is stated that the sheriff, on precept to him, is to return twenty-four or more persons, out of whom the grand inquest is to be taken and sworn; and at p. 161 it is said that, 'If there be thirteen or more of the grand inquest, a presentment by less than twelve ought not to be; but if there be twelve assenting, though some of the rest of their number dissent, it is a good presentment.' In Com. Dig., indictment is said to be an accusation, 'found by a proper jury of twelve men'; and the same definition (as to number) is given in 4 Hawk, P. C., 1, book 2, ch. 25 (7th ed. by Leach). In 4 Bla. Com., 306, it is said that 'to find a bill, there must at least twelve of the jury agree'; and 'no man can be

convicted at the suit of the King of any capital offense, unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve, at least, of the grand jury, in the first place, assenting to the accusation; and afterwards by the whole petit jury.' 'But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree.' And in 14 Vin. Abr., 377, Indictment (H. 9), Pl. 5, it is said that the caption ought to show that the indictors 'were twelve in number.' Compare 2 Haw. P. C., ch. 25, sec. 15; 1 Chit. Cr. Law, 311; 2 Bishop's New Cr. Pro., sec. 854.

With reference to the number necessary to the finding of an indictment the common law obtains in North Carolina and is not affected by the provision that the eighteen jurors first drawn shall be a grand jury for the court. C. S., 2333; *S. v. Davis,* 24 N. C., 153; *S. v. Barker,* 107 N. C., 914; *S. v. Perry,* 122 N. C., 1018; *S. v. Wood,* 175 N. C., 809, 816.

During the progress of the trial at the request of counsel for the prisoners and with the consent of the State, the court, the jury, the prisoners and all the attorneys, except one of those representing the prisoners, went to the scene of the homicide. There the court was opened in the usual way and the prosecuting officer suggested that the position of the Ford car and the trampled spot be pointed out by the witnesses, but the prisoners objected to the taking of any evidence. Thereupon L. R. Early, who had previously testified in the courthouse as to the position of the Ford car, the dead bodies, the place where the other car had turned around, and other circumstances, was permitted to identify the several places to which he had referred and certain land-marks by which he was guided; and A. A. Nelms and R. C. Fergus indicated places where shells and wadding had been found. Mattie Hooper, also was introduced as a witness for the State. She lived near the place of the homicide and testified as to what she had seen and heard at the time the shooting took place.

The prisoners have vigorously assailed this entire proceeding and have insisted that their rights were thereby impaired and their defense materially prejudiced.

After the examination of the witnesses just referred to the court returned to Southport and reconvened in the courthouse. Thereafter (the time is not definitely fixed) the judge struck from the record the entire testimony of Mattie Hooper and directed the jury not to consider it and to disregard any impression it might have created. He also instructed them not to consider the result of their "crouching observation" from one of the places pointed out by L. R. Early.

The power of the court to withdraw incompetent evidence and to instruct the jury not to consider it has long been recognized in this

State. Of course there are circumstances under which such power may not be exercised, as in *Gattis v. Kilgo,* 131 N. C., 199, with which may be compared *S. v. Bryant, ante,* 112. But here the presiding judge merely corrected the inadvertent admission of evidence which he afterwards conceived to be incompetent and to which the prisoners had objected. The withdrawal of the testimony was favorable to the defense and is sustained by a number of our decisions. In *McAllister v. McAllister,* 34 N. C., 184, *Ruffin, C. J.,* said: "It is undoubtedly proper and in the power of the court to correct a slip by withdrawing improper evidence from the consideration of the jury, or by giving such explanations of an error as will prevent it from misleading a jury." He expressed the same opinion more than three-quarters of a century ago and the practice has been observed since that time. *S. v. May,* 15 N. C., 328; *S. v. Davis, ibid.,* 612; *S. v. Collins,* 93 N. C., 564; *S. v. McNair, ibid.,* 628; *Bridgers v. Dill,* 97 N. C., 222; *S. v. Crane,* 110 N. C., 530; *Wilson v. Mfg. Co.,* 120 N. C., 94; *S. v. Lunsford,* 177 N. C., 117; *S. v. Dickerson, ante,* 327.

But a graver question is raised by the exception of the prisoners to the taking of any evidence at the place of the homicide. They say their request for the jury to visit the scene resulted in the introduction of a novel mode of developing the evidence which was without warrant in criminal procedure and destructive to their defense.

Under the practice at common law, the power to order a view by the jury in certain civil actions rested in the sound discretion of the court, and by 4 and 5 Anne, ch. 16, it was seemingly extended to all civil actions, while in criminal actions there could be no rule for a view without mutual consent. This statute was repealed by 6 George IV, ch. 50, by which it was provided that a view should be ordered if necessary in any case, civil or criminal. The officer serving the writ was commanded to have six or more of the jurors to go to the place in question, at some convenient time before the trial; and the place was to be designated by two persons appointed by the court. 1 Reeves' His. Eng. Law, 435; *Reg. v. Whalley,* 61 E. C. L. R., 376; Thompson on Trials, 665. Thompson says that in criminal cases there was no warrant in the English practice for sending the jury out to make a view, except when such a course was authorized by statute. Trials, Vol. sec. 8, 895. In several of the States such statutes have been enacted; but in *S. v. Perry,* 121 N. C., 533, it was held that the courts have inherent authority in their search for the truth to resort to this procedure. It was held, too, that evidence should not be taken on such occasions, the object being merely to present the scene to the jury more vividly than is possible by the description of witnesses. It was suggested that, under the settled practice, "showers" should be appointed by the court to point

out the *locus in quo,* so as to enable the jury to apply the evidence developed on the trial.

Chiefly upon *S. v. Perry, supra,* the prisoners rest their exception to the taking of the evidence at Bob's Branch; but that decision is applicable to cases in which the "showers" make known to the jury the scene described, and evidently was not intended to cover the facts embraced in the present record. Here there was a sharp conflict as to whether the prisoners were near the place where the Ford car was standing when the dead men were found. The car had been removed to Wilmington for storage, and it was essential to show the place where it had been found, and its distance at that time from other identified places. The prisoners requested a view of the locality, and accordingly the court, the jury, the solicitor, the prisoners, two of their attorneys, and certain witnesses went to the place where the homicide had occurred. The court held a short session there, and admitted evidence tending to identify the several disputed spots. The witnesses who testified on behalf of the State were, of course, subject to the prisoners' right of cross-examination. Indeed, with one exception, all these witnesses were in fact cross-examined.

The cardinal objection urged to this procedure was the asserted disregard of the statutory provision that a Superior Court shall be held by a judge thereof at the courthouse of each county. C. S., 1443. The place for holding a term of court is usually fixed by constitutional or statutory provision, and as a general rule issues of fact cannot be tried at any other place. *Bynum v. Powe,* 97 N. C., 374. But here the term was held at the courthouse in Southport, and the court, by virtue of its inherent power, granted the prisoners' request for a view of two or three places near the branch, frequently referred to by the witnesses, but difficult if not impossible of satisfactory identification by "showers," because the Ford car had been removed. The jury were permitted to consider only such part of the evidence taken at the branch as tended to make plain the position of the objects described, and the reception of this evidence should be treated as a continuance and essential part of the regular term. After critical examination of the proceeding complained of, we find no error which was fatal or prejudicial to the defense relied on, or to the prisoners' constitutional rights, and the exceptions addressed thereto must be overruled. Const. N. C., Art. IV, sec. 10, *et seq.; S. v. Perry, supra; Jenkins v. R. R.,* 110 N. C., 438; *People v. Thorn,* 42 L. R. A., 368, note; *People v. Averback,* Ann. Cas., 1915B, 568, note.

While, under the singular circumstances of this case, we find no reversible error in permitting the witnesses to identify the place where the crime was committed, we must not be understood as commending

the practice. There may be instances in which a view by the jury is necessary, but in criminal actions it is always hazardous and not infrequently an obstruction rather than an aid in the administration of justice. In any event, the court should permit such view only when satisfied that it will contribute to and not retard the due and orderly procedure which has been established as the best product of judicial thought.

The prisoners excepted to the exclusion of evidence tending to show that the deceased officers had a warrant for some one other than the prisoners, and that certain persons in no way connected with the trial had made threats against these officers, or one of them, or had both an opportunity and a motive for committing the crime with which the prisoners were charged. The object was to prove that the homicide had been committed by a third party. This is not permissible under the instant facts. A recent and learned discussion of the question by *Mr. Justice Walker* appears in *S. v. Lane,* 166 N. C., 333, 338, in which, with citation of authorities, there is a clear statement of the principle upon which the ruling is made to rest.

The exceptions presented in the sixteenth, seventeenth, eighteenth, and nineteenth assignments of error relate to instructions in reference to the law of conspiracy and flight; but in these instructions we see no ground for a new trial. As to conspiracy, the judge substantially charged the law as set forth in several decisions of this Court involving the doctrine that each party to a criminal conspiracy is the agent of all the others, so that an act done by one in furtherance of the unlawful design is the act of all. There was evidence of such conspiracy, but none of repentance or withdrawal by either party before the crime was committed. *S. v. Connor,* 179 N. C., 752. Flight, it is true, is not in itself an admission of guilt; but, when established, it is a fact which, together with a series of other circumstances, may be so associated with the fact in issue as, in the relation of cause and effect, to lead to a satisfactory conclusion. Considered in its proper setting and in its relation to other parts of the charge, the instruction complained of, as we understand it, imports only this—that the jury might consider evidence of flight in connection with other circumstances in passing upon the question whether the combined circumstances were tantamount to an implied admission of guilt, and not that flight *per se* constitutes such an admission or raises a presumption of guilt. When so considered, the instruction is in accord with the authorities in this jurisdiction. *S. v. Tate,* 161 N. C., 280; *S. v. Hairston,* 182 N. C., 851. His Honor took care to say that neither flight nor attempted concealment created a presumption of premeditation and deliberation. *S. v. Foster,* 130 N. C., 666.

The court's alleged refusal to give a special prayer as to the requisites of circumstantial evidence forms the twenty-third assignment of error. Upon this phase of the case his Honor's charge was in strict conformity with the law as laid down in *S. v. Wilcox*, 132 N. C., 1120 and other decisions, and was as favorable to the prisoners as they could reasonably demand.

The prayer set out in the twenty-fourth assignment is open to the objection that it recites an abstract proposition of law based upon a philosophical discussion of the difference between a confession of evidence and evidence of a confession without applying the proposition in any way to the testimony of the witnesses. The instruction, for this reason, if for no other, was properly declined. *S. v. Rash*, 34 N. C., 382; *S. v. Murph*, 60 N. C., 129; *S. v. Anderson*, 92 N. C., 733; *S. v. Speaks*, 94 N. C., 865.

Exceptions to the remaining prayers are so clearly without merit as to require no discussion. Assuredly, the judge would not have been justified in telling the jury there was no evidence tending to prove the guilt of Elmer Stewart; and so much of the other prayers as the prisoners were entitled to is embodied in the charge.

On Sunday morning the jury announced that they had reached a verdict, and the following proceeding took place:

"The Court: Gentlemen, have you agreed on a verdict?

"The Jury: Yes, sir; we have.

"The Court: Who shall speak for you?

"The Jury: The foreman.

"The Court: Gentlemen of the jury, look upon the prisoners. What say you as to C. W. Stewart and Elmer Stewart? Are they guilty of the murder whereof they stand charged, or not guilty?

"The Foreman: Guilty, with the mercy of the court.

"The Court: Guilty of what?

"The Foreman: Guilty of murder in the first degree.

"The Court: You find them both guilty of murder in the first degree?

"The Foreman: Yes, sir, with the mercy of the court.

"Counsel for the defendants asked that the jury be polled.

"The Court: All right. Mr. Clerk, call the jury.

"And each of the jurors answered 'Yes.'

"The Court: By polling the jury, it means that each one of you is asked the question as to whether or not you did find the prisoners guilty of murder in the first degree. That is true, is it?

"All of the jurors answered 'Yes.'"

The prisoners made a motion in arrest of judgment, on the ground that the verdict was too indefinite, and a motion to correct the verdict, and excepted to the denial of each motion. In refusing these motions

there was no error. The verdict was entered on the records of the court as it was returned, so there was nothing to correct; and the jury's recommendation of mercy was mere surplusage and no part of the verdict. This conclusion was reached in *S. v. McKay,* 150 N. C., 813, and approved in *S. v. Hancock,* 151 N. C., 699, and in *S. v. Snipes,* 185 N. C., 743.

After bestowing upon the record, the briefs, and the oral argument the care and reflection which the gravity of the crime demands, we perceive no error which entitles the prisoners, or either of them, to a new trial.

No error.

STATE v. J. E. MALPASS.

(Filed 1 April, 1925.)

1. Criminal Law — Obstructing Highways — Actions — Consolidation — Trials—Statutes.

Two bills of indictment—one charging the statutory offense of obstructing a public highway by wrongfully and willfully placing nails or tacks thereon, so as to obstruct the highway by causing punctures in tires of automobiles traveling thereon, and the other, in this manner injuring the automobiles of certain persons—are founded upon the same offense, the one growing out of the other, and are properly consolidated by the trial judge and tried together as separate counts of the same indictment. C. S., 4622.

2. Criminal Law—Obstructing Highways—Evidence—Questions for Jury.

Where the defendant denies the charge of obstructing a highway and injuring automobiles passing along it, by willfully and wantonly placing nails or tacks thereon, and the evidence is conflicting, an issue of fact is raised for the determination of the jury.

3. Highways—Obstructions.

The original meaning of an obstruction of a highway, that it is a physical barrier placed across it, so as to impede or interfere with travel thereon, is now regarded in a broader sense, and includes such acts as will interfere with the travel thereon by causing injury to vehicles passing over it.

4. Same—Injury—Criminal Law.

The placing of nails or tacks upon the public highway in such manner as to puncture and injure the tires of automobiles passing thereon, thus obstructing it, is the violation of separate statutes, each imposing a punishment, and the two are consistent with each other growing out of the same unlawful act, the one comprehending the other, though perhaps requiring the proving of additional facts; and *held,* upon the conviction under both sections, a sentence is not objectionable as too indefinite which makes the term of one of them begin immediately upon the expiration of the other. C. S., 4331, 3789.

STATE *v.* MALPASS.

5. Criminal Law—Statutes—Sentence—Constitutional Law.

Where there is a conviction of the violation of two separate criminal statutes consolidated and tried as two counts under one bill of indictment, a sentence for each offense—the one to begin upon the expiration of the other term—confining the punishment as to each within that prescribed in the statute relating to it, cannot be considered under the facts of this case as cruel and unusual within the inhibition of our Constitution, Art. I, sec. 14.

APPEAL by defendant from judgment rendered by *Lyon, J.*, upon a verdict of guilty, at September Term, 1924, of PENDER.

Two criminal actions were instituted against the defendant. It was charged in one bill of indictment that the defendant "did unlawfully and willfully obstruct a public road, or highway, by placing nails, driven in thin wood, and placing them in the public road, so as to stick in automobile tires, or by placing nails or tacks in said road, which nails did become fastened or stick in automobiles in large numbers and caused punctures."

In the other bill of indictment it was charged that the defendant "did unlawfully, willfully and wantonly injure the personal property of another, or another's, to wit, O. F. Woodcock, several times, between June, 1924, and September, 1924; G. E. Maultsby, Dewey Croom, Vance Croom, W. H. Horrell, Willie J. Pridgen, John Porten, and Alvin Woodcock, by placing nails or tacks in thin wood and placing same in the public road, to become fastened in automobile tires of the aforesaid owners, causing punctures and otherwise damaging and injuring said automobile tires, while passing upon the public road."

These criminal actions were consolidated and tried together as one bill of indictment with two counts.

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

C. E. McCullen and L. Clayton Grant for defendant.

VARSER, J. The defendant complained because the trial court consolidated the two cases and tried them together, as upon one bill of indictment with two counts. In this order we can perceive no error whatever. It was not only proper to consolidate these cases and try them together, instead of "taking two bites at the cherry," but it would appear that C. S., 4622, makes it the duty of the trial court so to do.

Both offenses charged are of the same grade, being misdemeanors, and the punishment for each is the same. When this is the case, the right to join the counts in one warrant of indictment has always obtained in North Carolina. "Each count is, in fact and theory, a separate indictment." *S. v. Toole,* 106 N. C., 736; *S. v. Mills,* 181

N. C., 530; *S. v. Brown,* 182 N. C., 761. This rule was in vogue in this State for many years prior to the enactment of C. S., 4622; Public Laws 1917, ch. 168. *S. v. McNeill,* 93 N. C., 552.

Prior to C. S., 4622, in *S. v. Watts,* 82 N. C., 656, the Court said: "The rule for joining different offenses in the same bill of indictment is, that it always may be done when the grade of the offenses and the judgments are the same."

Also, in *S. v. Speight,* 69 N. C., 72, the Court approved the joinder of separate counts, since the grade of the offenses and the punishments were the same.

The rule in this State now is that different counts relating to the same transaction, or to a series of transactions, tending to one result, may be joined, although the offenses are *not* of the same grade. *S. v. Lewis,* 185 N. C., 640; *S. v. Burnett,* 142 N. C., 578; *S. v. Howard,* 129 N. C., 585; *S. v. Harris,* 106 N. C., 683; *S. v. Mills, supra;* C. S., 4622.

The reasons against such a joinder, under the English cases, do not now obtain, as pointed out by *Adams, J.,* in *S. v. Lewis, supra.* In *S. v. Mills, supra,* as in the case at bar, there was no motion to quash or to require the State to elect.

S. v. McNeill, supra, relates to felonies, and the case at bar relates only to misdemeanors. In the *McNeill case,* the Court, through *Merrimon, J.,* says: "Distinct felonies of the same nature may be charged in different counts in the same indictment, and two indictments for the same offenses may be treated as one containing different counts." "This, certainly, may be done, and we can see no substantial reason why the same rule of practice may not apply to several indictments against the same parties for like offenses, when the just administration of criminal justice will thereby be subserved."

The evidence in the case at bar makes only one narrative. One connected story may be told covering the entire transaction or series of transactions. Therefore, C. S., 4622, clearly applies and makes plain the duty of the court to consolidate the indictments.

It appears from the evidence that the defendant lived near the highway, and that he was seen to come out from his house and put a block of wood, which was some three to five inches in length and one-half inch in thickness, with sharpened nails driven through it, so that the sharp points would stick up in the ruts where automobile wheels ran, and the block was so covered with sand that only the ends of the nails would protrude above the sand. These nails in the blocks of wood (and sometimes pieces of hoop-iron with nails likewise driven through them were used) would stick through the automobile tires and cause punctures and serious damage to the automobiles, and much inconvenience

and hindrance to travel on this highway. There was much evidence tending to show a continued nuisance, resulting from such practices, to the traveling public. Many witnesses saw the different parts of these transactions, and the evidence was ample to sustain a conviction on both counts.

The defendant contended that he was not present at the time when the State's witnesses testified that they saw him place one of the blocks, and that he was not guilty of placing any of these things in the highway, and was elsewhere each time such occurrences took place. The jury, however, accepted the State's view of the case and convicted the defendant on both counts.

In his second exception the defendant contends that the testimony is not sufficient to constitute an obstruction to the public road, or highway, as contemplated by C. S., 3789. This section uses the word "obstruction." The trial court charged the jury that if the defendant placed this block, with two nails in it, or any of these blocks, in the road, in the ruts where automobiles are accustomed to run, such would constitute an "obstruction" to the public highway, thereby holding as a matter of law that these pieces of wood and hoops, with nails driven through, so as to cause serious damage, hindrance and delay to the traveling public, was an "obstruction."

The original meaning of the word "obstruction" probably did not limit itself to the idea of "building up" before or against, to "block up," to "stop up," or "close up," being formed from the Latin verb, *"obstruere."* Long ago, usage broadened its meaning so as to include the idea of *delay, impeding,* or *hindering. S. v. Edens,* 85 N. C., 522.

In *S. v. Godwin,* 145 N. C., 464, the obstruction was a fence, and the test applied was whether it rendered the use of the public highway, a street, *less convenient. People v. Eckerson,* 117 N. Y. Supp., 419, holds that if the impediment prevents free passage along the highway and renders it difficult for travel, it is an "obstruction." An "obstruction" is a blocking up with obstacles or impediments; impeding, embarrassing, or opposing the passage along and over a street or highway. *Chase v. Oshkosh,* 81 Wis., 313. Interfering with free passage along a highway constitutes an "obstruction," in *Davis v. Pickerell,* 139 Iowa, 186.

"An 'obstruction,' like dirt on a boy's face, is merely matter out of place, and that which may be a stepping-stone, when in a position where it is needed and can be used as such, becomes an 'obstruction' when occupying a place intended for other use, and where it is not needed and cannot be so used," says *McCormack v. Robin,* 126 La., 594.

In *Jennings v. Johonnott,* 149 Wis., 660, an obstruction is defined to be: "An object unlawfully placed within the limits of a highway is an obstruction if it impedes or seriously inconveniences public travel or

renders it dangerous, and it is not at all necessary that such object should stop travel in order to be an obstruction." This case, with a wealth of authority, analyzes and discusses the reasons for this definition of an "obstruction."

Viewed in the light of these authorities, it is clear that the charge was correct, and properly defined an "obstruction." It is interesting to note in this connection that the defendant himself, in his testimony, referred to these blocks of wood, equipped with nails, as "obstructions." While such a statement on his part would not affect the question of law involved, it does show how such things are understood in ordinary, every-day affairs."

The court charged the jury that, "if the defendant put out these nails, or any of them, for the purpose of injuring an automobile or a motor-vehicle of any kind, of any one else, that would be wanton; and if that some one's property was injured by reason of placing these things in the road, that the defendant would be guilty under the second count in the consolidated bill of indictment, if he did it willfully and wantonly."

Under our statute (C. S., 4331) the evidence on the part of the State, which the jury has found to be true, is sufficient to sustain the charge of the court.

In *S. v. Martin,* 141 N. C., 832, the evidence disclosed that defendant threw a rock at a street car and broke a glass window. *S. v. Frisbee,* 142 N. C., 672.

The court charged the jury in compliance with the statute. The charge does not comply with the common-law requisites of malicious mischief, there being no destruction of the property, but that is not necessary now, because the statute (C. S., 4331) was enacted to change the law in this respect, though not, perhaps, to supersede the common law as to malicious mischief. *S. v. Martin, supra.*

The defendant excepts to the sentence pronounced against him wherein he is required to work on the roads for a period of four years—two years for each offense—the sentence in the latter case to begin at the expiration of the first sentence.

The contention that C. S., 2619, applies is not well founded. The evidence would support an indictment under this section, but the record plainly shows that the trial was under C. S., 4331, and C. S., 3789.

The gist of the offense, under C. S., 2619, is in the *putting* or *placing* of the dangerous substances named in a public highway, regardless of the actual results flowing therefrom. While, under C. S., 4331, and C. S., 3789, the gist of the offenses therein denounced is the effect of the acts prohibited. It is clear that the Legislature did not intend to supersede C. S., 4331, and C. S., 3789, even when the evidence may

show that C. S., 2619, has been violated, as a necessary link in the evidence, upon charges as made in the instant case.

Violations of C. S., 3789, and C. S., 4331, are punishable by fine or imprisonment, or both, in the discretion of the court.

C. S., 4622, provides not only for the joinder of indictments, as herein ordered, but further provides that "this section (C. S., 4622) shall not be construed to reduce the punishment or penalty for such offense or offenses."

The trial court sentenced the defendant to a term of two years on the roads for each offense, making the sentence in the second count begin at the expiration of the sentence in the first count.

It is admitted that neither sentence transcends the punishment permitted in each statute; hence we have no desire to interfere with this judgment as pronounced by the learned and experienced trial judge.

It is neither cruel nor unusual punishment; therefore it is not prohibited by Article I, section 14, of the Constitution of North Carolina. There is no occasion in the instant case for this Court to interfere. *S. v. Driver,* 78 N. C., 423; *S. v. Mangum,* 187 N. C., 477; *S. v. Manuel,* 20 N. C., 144.

In fact, the judgment in the instant case is fully sustained in this regard by the opinion in *In re Black,* 162 N. C., 457, in which it is said: "It seems to be well settled by many decisions and with entire uniformity that where a defendant is sentenced to imprisonment on two or more indictments on which he has been found guilty, sentence may be given against him on each successive conviction; in the case of the sentence of imprisonment, each successive term to commence from the expiration of the term next preceding. It cannot be urged against a sentence of this kind that it is void for uncertainty; it is as certain as the nature of the matter will admit. But the sentence must state that the latter term is to begin at the expiration of the former one; otherwise, it will run concurrently with it. It is absolutely essential that the last sentence shall state that the term of imprisonment is to begin at expiration of former sentence, in order to prevent the prisoner from serving the two sentences concurrently with each other."

This rule is sustained in other jurisdictions. *U. S. v. Patterson,* 29 Fed., 775; *Fortson v. Elbert County,* 117 Ga., 149; *Ex parte Gafford,* 25 Nev., 101; *Ex parte Hunt,* 28 Texas Rep., 361.

Judgments providing as in the instant case are proper. *Kite v. Com.,* 11 Met. (Mass.), 581; *Blitz v. U. S.,* 153 U. S., 308; *Ex parte Jackson,* 96 Mo., 116.

Mr. Justice Allen, in *S. v. Cathey,* 170 N. C., 794, reviews the authorities, and conclusively sustains the view entertained by the trial court in the instant case.

The contention of the defendant that this judgment inflicts *double punishment* for *practically* the same offense cannot be sustained. The same transaction, or the same series of transactions, may support several offenses that are separate and distinct crimes.

In *S. v. Jesse, a slave,* 20 N. C., 98, *Ruffin, C. J.,* says: "The facts contained in the first indictment fall short, in some essential respects, of those indisputably requisite to constitute the crime in the second indictment; so likewise of the facts laid in the second indictment, if true throughout, they would not make up the crime specified in the first indictment."

In *S. v. Nash,* 86 N. C., 650, it is clearly stated: "To support a plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction; but they must be for the same offense; *the same both in fact and in law.*" *S. v. Williams,* 94 N. C., 891.

In *S. v. Taylor,* 133 N. C., 755, *Connor, J.,* upholds the same doctrine, that the two prosecutions must be for the same offense—*the same both in law and in fact*—to sustain the plea of former conviction.

If two statutes are violated, even by a single act, and each offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the one statute. *S. v. Stevens,* 114 N. C., 873; *S. v. Robinson,* 116 N. C., 1046. To the same effect: *S. v. Hankins,* 136 N. C., 621.

In *S. v. Freeman,* 162 N. C., 595, *Allen, J.,* gives the seven principles of law bearing upon the plea of former acquittal, and the second principle seems to us to be decisive of the defendant's contention. It is as follows: "That the offenses are not the same if, upon the trial of one, proof of an additional fact is required which is not necessary to be proven in the trial of the other, although some of the acts may be necessary to be proven in the trial of each."

In *S. v. Gibson,* 170 N. C., 697, the plea was former jeopardy, and the same rule as stated in *S. v. Nash, supra,* was applied.

The plea of former acquittal, former conviction, former jeopardy, or double punishment for the same offense, or by whatever name called, have the same basis in these authorities, and in the "reason of the thing" the two prosecutions must be identical, *in law and in fact,* to make the plea good.

Upon the whole case, we find nothing of which the defendant can justly complain. Therefore, we are compelled to hold there is

No error.

CHARLES F. BEST AND MAUD D. ALLEN v. R. H. UTLEY.

(Filed 1 April, 1925.)

1. Deeds and Conveyances—Probate—Judicial Acts—Statutes.

The act of the proper officer in taking the acknowledgment of a deed is a judicial or a *quasi*-judicial act. C. S., 3293.

2. Deeds and Conveyances—Probate—Husband and Wife—Constitutional Law—Statutes.

Under the provisions of our State Constitution, Art. X, sec. 6, a deed from a wife to another than her husband must be with the latter's written consent, with the certificate of the probate officer that she states to him, upon her private examination, separate and apart from her husband, that she signed the same freely and voluntarily, etc. C. S., 997, 3324.

3. Same—Defective Probate—Correction—Courts.

A deed made by the wife to the husband of her lands must not only comply with the requirements of our Constitution, Art. X, sec. 6, and C. S., 997, 3324, but must also rebut the presumption of his influence over her by reason of the marital relations, as required by C. S., 2515, by the probate officer stating his conclusions in his further certificate that she freely consents to the same at the time of her separate examination, and that he is satisfied that her deed so made was not unreasonable or injurious to her; and when the probate is defective in this respect it cannot, after its execution and delivery, be corrected by the court so as to render it valid, except at least upon due notice to the parties.

4. Deeds and Conveyances—Probate—Husband and Wife—Impeaching Evidence.

By express terms, our statute relating to the certificate of the probate officer of a deed by a wife conveying her lands to her husband, "the certificate shall state the conclusions of the officer and shall be conclusive of the facts therein stated," to the effect, among other things, that the wife's deed was not "unreasonable or injurious to her"; and in the absence of fraud on the part of the husband in procuring the execution of the deed, such conclusion of the officer, so stated in his certificate, regular in form, may not thereafter be attacked by his evidence on the trial to set aside the deed. C. S., 2515.

5. Same—Deeds in Trust—Mortgages.

The requirements of C. S., 2515, as to the certificate of the probate officer to a deed from the wife to her husband, conveying her lands, applies to a deed in trust by the wife to secure an indebtedness by her to her husband.

6. Deeds and Conveyances—Probate—Registration—Presumption.

Where a deed has been registered upon a probate regular in form, it is prima facie taken as correct; and upon an issue as to whether it was executed and delivered, the law raises a presumption from the probate and registration that it had been executed and delivered, which may be rebutted by sufficient evidence.

7. Same—Fraud.

The certificate of a probate officer of a deed by the wife to her husband of her lands as not complying with C. S., 2515, cannot be impeached, except upon allegation and proof of fraud in the taking of the acknowledgment, the making the private examination, or in arriving at the conclusion as stated in the certificate.

8. Evidence—Declarations—Interest—Deeds and Conveyances—Husband and Wife.

Where the heirs at law of the deceased wife seek to set aside her deed to her lands to her husband, her declarations affecting the validity of the deed are in her own interest, and not available to her heirs at law claiming under her title.

9. Issues—Pleadings—Appeal and Error.

Where the issues submitted in a controversy arise from the pleadings, and are comprehensive enough to enable the parties to present to the jury all material matters involved in the inquiry, they will not be held for error on appeal.

APPEAL by plaintiffs from judgment rendered by *Horton, J.*, at August Term, 1924, of FRANKLIN.

Plaintiffs are nephew and niece of Mrs. Bettie D. Utley, who died in Franklin County on 30 January, 1924, leaving a last will and testament, in which plaintiffs are the residuary legatees and devisees. Defendant was her second husband. At the date of her marriage to defendant she owned certain tracts of land situate in Franklin County, containing about 1,700 acres, devised to her in the last will and testament of her first husband, George Winston. After his marriage to the deceased, defendant moved from his home in Wake County to the home of his wife in Franklin County, where he and she lived together until her death. During these years defendant, at the request of his wife, managed and controlled her farms, accounting to her for the rents and profits arising therefrom.

The fifth paragraph of the complaint filed in this action is as follows:

"Plaintiffs are informed and believe, and therefore allege, that the defendant, in every way in his power, from shortly after his marriage until the time of his wife's death, coaxed, begged, teased, persuaded and endeavored to intimidate said Mrs. Bettie D. Utley into conveying to him part of her real estate, and into devising to him the same, or to his children. In the prosecution of the said effort and purpose he succeeded in obtaining from his wife a deed, dated 20 July, 1920, recorded in Book 229, at p. 35, of the registry of Franklin County, for 173½ acres of her land that was then worth $6,000, or more, which deed the plaintiffs are informed and believe and allege was and is null and void for the lack of valuable consideration to support it, and because there

was a fraud upon his wife, as well as not executed in accordance with the form of law."

In his answer to said paragraph defendant denies each and every allegation thereof, except that his wife conveyed to him a tract of land containing 173½ acres, by deed, which he alleges was for a valuable consideration and was duly executed according to the form of law in every respect.

Plaintiffs further allege that defendant procured from his wife a deed of trust to A. S. Joyner, trustee, securing the payment of a note for $6,000, payable to defendant, said deed of trust bearing date 1 January, 1921. Plaintiffs allege that "said deed was fraudulent and is void for lack of proper consideration, and because of the presumed and known fraudulent influence of defendant over his wife, and because same was not executed in accordance with the forms of law." Defendant, in his answer, admits the execution by his wife of the deed of trust to A. S. Joyner, trustee, as alleged in the complaint, but denies that the said deed was fraudulent or that it is void because not executed in accordance with the forms of law.

The issues, with the answers thereto, as submitted to the jury, were as follows:

1. Was the deed from Mrs. Bettie D. Utley to R. H. Utley, recorded in Book 229, page 35, for 173 acres of land, called the Spruill tract, obtained by the said R. H. Utley from the said Mrs. Bettie D. Utley by fraud or undue influence, as alleged in the complaint? Answer: "No."

2. Was the deed of trust, securing R. H. Utley $6,000, made to A. S. Joyner, trustee, recorded in Book 224, page 487, obtained by the said R. H. Utley from the said Mrs. Bettie D. Utley by fraud or undue influence, as alleged in the complaint? Answer: "No."

From the judgment in accordance with this verdict plaintiffs appealed, assigning errors set out in the case on appeal.

T. T. Hicks & Son, W. H. Yarborough, and Ben T. Holden for plaintiffs.

W. M. Person, W. H. & Thos. W. Ruffin, and R. N. Simms for defendant.

CONNOR, J. Plaintiffs offered in evidence, for the purpose of attack, deed from Bettie D. Utley to her husband, R. H. Utley, defendant. This deed is dated 12 July, 1920. The consideration recited therein is "one thousand dollars and other valuable considerations to her paid by the said R. H. Utley." The deed is sufficient in form to convey the land described therein, containing 173½ acres, known as the Spruill land,

to R. H. Utley in fee simple, and contains the usual covenants and warranties. The execution of the deed was acknowledged by Bettie D. Utley and her husband, R. H. Utley, grantors, before G. R. Moye, a notary public, whose certificate, in due form, is annexed thereto and recorded. The certificate as to the private examination of Mrs. Bettie D. Utley, a married woman, is in full compliance with the statute, and concludes with these words, "and upon full examination I am satisfied and certify that the same is not unreasonable or injurious to her." The deed was recorded on 24 August, 1920, in Book 229, at page 35, registry of Franklin County.

Plaintiffs offered as a witness G. R. Moye, who testified that he was the notary public who took the acknowledgment by Mr. and Mrs. Utley of the execution of the deed by them. He further testified that the acknowledgment was taken at her home. Nothing unusual happened. She was very pleasant about it. Mr. Utley signed the deed and left the room. He then asked Mrs. Utley the usual questions, and made his certificate in accordance with her replies to these questions. Witness was then asked the following question by plaintiff: "Did you ask her any questions or make any investigation from any source to determine whether it was to her advantage or interest to convey the 173½ acres?"

Defendant objected. Objection sustained. Plaintiff excepted. If permitted by the court to answer the question, witness would have testified as follows: "I did not ask Mrs. Utley any questions or make any investigations from any source to determine whether it was to her advantage or interest to convey the land. I do not remember whether I read the certificate. She was very pleasant. I had no reason to believe other than that she signed it of her own free will and accord. I did not know or inquire the circumstances under which she gave Mr. Utley the 173½ acres. I knew he was looking after her estate for her. I lived next door to them. The certificate I signed contained the words, 'I do certify that the same is not unreasonable or injurious to her.' If she had shown any reluctance in signing the deed I would not have probated it. My mind is of the same opinion today as on that morning, that the deeding of the land to Mr. Utley was not unreasonable or injurious to her. The only investigation I made was if she signed of her own free will, without fear or compulsion of her husband or anybody. I also asked her if she had read over the paper and knew what she was signing, and she said she did. I did not know this particular piece of land, and did not know its value."

Plaintiffs also offered in evidence, for the purpose of attack, deed of trust from Bettie D. Utley to A. S. Joyner, trustee, securing payment of her note, payable to R. H. Utley, her husband, for $6,000. This deed

is dated 1 January, 1921. The deed contains a recital that Bettie D. Utley is indebted to R. H. Utley in the sum of $6,000, as evidenced by her bond of even date herewith for $6,000, due and payable 1 January, 1922, and that she desires to secure payment of said bond at maturity. The deed is sufficient in form to convey the land described therein to A. S. Joyner, trustee, for the purpose therein expressed. The lands are described as "being the land formerly known as the George Winston home place, less 173½ acres conveyed to R. H. Utley by deed recorded in Book 229, page 35, leaving about 1,438 acres." There is a recital in the deed that "it is given in renewal of balance due on note secured by deed of trust recorded in Book 224, page 425, which latter deed of trust is to be canceled." It contains the usual covenants and warranties. The execution of the deed of trust was acknowledged by Bettie D. Utley and her husband, R. H. Utley, grantors, before J. W. Daniel, notary public, whose certificate, in due form, is annexed thereto and recorded. The certificate as to the private examination of Mrs. Bettie D. Utley, a married woman, is in full compliance with the statute, and concludes with these words, "and after full examination into the facts of the transaction, I am satisfied the same is in no way unreasonable or injurious to her interest." This deed was recorded on 9 February, 1921, Book 224, page 487, registry of Franklin County.

Plaintiffs offered as witness J. W. Daniel, who testified that he was the notary public who took the acknowledgment by Mr. and Mrs. Utley of their execution of the deed. The acknowledgment was taken either at his office or at her home. Witness was asked the following question by plaintiffs: "I ask you if at the time you took the examination you investigated the trade that was then made?"

Defendant objected. Objection sustained. Plaintiffs excepted. If permitted by the court to answer the question, witness would have testified that he did nothing but ask Mrs. Utley if she freely and voluntarily assented thereto, and did not make any examination whatever into the nature of the transaction, as to the consideration or its value.

By these exceptions and the assignments of error, based thereon, plaintiffs present to this Court for review, upon their appeal, the exclusion of evidence offered by plaintiffs tending to show that the facts relative to the official acts of the notaries public were not as recited in their certificates. They contend that these certificates may be impeached by the testimony of the officers who made them.

It is conceded that neither the deed from Mrs. Utley to her husband, the defendant, nor the deed of trust securing the payment of her note, payable to him, is valid, unless there was a compliance with C. S., 2515. No contract between a husband and wife, made during coverture, shall

be valid to affect or change any part of the real estate of the wife unless such contract is in writing and is duly proved as is required for conveyance of land; "and upon the examination of the wife, separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of femes covert, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be."

It is held in *Butler v. Butler,* 169 N. C., 584, and in cases therein cited, that deeds "are embraced in the term 'contracts' used in sec. 2107 of the Revisal (now C. S., 2515) and that therefore deed from wife to husband, purporting to convey to him her land is void, unless the provisions of C. S., 2515, are complied with. *Whitten v. Peace,* 188 N. C., 298; *Davis v. Bass,* 188 N. C., 200; *Smith v. Beaver,* 183 N. C., 497; *Foster v. Williams,* 182 N. C., 632; *Frisbee v. Cole,* 179 N. C., 469; *Kornegay v. Price,* 178 N. C., 441; *Shermer v. Dobbins,* 176 N. C., 547; *Wallin v. Rice,* 170 N. C., 417. This Court has held, uniformly and consistently that deed of a wife, conveying land to her husband, is void, unless executed and proven in accordance with provisions of C. S., 2515. The statute also applies to conveyance by wife of her land in trust to another for her husband and this is the law although the land is held by husband and wife as tenants by entirety. *Davis v. Bass,* 188 N. C., 200. A paper-writing, however, void for failure of compliance with C. S., 2515, is good as color of title, *Whitten v. Peace, supra.*

Under the provisions of C. S., 2515, in order that a contract between a husband and wife, made during coverture, affecting or changing any part of the real estate of the wife, shall be valid and effective, it is required not only that the contract must be in writing, but also (1) that it must be duly proved as is required for conveyance of land, and (2) that the officer making the private examination of the wife as required by C. S., 997, shall not only certify (as required by C. S., 3324) that she stated upon such examination that she signed the instrument freely and voluntarily, without fear or compulsion of her said husband or any other person, and doth still voluntarily assent thereto, but must also certify that it appeared to his satisfaction (1) "that the wife freely executed the contract and freely consented thereto at the time of her separate examination and (2) that the same is not unreasonable or injurious to her." These facts should be stated in the certificate, as the officer's conclusions from his examination; when so stated, the certifi-

cate is conclusive as to these facts. The certificate may be impeached for fraud only, as other judgments may be.

In *Kearney v. Vann,* 154 N. C., 311, *Justice Allen,* discussing Revisal 2107 (now C. S., 2515) says: "The statute requiring the written consent of the husband when dealing with a stranger was to protect her against an improvident contract, and there was no such relationship between her and the stranger as raised a presumption of undue influence and fraud, while the statute regulating contracts between husband and wife was to protect the wife from the influence and control which the husband is presumed to have over her by reason of the marital relation. *Sims v. Ray,* 96 N. C., 89. The law presumes that contracts between husband and wife affecting her real estate are executed under the influence and coercion of the husband and to rebut this presumption and render the contract valid, an officer of the law must examine the contract and be satisfied that she is doing what is reasonable and not hurtful to her and so certify." The taking of acknowledgment of a deed by an officer authorized by statute to do so (C. S., 3293) is a judicial, or at least a *quasi-judicial* act. See cases cited.

Where the conveyance of the wife's land by her is made to a stranger, the deed must be executed by her with the assent in writing of her husband (Const. of N. C., Art. X, sec. 6) and there must be annexed thereto the certificate of an officer certifying that she stated to him upon her private examination, separate and apart from her husband that she signed the deed freely and voluntarily, as provided in C. S., 997 and 3324; but when the conveyance is made by the wife to the husband, because of the presumption arising from the relationship, the officer must himself be satisfied, not only that she freely executed the deed, but also that she freely consents to the same at the time of her separate examination. In addition to this, the officer must be satisfied that the deed is not unreasonable or injurious to her. These conclusions of the officer must be stated in his certificate, attached or annexed to the deed.

If the certificate of the officer, attached or annexed to the deed of a wife conveying her land to her husband, is defective, in that it fails to show full and substantial compliance with the requirements of C. S., 2515, it cannot be subsequently amended, so as to supply the defect and thus render the deed valid, at least after the death of the wife.

In his learned and exhaustive opinion in *Smith v. Beaver,* 183 N. C., 497, *Justice Walker* says: "Whatever may be the true rule in cases of this kind, concerning the power of the justice to alter his certificate, as to the probate and privy examination of a married woman, who was

a party to it, he cannot do so long after the probate was taken and the certificate had been made and filed, and the deed duly registered."

In *Butler v. Butler,* 169 N. C., 584, *Justice Allen* investigated the authorities, in this and other jurisdictions relative to this subject, and says: "There is much conflict of authority as to the power of a judicial officer to amend his certificate of probate after the instrument he is probating has passed from his hands, but it seems that the weight of authority is against the exercise of the power, and all agree that it is a power fraught with many dangers."

In both these cases, this Court held that the certificate could not be amended, to supply defects appearing in the face of the certificate, although the right to amend in these cases was denied because of facts peculiar to the instant case, and whether the power exists independent of these facts is left as an open question. In his concurring opinion in *Butler v. Butler, supra, Walker, J.,* says: "After careful and deliberate examination of the law, my conclusion is that the justice had no authority to change his certificate." All the decisions of this Court are to the effect that the officer cannot, of his own motion, alter or amend his certificate so as to supply a substantial defect, and thus render a deed which was invalid, valid and effective, without notice to the parties to the deed. Nor will the Court, in the exercise of equitable jurisdiction, require an amendment for that purpose, without notice to the parties and opportunity to be heard.

In the instant case, it is conceded that the certificate attached to both the deed and the deed of trust complies with the provisions of C. S., 2515. Plaintiffs offer to impeach the certificate, by showing that the facts are not as stated therein. This they are forbidden to do, by the express terms of the statute, for it is therein provided that "the certificate shall state the conclusions of the officer, and shall be conclusive of the facts therein stated."

"The general rule in the absence of any statute providing otherwise, is that where a grantor has appeared and made some kind of acknowledgment before an officer having jurisdiction, a certificate regular in form, is conclusive as to all those matters which the officer is required by law to certify, and in the absence of any showing of fraud or imposition in the procurement of the acknowledgment cannot be impeached by merely denying that the acknowledgment was taken in the manner certified by the officer." 1 C. J., 886 and cases cited.

There is no allegation or contention that there was fraud in the procurement of the acknowledgment by Mrs. Utley of the execution by her of either the deed or deed of trust. The certificates of the notaries public are not impeached for fraud, and are therefore conclusive as to

the facts therein stated. If there had been allegation of fraud with respect to the acknowledgment of her execution of the deed or deed of trust by Mrs. Utley, or of the private examination made by the officer in each instance, or of the conduct of the officers with respect to conclusions stated, the testimony of the officers would have been competent, just as the testimony of any other witness. The exclusion of the testimony, however, was not error, because, without allegation of fraud, the certificate is conclusive.

We therefore hold that a certificate of an officer, having jurisdiction to take the acknowledgment of the execution of an instrument in writing by a party thereto, and to make the private examination of a married woman who signed the same, as required by statute, and to make conclusions as to the existence of facts necessary for the validity of the instrument, cannot be altered or amended after the instrument has been delivered, or registered, if registration is required or permitted for any purpose, to supply a defect in said certificate, without notice to the parties to such instrument, nor can the certificate be impeached, except upon allegation and proof of fraud in the taking of the acknowledgment, the making the private examination, or in arriving at the conclusions as stated in his certificate. *Whisnant v. Price,* 175 N. C., 613. If there are allegations of fraud, the testimony of the officer, whose certificate is impeached upon these allegations is competent as evidence.

Where a deed has been registered upon a probate, prima facie correct, and the issue is whether the deed was executed and delivered, the law raises a presumption from the probate and registration that the deed was executed and delivered, but this presumption may be overcome by evidence sufficient to rebut the presumption. *Jones v. Coleman,* 188 N. C., 631; *Belk v. Belk,* 175 N. C., 69. In *Lumber Co. v. Leonard,* 145 N. C., 340, the attack upon the certificate of the officer was made by a party to the deed—the married woman—and it was held that her testimony was competent for that purpose. The fact of privy examination was in issue, and the testimony of the officer, supporting and sustaining his certificate was held to be competent as evidence, the feme defendant having been permitted to testify in opposition to the certificate. *Justice Brown,* in the opinion for the Court, says: "Much may be said in favor of the contention that if a private examination of the wife shall have been certified in the manner prescribed by law, by the purport of section 956 of the Revisal (C. S., 1001) it is not open to attack at all, except upon the ground that its execution was procured by fraud, duress, or other undue influence, to which the grantee must be shown to be a party." The public policy, upon which our registration laws are founded, favors an interpretation and construction of statutes

relative to probates and registration, which will encourage confidence in records affecting titles, rather than suspicion, doubt, or uncertainty.

The assignments of error relied upon by plaintiffs are not sustained.

Plaintiffs also excepted to the exclusion of the testimony of witnesses as to declarations made by Mrs. Utley as to the conduct of defendant toward her with respect to her property. These declarations were all in her own interest, and were not competent as evidence in behalf of plaintiffs who claim under her. The admission of these declarations would be a violation of the "hearsay" rule; they do not come within any of the exceptions to this rule, and they were properly excluded. The testimony of Mr. White as to statements and declarations made to him by Mrs. Utley, while he was conferring with her about the preparation of her will were competent, because against her interest and therefore within a well-recognized exception to the rule; *Roe v. Journegan,* 175 N. C., 261.

Assignments of error based upon other exceptions appearing in the statement of case on appeal have been carefully considered by us. They are not sustained. The issues submitted to the jury arose upon the pleadings and enabled the parties to this action to present to the jury all their contentions with respect to the matters in controversy.

In July, 1920, Mrs. Bettie D. Utley conveyed to defendant, her husband, the Spruill land, containing 173½ acres; her deed, probated by her next-door neighbor, was promptly recorded. In January, 1921, she executed a deed of trust to secure a note for money advanced by her husband to pay off an incumbrance on her lands, and specifically excepted the Spruill land, reciting that she had conveyed same to R. H. Utley by deed, recorded in Book 229 at page 35. On 10 January, 1910, she joined her husband in a deed conveying this identical land "in consideration of love and affection and ten dollars" to Hubert H. Utley, a son of R. H. Utley. In conference with her trusted friend and adviser, relative to her will, she referred to this deed, and made careful provision for the disposition of her lands in order that the note secured in the deed of trust should be paid out of the sale of undevised lands, in exoneration of lands devised to the plaintiffs and incumbered by the deed of trust. During her life she made no charge that her husband had defrauded her or that the officers of the law had been remiss in the performance of their duties. No such charge was made until after her death, and then by these plaintiffs, to whom both she and her first husband had devised valuable lands. The judgment is affirmed. We find

No error.

VOLNEY ELVINGTON v. WACCAMAW SHINGLE COMPANY, JOHN F. McNAIR, J. J. McKAY, ET ALS.

(Filed 1 April, 1925.)

Deeds and Conveyances — Contracts — Timber — Extension Periods— Tender—Payment—Determinable Rights.

Where the right to cut and remove timber growing upon land is given upon consideration for a period of years, with right of grantee to continue thereafter to do so as to the remaining uncut timber by paying interest upon the original purchase price, from year to year, for an additional time, time for the tender or payment of the yearly interest for the continuance of the yearly right is ordinarily of the essence of the contract, and it should be tendered or paid by the grantee before the termination of the first period, or before the beginning of each successive year thereafter, or the grantee will lose his right.

ADAMS, J., not sitting.

APPEAL by plaintiff from *Grady, J.*, refusing a permanent restraining order, heard at September Term, 1924, of BRUNSWICK.

E. H. Smith and Robert W. Davis for plaintiff.
C. Ed. Taylor and John D. Bellamy & Son for defendants.

CLARKSON, J. This was an action to perpetually restrain defendants from cutting timber on a tract of land. The timber rights were purchased by defendants from W. C. Manning, trustee. Manning, trustee, purchased from the plaintiff. The plaintiff alleged that the defendants' contract had expired on 7 May, 1922. The defendants were temporarily restrained until the hearing. The contract was dated 7 May, 1912, and gave the grantee, W. C. Manning, trustee, and his assigns, ten years from said date to cut and remove the timber, and this clause of the extension was inserted in the contract: "And should the said W. C. Manning, trustee, his heirs, successors or assigns fail to cut and remove the said timber herein conveyed during the said term of ten years, then said W. C. Manning, trustee, his heirs, successors or assigns shall have an additional term of five years, or so much thereof as he or they may desire from the date of the expiration of this deed, by paying annually to said V. Elvington, his heirs or assigns, six per cent of the purchase money herein mentioned."

The admitted facts, as found by the court below, are as follows: "And the plaintiff having introduced in evidence the original contract of sale of timber by plaintiff to defendants' vendor, recorded in Book 18, page 54, bearing date of 7 May, 1912; and it being admitted that the defendants made legal tender of the sum of money required in the contract for extension privilege on 10 May, 1922; and that defendants did

not give notice that they would avail themselves of the extension prior to 10 May, 1922; and it further being admitted that there was no cutting of the timber by defendants on said lands between 7 May and 10 May, 1922; and the court being of the opinion, finds that the tender of $126.00 on 10 May, 1922, by defendants was within the proper time, under the contract, to gain an extension privilege, and that the refusal to extend the cutting privilege by plaintiff was wrongful and unlawful."

From the judgment of the court below plaintiff duly excepted and appealed to the Supreme Court.

The contention of plaintiff is: "The correct interpretation of the contract requires that, on or before the expiration of the period of ten years, the grantees claiming the privilege should notify the owner of the property and tender the stipulated amount. The plaintiff, appellant, was bound, if proper notice or tender had been made on or before 7 May, 1922, to extend the time in accordance with the contract, while the defendants, appellees, were not bound to avail themselves of the extension privilege."

The plaintiff relies on *Bateman v. Lumber Co.,* 154 N. C., p. 248, and we think it decisive of this case. The contract in the *Bateman case* is as follows: "That the parties shall have two years in which to cut and remove the timber, and in the event they do not get it off in that time, they shall have one year's time thereafter in which to remove the same, by paying to the party of the first part interest on the purchase money for said extension of time."

Hoke, J., in the *Bateman case,* said: "We have held in many recent decisions that deeds of this character by correct interpretation convey to the grantees an estate in fee in the timber, determinable as to all of the timber not cut and removed within the stipulated period (citing numerous cases). . . . The provision in question, conferring as it does a privilege, and unilateral in its obligation, partakes to some extent of the nature of an option, in which time is ordinarily of the essence, and the accepted doctrine in reference to this and other instruments containing the same and similar language is that they should be strictly construed" (citing numerous cases).

In the *Bateman case* the Court held that, "By correct interpretation requires that on or before the expiration of the special period of two years the grantees claiming the privilege should notify the owner of the property and tender the stipulated amount."

The fact that the payment should be made "annually," as in the present case, does not militate against the rule laid down in the *Bateman case.* It was the duty of the defendants to notify the plaintiff and tender the stipulated amount for one year before the option, or privilege, expired on 7 May, 1922. Having failed to do this, the privilege, or option, was at an end.

Stacy, J. (now *C. J.*), in *Dill v. Reynolds,* 186 N. C., p. 296, said: "The original consideration for that deed gave the grantee and his assigns the right to cut the timber for a term of ten years, and also the right to extend that term from year to year for an additional period of ten years upon the yearly *request* and *payment* of the stipulated annual extension price. *Bangert v. Lumber Co.,* 169 N. C., 628."

The decision in the *Bateman case* was cited in the *Dill case,* and has been cited on this and other aspects some twenty times.

The judgment of the court below is

Reversed.

ADAMS, J., not sitting.

HADDIE McCOLLOUGH RAWLS v. DURHAM REALTY & INSURANCE COMPANY, A CORPORATION.

(Filed 1 April, 1925.)

Wills—Devise — Posthumous Child — Deeds and Conveyances — Title— Statutes.

A devise to the testator's wife "to do with as she thinks best for herself and (our) the children," the word "our" being stricken out by the testator, or "the" either is construed as evidencing the testator's intent to include a child *in ventre sa mere* at the time of the execution of the will, and born within a short time after his death, and the wife can convey a good fee-simple title to the purchaser, C. S., 4169, as to a provision for a posthumous child, and Rule 7, Canon of Descent, C. S., 1654.

APPEAL by defendant from *Calvert, J.,* March Term, 1925, of DURHAM.

J. L. Morehead for plaintiff.

Wm. W. Sledge for defendant.

CLARKSON, J. This was a controversy submitted without action. The plaintiff had contracted to sell, and defendant had agreed to purchase, a certain piece of land in the city of Durham.

The material facts are as follows:

That on 5 March, 1919, Holman Calvin Rawls, at that time a resident of the city of Durham, died, leaving surviving him plaintiff, his wife, and three children born of the marriage, Hannah, Charlotte and Mary, and one unborn.

That upon the death of the said Holman Calvin Rawls there was found among his papers, written in his own handwriting, a will in the following words and figures, which will was duly admitted to probate in the office of the clerk of the Superior Court of Durham County, and is now recorded in Book of Wills 3, page 96, and being as follows:

"Durham, N. C., 22 February, 1919.

"To whom it may concern:

"In the event of my death I leave all my real and personal property to my wife, Haddie McCollough Rawls, to do with as she thinks best for herself and (our) the children.

"(Signed) HOLMAN CALVIN RAWLS."

That thereafter, on 5 May, 1919, there was born to the plaintiff a son, Holman Calvin Rawls, Jr., who is now living with plaintiff at her residence, in the city of Norfolk, Virginia.

The plaintiff, in compliance with her contract with defendant, tendered "to the defendant a deed with full covenants and warranties purporting to convey the entire interest in said land to the defendant in fee simple; that defendant has refused to accept the said deed for the reason that it is advised that plaintiff is not the owner of the entire estate in said land and that the said Holman Calvin Rawls, Jr., the after-born child of plaintiff and Holman Calvin Rawls, is entitled to a one-fifth interest in said land under and by virtue of section 4169 of the Consolidated Statutes of North Carolina, and that plaintiff is without authority to convey the interest of the said Holman Calvin Rawls, Jr."

Plaintiff contends that the will of Holman Calvin Rawls vests in her a fee-simple title to the land in question and that her deed will convey a fee-simple title to the defendant.

The court below rendered the following judgment:

"That the will of Holman Calvin Rawls, executed the 22d day of February, 1919, vests in plaintiff Haddie McCollough Rawls a fee-simple estate to all of the land mentioned and described in the complaint, and all other real or personal property of which said Holman Calvin Rawls died, seized or possessed.

"That defendant is directed upon the delivery of the deed tendered, to pay the purchase price agreed upon."

From the judgment rendered by the court below, defendant excepted, assigned error and appealed to the Supreme Court.

C. S., 4169, is as follows: "Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such

after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in this chapter."

Rule 7, Canon of Descents, C. S., 1654, is as follows: "No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized."

At the time the testator, Rawls, made his will, 22 February, 1919, his wife was *enceinte*—with child. Rawls died 5 March, 1919, and the child was born two months later and named after his father. It is presumed that he knew when he made his will the condition of his wife. If he had died intestate, the posthumous child, under the law of this State, would inherit the same as his other children. The principle of law is: "*Posthumus pro nato habetur.* A posthumous child is considered as though born, (at the parent's death). *Hall v. Hancock,* 15 Pick. (Mass.), 258, 26 Am. Dec., 598." Black's Law Dictionary (2d ed.), p. 920. *Deal v. Sexton,* 144 N. C., p. 158; Mordecai's Law Lectures (2 ed.) pp. 395-396.

The question to be considered in this case: Did Rawls die without making any provision for his unborn son? If he made no provision, as contemplated by the statute, the unborn child is entitled to the portion of his father's estate as if he had died intestate, and the plaintiff cannot carry out her contract. From a careful study of the authorities and the will, we think the testator made "provision" in accordance with the statute. In none of the cases on the construction of this statute does the court make any attempt to say what is an adequate provision.

This Court, in *Meares v. Meares,* 26 N. C., 192, said: "The statute only provides for the case where the parent dies without having made provision for the child; which means, without making any provision. For the act does not mean to judge between the parent and child as to the adequacy of the provision he may choose to make." *King v. Davis,* 91 N. C., p. 147.

In *Thomason v. Julian,* 133 N. C., p. 310, this Court said: "But that 'without making any provision' means any arrangement or circumstances tending to show that the testator had these children in mind when the will was made and without any indication that it was his purpose to disinherit them. That purpose does fully and unmistakably appear in the will."

In the *Thomason case,* the language of the will was "to the exclusion of any children now living or hereafter to be born of my present marriage."

In the case of *Flanner v. Flanner,* 160 N. C., p. 126, Lizzie H. Flanner made a will as follows: "I give, grant and devise to my beloved husband, William B. Flanner, all my property of every kind, real personal and mixed." The will was made 16 May, 1891. On 7 February, 1922, William B. Flanner, Jr., was born of the marriage and thereafter Lizzie H. Flanner died. The Court in that case very properly held that no provision was made for the child, and says: "The courts have generally held that they were not designed to control a parent as to the provision he should make for his child, but the correct interpretation should proceed on the theory that the law was only intended to apply when the omission to provide for an after-born child was from inadvertence or mistake, and this position should be allowed to prevail unless the will in express terms showed that the omission was intentional, or unless, as contemplated by the statute, provision was made for the child, by the parent whether under the will or by gift, or settlement ultra, 'whether before, contemporaneous with, or after the making of the will.'" *Dixon v. Pender,* 188 N. C., p. 794.

In the present case, the testator when he made his will knew his wife was with child. He leaves all his real and personal property to the plaintiff his wife "to do with as she thinks best for herself and (our) the children." He had three children born and one unborn when he used the words "the children." We think the clear intention was to include the child he knew unborn with those born. We think "our," which he struck out, would have included the unborn child. From the language of the will, written by the testator in his own hand-writing, he seemed to be a man of intelligence. He strikes out the word "our" and uses the word "the," intending to make more definite whom he meant—those born and the one unborn. If this was not his intention, with knowledge of his unborn child, he could have inserted some language manifesting a distinction between his children born and the one unborn—*in ventre sa mere.*

In *Barringer v. Cowan,* 55 N. C., p. 438, the language of the will, in part, is as follows: "And that Thomas Cowan and the children of James L. Cowan have one part or share." *Battle, J.,* said: "At the time of the testator's death, James L. Cowan had three children only, but another was born to him within less than nine months afterwards, and having been, therefore, *in ventre sa mere* at that time, he is entitled to take with the others." *Culp v. Lee,* 109 N. C., p. 675; C. S., 1738 and cases cited.

The defendant contends, and well says, "that some specific provision or mention, either by a devise or exclusion must be made by the testator for the statute not to apply." The will uses no language of exclusion. The statute does not fix the provision to be made, that is left to the

parent. Rawls, the parent, mentions "the children," which includes the unborn child. The mother is given all the property "to do with as she thinks best for herself and (our) the children." There is no inadvertence or mistake. The testator had these children in mind, those born and the one unborn, and he makes the most specific provision—one dictated by the highest natural law we have—the love that a mother bears for her offsprings. With this knowledge of her love for her children, he leaves all his property to his wife, and gave her discretion to do with it as she thought best for herself and the children. The specific provision is made, but is delegated to the mother's discretion. The plaintiff, under the will, has a fee-simple title.

In the judgment below, we can find

No error.

THE VIRGINIA TRUST COMPANY ET AL. v. W. H. POWELL, ADMINISTRATOR.

(Filed 1 April, 1925.)

Mortgages—Deeds in Trust—Foreclosure — Sales — Clerks of Court—Statutes—Resales—Parties—Actions.

C. S., 2591, requiring among other things all foreclosure sales of land under the power thereof contained in the mortgage to be kept open for an increase of bid, is for the protection of the mortgagor, requiring the clerk of the court to order a resale upon the offer of increase of the bid upon certain conditions, and where the clerk of the court in an action by the trustee under the deed of trust to compel the bidder at the foreclosure sale to accept a deed to the land, it is established that thereafter a resale had been ordered by the clerk, and the bid at such sale was unenforceable, the mortgagors are necessary parties to the action, and without them it is error for a judgment in plaintiff's favor to be entered.

VARSER, J., not sitting, and taking no part in the decision of this case.

APPEAL by defendant from *Grady, J.*, at December Term, 1924, of COLUMBUS.

Civil action to require the administrator of E. F. Powell, deceased, to accept from plaintiffs a deed and pay for a certain tract of land, sold under the power of sale contained in a deed of trust and at which sale it is alleged the said E. F. Powell became the last and highest bidder. The following judgment was entered in the cause:

"This cause came on for hearing at Whiteville, N. C., during a regular term of the Superior Court, all parties being present and represented by counsel. It was agreed in open court that the presiding judge, Henry A. Grady, might find the facts and enter judgment thereon as he might view the law of the case, said judgment to be signed out of the term and out of the county, with the same effect as if signed and entered at term.

"Evidence was offered by the parties plaintiff and defendant, and upon such evidence and the admissions in the pleadings, and those made during the hearing, the court finds the following facts:

"1. The Virginia Trust Company is a banking corporation, created under the laws of Virginia, with its principal office in the city of Richmond.

"2. E. F. Powell died intestate, on 19 November, 1923, domiciled in Columbus County, and W. H. Powell, prior to the commencement of this action, qualified as administrator upon his estate, and is now acting in that capacity.

"3. On 1 June, 1918, W. D. Wooten and wife, Elizabeth, executed certain promissory notes to the Virginia Trust Company, and on the same day made to the plaintiffs Jerman and Scott, a deed of trust upon lands situate in Columbus County, North Carolina, to secure said notes, which deed of trust is of record in book D-2, page 471 of the register's office of said county.

"4. Default was made in the payment of said notes and the power of sale in said deed of trust became absolute, whereupon said lands were duly advertised and sold at the courthouse door in Whiteville, N. C., on 3 August, 1923, and bid in by one R. L. Brown; no report of said sale was ever made to the C. S. C.

"5. On 13 August, 1923, Elizabeth Wooten, one of the parties to the deed of trust, raised said bid and there was a resale under the orders of the C. S. C. and the lands were bid in by said R. L. Brown.

"6. On 17 September, 1923, E. F. Powell, defendant's intestate, deposited with the C. S. C. a 5% upset bid on said lands, whereupon the C. S. C. made the following entry on his record of sales:

" 'Whereas, E. F. Powell has filed five per cent, $200.00, paid no the purchase money paid for the above described land, and has paid the same to me, now, therefore, it is ordered, considered and adjudged that T. L. Johnson, trustee (note, T. L. Johnson was attorney for trustees, and this entry is a mistake as to the name of the trustee) advertise said land for resale for fifteen days in some newspaper published in Columbus County under provisions of chapter 146, Public Laws 1915, and chapter 124, Public Laws 1919.

" 'This 17th day of September, 1923.

" '(Signed) J. L. Memory, C. S. C.'

"And thereupon the deposit of Elizabeth Wooten was returned to her on 21 September, 1923.

"7. On 8 October, 1923, said lands were resold and bid in by E. F. Powell, defendant's intestate, at the price of $3,901.00, at which time he

paid to Thos. L. Johnson, attorney for the plaintiffs, the sum of $975.00 on the purchase price.

"8. On 18 October, 1923, an upset bid for said lands was made by W. D. Wooten, in the name of his mother-in-law, Mrs. Nora Fletcher, and he deposited with the clerk the sum of $195; whereupon the clerk entered the following order on his record of sales:

" 'Whereas, Nora Fletcher has filed a five per cent, $195.00, bid on the purchase money paid for the above described lands, and has paid the same to me, now, therefore, it is ordered, considered and adjudged, that the Virginia Trust Company, trustee, advertise said lands for resale fifteen days in some newspaper published in Columbus County under provisions of chapter 146, Public Laws 1915, and chapter 124, Public Laws 1919.

" 'This 18th day of October, 1923.

" '(Signed) J. L. MEMORY, C. S. C.'

"On the same date the following entry was made on said record, '$200.00. Received of J. L. Memory, C. S. C. the sum of $200.00.

" '(Signed) E. F. POWELL.'

"No order was made releasing the said E. F. Powell from his bid; but his money was returned to him when the upset bid of Nora Fletcher was filed.

"9. Protest was made by the plaintiffs that the bid of Nora Fletcher was not bona fide; and the court does now find as a fact that said bid was not bona fide, but was made by W. D. Wooten in the name of Nora Fletcher, both of them being insolvent, and for the sole purpose of hindering and delaying said sale, with no intention of really purchasing said lands.

"10. On 19 October, 1923, Nora Fletcher was directed by said clerk to excute a bond, as required by law, and upon her refusal to make said bond, on 29 October, 1923, the clerk made the following entry:

" 'No bond having been given by Mrs. Nora Fletcher, this order is hereby stricken out. This 29th day of October, 1923.

" '(Signed) J. L. MEMORY, C. S. C.'

"This order had reference to the order of resale made by said clerk on 18 October, 1923. And thereupon the said Nora Fletcher withdrew her money and her bid by entry on said record of sales.

"11. That thereupon a deed was duly executed by the plaintiff trustee, conveying said lands to the said E. F. Powell, and said deed was tendered to him on 30 October, 1923, and said E. F. Powell, refused

to accept said deed and pay the balance of the purchase price on the ground that the said trustee could not convey to him a valid title to said lands, because of the upset bid theretofore filed by the said Nora Fletcher.

"12. The court finds as a fact that the plaintiffs did not have any notice of the orders made by the clerk, except that on 18 October, 1923, the clerk sent a postal card to plaintiff's counsel containing the following notice: 'Whiteville, N. C., 18 October, 1923. There has been 5% raise of bid placed in my hands on W. D. Wooten land this date.

"Very truly,

" 'J. L. MEMORY, C. S. C.'

"13. That E. F. Powell died on 19 November, 1923, suddenly, and afterwards said deed was again tendered to his administrator and the balance of the purchase money demanded of him; but he also refused to accept said deed, for the same reasons made by his intestate, and now contends that he is not required to accept the same because the heirs at law of E. F. Powell are not parties to this action and that the court cannot proceed to judgment for that reason.

"Upon the foregoing facts, and those admitted in the answer, the court is of the opinion that the defendant's intestate became the purchaser of said lands, and is bound by his bid; and it is therefore considered, ordered and adjudged that the plaintiff, Virginia Trust Company, have and recover of the defendant the sum of $2,926.00 with interest thereon at six per cent per annum from 18 October, 1923, and the costs of this action to be taxed by the clerk."

Defendant excepts and appeals.

Johnson, Johnson & McLeod for plaintiffs.
Powell & Lewis for defendant.

STACY, C. J. The facts are to be found in the judgment of the Superior Court, which will be reported herewith.

Let it be observed *in limine* that W. D. Wooten and wife, Elizabeth Wooten, makers of the deed of trust, and whose equity of redemption in the *locus in quo* is sought to be extinguished and cut off by the judgment rendered herein, are not parties to this proceeding. The judgment, therefore, would not be binding on them. *Jones v. Williams,* 155 N. C., 179.

The purpose and intent of C. S., 2591 is very well interpreted and declared by *Clark, C. J.,* in *Pringle v. Loan Asso.,* 182 N. C., 316, as follows:

"Chapter 146, Laws 1915, and amendments, now C. S., 2591, was intended for the protection of mortgagors where sales are made under

a power of sale without a decree of foreclosure by the court. In the latter cases there was always an equity to decree a resale when a substantial raise in the bid, usually 10 per cent, had been deposited in court. There being no such protection as to mortgages with power of sale, this statute was passed to extend to mortgagors, whose property had been sold under power of sale without a decree of foreclosure, the same opportunity of a resale when there has been an increased bid of 10 per cent when the bid at the first sale did not exceed $500, and of 5 per cent when the bid of the first sale was more than $500.

"This statute has been construed at this term, *In re Sermons, ante,* 122, not to require a report to the clerk of every sale made under a mortgage with power of sale, but that in all such cases if the prescribed amounts of the raise in bid is guaranteed, or paid, to the clerk he shall require the mortgagee or trustee to advertise and resell on 15 days notice. In short, the condition of a mortgagor in a mortgage with a power of sale is assimilated to the condition of property sold under a decree of foreclosure so far as the right to set aside the bid at the first sale and to require a resale."

And in the case of *In re Sermon's Land,* 182 N. C., p. 128, it was said: "The statute, sec. 2591, as we have seen, in express terms provides that any and all sales of this character shall remain 'unclosed for ten days,' but it confers no power on the clerk to make any orders in the matter except in case of an increase of bid, nor is any report required to be made in any other instance. That and that alone is the basis for his interference in sales of this kind. It might be well in the case presented if the law should give the clerk jurisdiction to make the order that justice and right would require, but thus far the statute has not done so, and we are not at liberty to go beyond the statutory provision."

See, also, the case of *In re Ware,* 187 N. C., 693, where the statute was again considered.

It will be observed that the upset bid of Mrs. Nora Fletcher was filed on 18 October, 1923, the last day open for making the same. It was accepted by the clerk, and a resale ordered. This, under the statute, insured another sale of the property. To strike out the order, 11 days thereafter, and declare the E. F. Powell bid final and binding, would be to deprive the mortgagors of any further rights under the statute. The title offered is not sufficient, under the facts of the present record, to extinguish the equity of redemption of W. D. Wooten and wife.

Error.

VARSER, J., not sitting and taking no part in the decision of the case.

I. C. SCOTT AND N. M. SCOTT, TRADING AS SCOTT BROTHERS v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 1 April, 1925.)

1. Commerce — Interstate Commission — Federal Statutes — Damages—Total Loss—Bills of Lading—Conditions—Contracts—Express Companies—Carriers.

In an action brought against an express company for loss of an interstate shipment: *Held*, a total loss in transit of the consignment comes within the exception of the Federal Statute (Cummins Amendment, 4 March, 1915) "damaged in transit by carelessness or negligence," rendering it unnecessary, as a condition precedent to recovery, to file written notice within four months after a reasonable time for delivery has elapsed.

2. Same—Torts.

An action against an express company to recover damages for the total loss of an interstate consignment of goods lost in transit is covered by the stipulation as to the partial loss in the bill of lading, sounds in tort, and is cognizable in the jurisdiction of the Superior Court, when exceeding in amount that given, in cases of tort, to a justice of the peace.

3. Same—Federal Courts—Precedents—Conflict of Decisions of Lesser Courts.

Where a federal question is presented in an action in the State courts, within their jurisdiction, the federal law governs, but where the Supreme Court of the United States has not decided the particular question and the Federal courts of lesser jurisdiction are in conflict with each other, the State court will decide in accordance with its own opinion.

APPEAL by defendant from *Daniels, J.*, at December Term, 1924, of DUPLIN.

Civil action to recover damages for an alleged negligent loss in transit of a shipment of shoes. The following judgment was rendered in the cause:

"This cause coming on to be heard before his Honor, F. A. Daniels, at the December Term, 1924, and the parties having waived trial by jury and agreed for the court to find the facts and enter judgment accordingly, from the admissions of the parties and of the pleadings, and from the presumption of negligence arising from the admitted failure of defendant to deliver to plaintiffs the shoes mentioned in the complaint, the court makes the following findings of fact:

"(a) The action is to recover the value of 12 pairs of shoes, the complaint alleging that defendant carelessly and negligently failed to transport and deliver the shoes to plaintiffs, and carelessly and negligently lost said shoes in transit, to plaintiffs' damage in the sum of $57.00.

"(b) The defendant admits, and the court finds same as a fact, that the shoes were received and accepted by defendant on 29 September, 1920, at its office in the city of Milwaukee, Wisconsin, for transportation to plaintiffs, at Rose Hill, North Carolina; that an express receipt for the shoes was then issued by defendant to plaintiffs' vendor; that the shoes have never been delivered to plaintiffs, and that the value of the shoes was $57.00. But defendant denies negligence, and as a bar to plaintiffs' right to recover, sets up and pleads section seven of the express receipt issued to plaintiffs' vendor. That said four cases of shoes moved under a contract for shipment known as the Uniform Express Receipt, as prescribed by the Interstate Commerce Commission. Section seven of which contained the following language:

" '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 a condition precedent to recovery, claim must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.'

"(c) Suit was instituted within two-year period mentioned in the express receipt, but the claim was not filed or made in writing within the four-months period mentioned in said express receipt, nor within four months after a reasonable time for delivery had elapsed.

"(d) The court further finds that the failure of defendant to make delivery of the shoes was negligent, and that plaintiffs were thereby damaged and sustained a loss in the sum of $57.00.

Upon the foregoing findings of fact, the court is of the opinion, and so holds, that plaintiffs' claim for the loss and nondelivery of the shoes is within the exception to the requirement for filing within four months mentioned in the express receipt; that the claim is not thereby barred, and that plaintiffs are entitled to recover of defendant the sum of $57.00, with interest thereon from 9 October, 1920."

Defendant excepts and appeals.

Oscar B. Turner for plaintiffs.

Robert C. Alston, Rivers D. Johnson and Blair Foster for defendant.

STACY, C. J. The facts are to be found in the judgment of the Superior Court, which will be reported herewith.

The case presents but a single question for decision. It is this: Are the words, "damaged in transit by carelessness or negligence," as used in the "Cummins Amendment" of 4 March, 1915, and in the contract of shipment, approved by the Interstate Commerce Commission and known as the uniform express receipt, broad enough to include, and were they intended to include, a total loss in transit occasioned by the carrier's carelessness or negligence? Or, stated differently, does a negligent loss in transit come within the exception "damaged in transit by carelessness or negligence," rendering it unnecessary, as a condition precedent to recovery, to file written notice of claim with the originating or delivering carrier within four months after a reasonable time for delivery has elapsed? We think the question must be answered in the affirmative.

It is the position of the plaintiff, and such was adopted by the court below, that these words are sufficiently comprehensive to include, and were intended to include, a total loss in transit occasioned by carelessness or negligence as well as a partial loss by damage in transit from carelessness or negligence. The defendant takes a contrary view. It says the exception applies, not to loss in transit, but to damage in transit; that loss and damage are not synonymous, and cites the following authorities as supporting, either directly or in tendency, its position: *St. Sing v. Express Co.*, 183 N. C., 405, 111 S. E., 710; *Kahn v. Express Co.*, 88 W. Va., 17, 106 S. E., 126; *Allen v. Davis,* 118 S. E. (S. C.), 614; *Lissberger v. Bush Terminal Co.*, 197 N. Y. Supp., 281; *Henningsen Produce Co. v. Express Co.*, 152 Minn., 209, 188 N. W., 272; *Farmers & Mer. Bk. of Samson v. Express Co.*, *Ala.*, , only recently decided and not yet reported.

It is conceded that the plaintiffs' position and the judgment entered below are sanctioned by the following authorities: *Holmes & Dawson v. R. R.*, 186 N. C., 58, 118 S. E., 887; *Davis v. Lbr. Co.*, 122 S. E. (Va.), 113; *Gillette Safety Razor Co. v. Davis,* 278 Fed., 864.

Defendant contends that our decision in the *Holmes & Dawson case* is in direct conflict with the decision in the *St. Sing case,* but an examination of the two cases will disclose that the former was an action in tort based on an allegation of damage in transit by reason of the defendant's negligence, while the latter was an action for damages "suffered by breach of defendant's contract of carriage." There was no contention in the latter case that the loss or damage was occasioned by the carelessness or negligence of the defendant. The one was brought directly under the exception in question, the other without regard to it. The two cases, therefore, instead of being in conflict, are entirely consistent and quite easily distinguishable. See *Hailey v. Oregon, etc. R.*

Co., 253 Fed., 569, for satisfactory reasons pointing out the difference between proceeding in a tort action and one based on contract under the statute now in question and *Barrett v. Van Pelt*, 69 L. Ed., decided 13 April, 1925.

The case at bar is one sounding in tort. If it were not, a justice's court alone would have had original jurisdiction of the action as the amount involved is only $57.00. *Machine Co. v. Burger*, 181 N. C., 241. Suit was commenced by summons issued out of the Superior Court. The finding of negligence on the part of the carrier sustains the jurisdiction and brings the case within the exception, "damaged in transit by carelessness or negligence."

The pertinent provisions of the "Cummins Amendment," approved 4 March, 1915, are as follows: *"Provided further,* that it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

In the provisions of the act preceding the provisos (set out in full in *Mann v. Transportation Co.*, 176 N. C., 107) the carrier, on receiving property for an interstate shipment, is required to issue a receipt or bill of lading therefor and is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier to which such property may be delivered," etc.

This being an interstate shipment, the rights and liabilities of the parties are to be determined by the federal law. *Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S., 190; *Adams Ex. Co. v. Croninger*, 226 U. S., 491. There has been no authoritative decision by the Supreme Court of the United States covering the exact point here presented. The decisions of courts of lesser jurisdiction, as above indicated, are not in harmony. In this state of the law, we must adopt that interpretation which, to us, seems more in keeping with the true intent and purpose of the law-making body and the parties to the contract of carriage. We think the judgment of the Superior Court should be upheld. *Mann v. Transportation Co., supra.*

It is suggested that there may be a valid reason for requiring notice of claim to be filed in case of total loss which does not exist in case of damage in transit by carelessness or negligence, in that the carrier has notice of the damaged condition of the goods while in its possession and at the time of delivery and might not have such notice of a total

loss of a shipment in transit. This argument would seem to be without special merit, because it is a matter of common knowledge that all carriers, issuing bills of lading and express receipts, keep records of shipments made over their lines; and, from such records, information of nondelivery is just as easily had as notice of negligent injury or damage in transit. There can be no difference in principle, as regards the duty to exercise diligence, between the loss in transit of a part or all of a shipment of goods, and damage in transit by some negligent act of the carrier, resulting in the partial or total loss of said shipment.

In the judgment rendered, we find

No error.

CLAUDE GRAHAM, BY HIS NEXT FRIEND, W. H. GRAHAM, v. THE SANDHILL POWER COMPANY.

(Filed 8 April, 1925.)

1. Evidence—Nonexpert Witnesses—Collective Facts—Electricity.

Where there is evidence tending to show that defendant electric power company was negligent in the construction of transmission lines, uninsulated, near the top of a sawdust pile, where children were accustomed to play, and that the plaintiff was injured thereby, a boy of 15 years of age, it is competent for an expert in such matters to testify, from his own observation of the plaintiff, that he was only of the mentality of a boy 8 or 10 years of age, relative as to whether he should have been aware of the dangerous circumstances under which he had voluntarily acted at play, and which produced the injury, and that such low mentality was hereditary in his family. *Semble*, a nonexpert witness may likewise testify from his own observation as to the boy's mentality.

2. Evidence—Appeal and Error—Harmless Error.

Where there is evidence tending to show that the plaintiff, 15 years of age, and immature for his age, was injured by the negligence of the defendant electrical power company in stringing its uninsulated high-power lines near the top of a sawdust pile, where boys were accustomed to play, the admission of testimony of the plaintiff's father, after he had said the plaintiff had previously told him he was at play on the sawdust pile, but that afterwards the plaintiff told him he could not remember this circumstance, is not reversible error, when the trial judge instructed the jury they must disregard the plaintiff's own testimony as to his playing on the sawdust pile when he had received the shock causing the injury complained of.

3. Evidence — Electricity — Burns—Opinion Evidence—Nonexpert Witnesses.

In an action to recover for the negligent injury caused the plaintiff from the power line of an electric company carrying a high voltage of electricity, it is competent for a witness to testify, from his own observa-

tion, that the injuries he had observed on the plaintiff, after the accident, had been caused by burns from highly electrically charged wires, though he may not have proved that in this respect he could give an expert opinion.

4. Electricity — Negligence — Contributory Negligence—Evidence—Nonsuit.

In an action to recover damages of the defendant electrical company, caused by its negligent stringing of its highly charged wires, there was evidence in plaintiff's behalf tending to show the plaintiff was a lad 15 years of age, of the mentality of a boy 8 or 10 years old, and came in contact with the defendant's uninsulated wires, strung some three months before, a few feet above the top of a sawdust pile, where the boys of a rural district were in the custom of playing, and of which the defendant had either actual or constructive notice: *Held*, companies of this character are held to the highest degree of care not to cause injury to others, and the evidence was sufficient to take the case to the jury upon the issue of defendant's actionable negligence and plaintiff's contributory negligence, and to deny the defendant's motion as of nonsuit.

APPEAL by defendant from *Calvert, J.*, and a jury, November Term, 1924, of HOKE.

Claude Graham, a minor, by his next friend, his father, W. H. Graham, brings this action against the defendant for personal injuries sustained by the alleged negligence of the defendant. The defendant owns an electric plant at Lakeview, in Moore County, and owned and operated an electric transmission line extending from its plant across a portion of Hoke County to the State Sanatorium. The electric current was transmitted on uninsulated wires and carried 11,000 voltage. The line was 7 miles long, and constructed about 1 February, 1923. The wires were put on poles about 132 feet apart, three wires, and the current turned on about 15 February, 1923. The plaintiff was injured 23 April, 1923, in less than three months. In the construction of the line, the low wire was 19 feet from the ground. The two lower wires transmitting the current are about 18 inches apart, and a third wire about 18 inches almost above the center of the two lower wires. The wires were strung on brackets on the poles.

The allegations of the plaintiff are that the electric current transmitted over the line was of high, dangerous and deadly voltage, capable of producing death or great bodily harm; that on or near the Gillis land there had been a sawmill and a large quantity of sawdust had been piled up, 15 or 20 feet high; that the defendant well knew, or by the exercise of reasonable care ought to have known, that plaintiff, Claude Graham, and other children in the community were accustomed to use the sawdust pile as a place to play; that defendant, with gross carelessness and negligence, erected its transmission line within 2 or 3 feet above the top of the sawdust pile, within close proximity

to any children who might play on the sawdust pile; that the transmission line was uninsulated and defendant transmitted thereon a high and dangerous voltage of electric current; that defendant negligently and carelessly used and operated the wires and line on 23 April, 1923; that the said Claude Graham, the plaintiff, about 15 years old, was an illiterate and ignorant negro boy, not informed of the deadly peril of the electricity transmitted over the wires; that while playing with other boys on the sawdust pile, on said date above mentioned, without any fault on his part, he came in contact with the said wires, carrying a high and dangerous voltage of electric current, and was seriously and permanently injured. "The plaintiff's feet were buried in the damp sawdust, and the electric current, being transmitted by the defendant over the said wires, was grounded through the body of the said plaintiff; that the said plaintiff hanged on the said wires by his neck for some time, until the wires had burned their way to the bone of his neck and head, and until one of his shoes was burned off and his right leg and foot so badly burned that it was necessary for the same to be amputated just below the knee; that the carelessness and negligence of the defendant in constructing and operating the said transmission line and uninsulated and unprotected wires, as aforesaid, was the sole, proximate cause of the injury and suffering of the said Claude Graham."

The defendant admitted that it was "engaged in the business of generating, transmitting and selling electric current, and was so engaged on 23 April, 1923. It is further admitted that said defendant company transmits its electric current by means of the usual mode of transmission used by such companies for such business." It also admitted that "on 23 April, 1923, the said defendant was engaged in transmitting electric current over its transmission line extending across a portion of Hoke County, said current being transmitted from its plant towards Sanatorium, N. C." All other allegations of the complaint were denied. As a further defense the defendant alleges "that the electric line referred to in the complaint, erected to Sanatorium from defendant's power plant, was erected by the defendant over the lands embraced in Camp Bragg territory, under and by virtue of a lease by the Government of the United States to the defendant, said line being erected in the usual manner that all such lines are erected and operated by electric companies, with all precautions taken for the protection of conditions that might arise in connection therewith; that if the plaintiff, Claude Graham, was injured by reason of coming in contact with said wires, it was on account of his own negligence and carelessness, and not on account of any act of this defendant; and that if the plaintiff, Claude Graham, was injured by the electric line of this defendant, he was a trespasser

upon the property of the defendant and was at the time at a place he had no right to be, and his injury, if any, was caused by his own negligent and careless act in trespassing on defendant's property and on property of Fort Bragg, and in that said plaintiff carelessly, negligently and purposely brought his body in contact with the wires of the defendant, which had been properly constructed and erected and maintained, as hereinbefore alleged, which wrongful and unlawful trespass of the plaintiff, and his careless and negligent act in putting his body in contact with the wires and property of the defendant, contributed to and was the proximate cause of his injury."

In the case on appeal it was agreed that the complaint was so amended as to show Claude Graham was below normal, mentally, and defendant's counsel announced in open court, when objecting to the testimony of Dr. Brown and others as to plaintiff's mental condition, that the objections were not based on any failure of plaintiff to allege a subnormal mental condition in his complaint, since it had agreed at the prior August term that this allegation need not be put into the complaint.

The usual issues of negligence, contributory negligence, and damages were submitted to the jury, and found in favor of plaintiff. The damages awarded plaintiff were $1,500.00.

From the judgment rendered, defendant appealed and assigned error. There are sixty-eight exceptions and assignments of error in the record. The material ones and other necessary facts we will consider in the opinion.

W. H. Weatherspoon and J. W. Currie for plaintiff.
Smith & McQueen and H. F. Seawell for defendant.

CLARKSON, J. This cause was tried, upon the part of the plaintiff, upon the theory that plaintiff was hurt while playing, as a child, with other children, on top of a sawdust pile, on Sunday, 23 April, 1923. The defendant constructed its transmission line 2 or 3 feet from the top of the sawdust pile, where it knew, or by the exercise of reasonable care and prudence ought to have known, that children were in the habit and accustomed to play. Plaintiff, while playing, came in contact with the "live wire" of defendant near the pile and was seriously injured.

There were numerous families living in the neighborhood, and plaintiff and other boys were accustomed to go there and play on the sawdust pile. The sawdust pile was a few yards from a neighborhood road. The wires were close to and in easy reach of the children playing on the sawdust pile, which was 15 or 20 feet high.

The theory of defendant was that the plaintiff, after being warned by his companions not to do so, deliberately undertook to test out the effects of the wires, and purposely jumped from the top of the sawdust pile to the wires, catching and coming in contact with at least two or three of the wires, causing a short-circuit through his hand and neck until, when the weight of his body had sagged the wires sufficiently, his right foot touched the sawdust pile, causing the electric current to pass through his right side into the ground, burning his foot at the point of exit. That the wires were set out of reach, some 10 or 12 feet from any point on the sawdust pile, and plaintiff, to come in contact, had to jump to catch the wires. That defendant did not know that children played around the sawdust pile, and had no reason to suppose they played there. That the nearest house was about one-quarter of a mile away, and the plaintiff and other boys lived as much as three-quarters of a mile away.

The evidence was in conflict as to where the sawdust pile was located, whether on the Duncan Gillis land or Fort Bragg territory. There is no evidence in the case that plaintiff trespassed on any land of defendant, nor was there any evidence in the case that the sawdust pile was on defendant's land or right of way. From the facts in this case, we do not think this material.

Defendant's first group of exceptions and assignments of error is to the testimony of Dr. G. W. Brown, a medical expert. This testimony was to the effect that plaintiff was mentally below normal; that he had inherited insanity. The plaintiff was 15 years old when he was injured. The medical expert went so far as to say that plaintiff "hasn't the mind of a boy over 8 or 10 years old." We think this evidence material and competent, and the fact that he had inherited insanity also competent as corroborative of the main fact that plaintiff was mentally below normal.

In *S. v. Cunningham*, 72 N. C., 474, "The prisoner, in his defense, relied upon the plea of insanity, and to establish it gave in evidence that some of his uncles and aunts were insane, but the case states that 'there was no testimony whatever that the prisoner had exhibited signs of insanity,' and the testimony, which is made a part of the case, fully bears out the statement just quoted. When a foundation is laid by *some* evidence tending to show insanity in the prisoner, it is held admissible in corroboration, and as an additional link in the chain of circumstances to give in evidence, a hereditary taint in the blood, of a like malady." We think the foundation was laid, the *"plaintiff was mentally below normal,"* for the corroboration of hereditary taint.

It is well settled law that "The inference of a medical practitioner is frequently and favorably invoked with regard to questions relating to

mental condition." The Modern Law of Ev. (Chamberlayne), Vol. 3, part sec. 2006. 11 R. C. L., p. 603, sec. 29.

The mental condition may be shown by persons who are not experts, but who have had opportunities for observing and have observed the person.

In *White v. Hines,* 182 N. C., p. 279, this Court said: "The defendants contended that testimony to the effect that he 'was crazy,' or 'not normal,' was the statement of a positive conclusion or fact, and, for this reason, incompetent. But in this jurisdiction it is established that a nonexpert witness, who has had conversations and dealings with another, and a reasonable opportunity, based thereon, of forming an opinion as to the mental condition of such person, is not disqualified on the ground that his testimony is a mere expression of opinion. *McLeary v. Norment,* 84 N. C., 235; *In re Stocks,* 175 N. C., 224; *In re Broach,* 172 N. C., 522. One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane. *Whitaker v. Hamilton,* 126 N. C., 470; *Clary v. Clary,* 24 N. C., 78."

The next group of exceptions and assignments of error by defendant is to the fact that plaintiff, at the trial, testified that he was hurt playing on the sawdust pile, when in fact he said, the day he was hurt, "The last I can remember is when I was there at Uncle Jack Watson's." This was before he was hurt. This testimony was stricken out by the court below and the jury instructed not to consider it. Defendant, in its brief, says: "Later, William H. Graham, father of the plaintiff, was questioned by plaintiff's counsel, and testified that 'I asked him (plaintiff), and he said he was just playing on the sawdust pile, but how it happened he didn't know.' "

Defendant contends that this evidence was very material to plaintiff and prejudicial to defendant. It sustains plaintiff's theory of the injury and contradicted the defendant's.

On this group of exceptions the full testimony necessary to be considered of the father is as follows:

"Q. Had Claude returned home on Sundays at other times and told you that he and the boys had been playing on this sawdust pile? Answer: 'Yes, sir.'

"Q. What did he tell you? Answer: 'He told me they had been playing down there in the sawdust pile.'

"Q. Now, Graham, have you tried to find out from Claude as to how this matter happened? Answer: 'Yes, sir.'

"Q. What did he tell you? Answer: 'He said he couldn't remember. I asked him, and he said he was just playing on the sawdust pile, but how it happened he didn't know.'

"Q. Did he say anything else about going there—anything in connection with it? Answer: 'No, sir; he said he didn't remember going there. It seemed that that day he can't remember nothing. But he remembered going there at different times before, but it seemed like from the shock he couldn't remember.' "

From the entire testimony we cannot hold it prejudicial. The fact that at other times on Sundays plaintiff and the boys played on the sawdust pile was some evidence going to fix defendant with notice that the pile was a play-place. The father, although saying that plaintiff said "he was just playing on the sawdust pile," follows this with the positive statement, "No, sir; he said he didn't remember going there," etc.

The next group of exceptions and assignments of error of defendant: Dr. G. W. Brown, introduced by plaintiff, was admitted by the defendant to be a medical expert. This witness was permitted, over defendant's objection, to testify as follows:

"Q. From the examination made by you of the boy, Claude Graham, and the condition you found him in, have you an opinion satisfactory to yourself as to whether or not he caught hold of a live wire with either one or both of his hands? Answer: 'I have an opinion; I don't think he grabbed the wire; I think that hand just barely touched the wire—his right hand."

Dr. Brown attended the boy, examined and treated him, and gave in detail his injuries. He gave it as his opinion that the condition came from burns; saw a print of wire across his neck—and that he was burned by a live wire.

The court asked Dr. Brown if he had any opportunity for observation of matters of this kind—burns by electricity. He answered, "Very little—not very much." He was asked by the court if he had opportunity to observe conditions before; he answered, "I have seen a few cases." The court then asked witness, "And you have an opinion satisfactory to yourself sufficient to answer the last question?" Answer: "Yes, sir."

Then the question and answer, which defendant particularly objected to, above set forth, was asked and answered. We can see no error under the facts and circumstances of this case to the questions and answers.

"A large class of cases embracing statements as to the probability or the possibility of an event, the capacity or tendency of an act or a machine, *the cause or the effect of a fact* (italics ours), may fairly be grouped together, because the reason why the opinion rule is urged against them is in general that the thing to which the witness testifies is not anything which he has observed, but is a quantity which lies in

estimate only and is the result of a balancing of concrete data. This is no sufficient reason for excluding such statements, because it must almost always be impossible for a witness to reproduce in words absolutely all the detailed data which enter into his estimate, and there can be no danger in receiving such an estimate from a competent witness." 4 Wigmore on Evidence (2 ed.), sec. 1976.

In *S. v. Clark,* 34 N. C., p. 151, it was held competent for a physician to give his opinion how a wound had been made. "Whether the skin of the throat under the chin of the deceased was cut by a sharp instrument or torn." The physician had not seen the body, but heard the evidence on the trial.

In *S. v. Wilcox,* 132 N. C., 1120, it was held competent for a physician to state the cause of a wound. *S. v. Morgan,* 95 N. C., p. 641. In the above cases the witnesses were experts.

In *S. v. Skeen,* 182 N. C., 844, it was held competent for a nonexpert witness to testify as to his opinion, "His clothes were damp—shoes muddy—looked like; didn't look like they had been unlaced for several days."

The real controversy in the case is on the motion of defendant as of nonsuit at the close of all the evidence. It is well settled in this jurisdiction that on this motion the evidence must be considered in the light most favorable to plaintiff.

There was evidence sufficient to be submitted to the jury that the defendant knew, or by the exercise of reasonable care ought to have known, that children in the community were accustomed to use the sawdust pile as a place to play, and there were numerous families in the community. It is admitted on all the evidence that defendant had a uniform height—19 feet from the ground—to string on the poles the wires carrying 11,000 voltage of electric current, and had fixed this as a safe height to carry so dangerous and deadly voltage. Defendant could have constructed its line easily with a small cost some distance from the sawdust pile, but, according to plaintiff's evidence, it was constructed within 2 or 3 feet above the top of the pile—in easy access to children playing on the pile. It was not disputed that these wires, so near the sawdust pile, were not insulated, but "naked and live wires," carrying 11,000 voltage. As to how the injury occurred, the jury accepted the plaintiff's theory.

The learned and accurate judge in the court below who tried this case charged the jury: "Now, gentlemen, one who maintains dangerous instrumentalities or appliances as could or would likely attract children in play, or permits dangerous conditions to exist, with a knowledge that children are in the habit of resorting there for amusement, or by the

exercise of reasonable care and prudence ought to know that children are so in the habit of going there to play, is liable to a child who is injured—that is, as to a child of tender years who from infirmity is incapable of exercising a proper care or degree of care for its own protection. The degree of care must be commensurate with the dangerous nature of the article, and greater or less as would be reasonably expected of young children. A boy of the age of 14 years is presumed to have sufficient capacity to be able to sense danger and to have power to avoid it, and this presumption will stand unless rebutted by proof of such lack of intelligence as is usual of a boy of similar age. The law imposes upon minors the duty of giving such attention to their surroundings and acts to avoid dangers as may reasonably be expected of persons of their age and capacity. Children, as well as adults, must use such discretion as persons of their age and discretion ordinarily have, and one who is apparently capable of sensing peril or danger cannot be permitted with impunity to indulge in conduct which he knows or ought to know to be reckless." The court below gave a full and accurate charge on the issues submitted, applied the law to the facts, and gave fairly the contentions of the parties. No exception was taken to the charge.

Is defendant liable to plaintiff on the facts and circumstances of this case? We think it is, and that the nonsuit was properly refused. The weight of authorities in this and other States sustain this view.

In *Haynes v. Gas Co.*, 114 N. C., p. 203, *Burwell, J.*, it was held that John W. Haynes, about 10 years of age, who was "a very healthy, intelligent, moral and industrious boy, well educated for his age," who was killed by taking hold of a "live wire," on or near the sidewalk over which he was passing in the city of Raleigh—the principle of *res ipsa loquitur* applied. "A complete prima facie case of negligence was made out," . . . and "we are clearly of the opinion that there was no evidence of contributory negligence."

In *Harrington v. Wadesboro*, 153 N. C., p. 437, *Hoke, J.* (defendant was held liable), the facts were: "That on 4 July, 1908, the Bratton Amusement Company was conducting a moving-picture show under a tent erected on an open and vacant lot in the town, being an exposed and public place, and the defendant, under a contract with the company, had installed the wires and was supplying the electricity for carrying on the enterprise. That the wire conducting the electricity to the tent passed over a path in which numbers of persons were accustomed to move, and had been negligently placed or allowed to sag so that persons going along the path could easily reach it, some of the witnesses saying it was so low that one would have to bend his body to pass under it, and just at this point the wire was uninsulated for a space of a foot or more. That the intestate, an inexperienced boy of 17 years of age, living with

his mother and doing work on the farm, in passing along the path, caught hold of the wire and received a shock that killed him."

In *Ferrell v. Cotton Mills,* 157 N. C., p. 528, *Walker, J.* (defendant was held liable), in the opinion, citing numerous authorities, held in general: "The defendant permitted a guy-wire of its electric pole to become loose from its fastening in the ground and to hang down its pole at an exposed and uninclosed place within a few inches from a naked and uninsulated wire charged with a deadly or high voltage of electricity. This hanging guy-wire was attractive to the boys, who would swing on it from the pole and back again, and who would congregate there for the purpose. About eight months after the guy-wire became loose, the plaintiff's intestate, his 6-year-old son, while swinging, as indicated, was instantly killed by electricity passing suddenly through the guy-wire from contact with a highly charged wire carrying the current: *Held,* the defendant knew or should have known of the dangerous condition existing, and that children would be attracted to and were accustomed to play with the loose guy-wire, and the technical defense that the plaintiff's intestate was a trespasser would be unavailing."

In *Benton v. Public Service Corp.,* 165 N. C., p. 355, *Brown, J.* (the defendant was held liable), the facts were: "The evidence tends to prove that the plaintiff's son, 12 years old, and not well grown for his age, was killed, on 22 June, 1909, by coming in contact with an uninsulated high-power wire of the defendant, carrying some 2,300 volts of electricity. The boy was attending a Sunday-school party on Eugene Street, one of the main thoroughfares of the city of Greensboro, with some other boys, and when they got through with the entertainment in the house, went out on the street and were standing around on the sidewalk, under and near to the tree in which the intestate of the plaintiff was killed. Two other boys besides the intestate of the plaintiff climbed up the tree, and three or four more were standing around the tree on the sidewalk. The intestate of the plaintiff came in contact with the wires in the tree, one of them burning his hand and the other his left leg as if a hot iron had been run across the flesh. The other boys in the tree were not injured. The wires were exposed 1½ to 2 feet in the trees and were about 20 feet above the ground. The insulation was rubbed off by the limbs coming in contact with the wires and rubbing against them. The tree was between 30 and 40 feet in height; and the limbs came within 7 feet of the ground, making it an easy tree to climb. The evidence also tended to prove that Eugene Street is a thickly settled and populous street, and that the defendant's wires along this street were in very bad condition as to insulation, especially where they passed through the trees, and that at night especially the wires in this and other trees near by could be seen 'sparking.'" The defendant's

attention was called to the condition of its wires before the injury, and they were not repaired. See, also, *Ragan v. Traction Co.*, 170 N. C., p. 92.

In *Love v. Va. Power Co.*, 86 W. Va., p. 393: it is held: "A company maintaining an electric line, over which a current of high and dangerous voltage passes, in a place to which it knows or should anticipate others lawfully may resort for any reason, such as business, pleasure, or curiosity, and in such manner as exposes them to danger of contact with it by accident or inadvertence, is bound to take precaution for their safety by insulation of the wire or other adequate means. A declaration alleging that defendant, for a period of two years or more, permitted its uninsulated high-power transmission cables, carrying a current of dangerous voltage, to remain within 4 feet of the top of a pile of slate, slag or other refuse from a near-by coal mine, lawfully placed there subsequent to the erection of the cables by the owner or lessee of the tract over which they passed, when defendant knew or should have known that children of miners living in that neighborhood had long been accustomed to play on the pile, but made no effort to safeguard and protect them by the insulation, elevation or removal of its lines to another portion of the tract, as a result of which failure plaintiff's intestate, a child of tender years, was killed, states a cause of action."

In *Talkington v. Washington Water Power Co.*, 96 Wash. Rep., 386 (the defendant was held liable), it was held: "The negligence of a power company in maintaining high-voltage wires on the roof of a warehouse, and the contributory negligence of a boy 10 years of age who came in contact with the wires after being warned to keep away from them, are questions for the jury, where it appears that the power line was maintained 15 inches above the comb of the roof; that the roof was easily accessible to boys by means of a low lean-to with a practically flat roof; that boys were in the habit of playing on the roof, and that the boy thought the wires were ordinary telephone wires, and there was testimony that he was not warned until the very instant of the accident."

In *Meyer v. Menominee & Marinette L. & T. Co.*, 151 Wis., p. 279 (defendant was held liable), it was held: "A boy, about 15 years old, while upon the top of a lumber pile, took hold of defendant's electric-lighting wires and was killed. The lumber pile had for a year stood adjacent to a much-traveled private road through a lumber yard, was about 24 feet high and was easy of access by children, steps to the top of the pile being formed by projecting boards. For many years lumber had been piled to about the same height at that place, and some fifty children living near by were accustomed to play upon the piles. The wires, which were strung upon poles along the side of the road, passed

over the pile in question 21 inches above its top. There was evidence that they were very slack, sagging much more than is customary; that where they passed over the pile the insulation was worn or rotten off; that defendant had been notified and warned of the condition of the wires and poles about eight months before the accident, and it knew or ought to have known that children were likely to be upon the lumber pile: *Held,* that the jury were warranted in finding that defendant was negligent in the use of its wires so placed and strung, and that it ought reasonably to have anticipated that some child would be injured thereby, and, there having been no contributory negligence on the part of the deceased or his parents, a recovery was properly had against the defendant, although the boy was a bare licensee or invitee upon the lumber pile."

In *Temple v. Electric Light and Power Co.* (Miss.), 11 L. R. A. (N. S.), 449, the Court said: "It is perfectly idle for the appellee to insist that it was not bound to have reasonably expected the small boys of the neighborhood to climb that sort of tree. The fact that such boy would, in all probability, climb that particular tree, being the kind of tree it was, was a fact which, according to every sound principle of law and common sense, this corporation must have anticipated. The argument that it did not almost suggests the query whether the individuals composing this corporation, its employees and agents, had forgotten that they were once small boys themselves. The immemorial habit of small boys to climb little oak trees filled with abundant branches reaching almost to the ground is a habit which corporations stretching their wires over such trees must take notice of."

The editors of the L. R. A., in citing the *Temple case, supra,* after reviewing a number of decisions, say: "As to the duty to guard against danger to children in placing electric wires, no rule can be enunciated that would be accepted by all courts. As in the 'turntable' cases and those involving other 'attractive nuisances,' the authorities are in irreconcilable conflict. It would seem, however, that reason and humanity, alike, support the rule laid down in the above case, that those dealing with such an extremely dangerous agency as electricity should, in stringing their wires in places where it is reasonably probable that children will go, be charged 'with the very highest degree of skill and care' to protect the children from injury while in the vicinity of such places, even though they may be trespassers."

In *Parker v. R. R.,* 169 N. C., p. 68, defendant was held not liable. The wires were located under the bridge, and the boys knew what they were. The injured boy, being dared by some of the other boys, reached 22 inches under the bridge and touched the wire rather than take a dare.

In *McAllister v. Pryor,* 187 N. C., p. 832, we have recently said, under another aspect, in general: "There is nothing by which the user of an electrical appliance can detect the presence of an unusual high voltage or deadliness of current before touching the wire or coming in contact with it, and the greatest degree of care is required of those furnishing this deadly instrumentality to guard against the danger of its ordinary use as the circumstances may require. Where the furnisher of electricity for a building was, under its contract with the owner, required to furnish a low voltage of electricity for lighting and various domestic uses, and there is evidence tending to show that in attempting to iron clothes within the building with an electric iron the plaintiff touched the ironer and received a severe shock of electricity, to her injury, which should not and would not ordinarily have occurred by such use had the defendant supplied the current it had contracted to do, the doctrine of *res ipsa loquitur* applies, and the issue of actionable negligence should be submitted to the jury, denying defendant's motion as of nonsuit thereon."

The great weight of authorities sustain the contention of plaintiff in this case. The development of electric power is of vast importance to the commercial, domestic and civic life of our people, and should be encouraged. Electricity is an invisible and subtle power. In the manufacture and distribution it requires trained and skilled artisans. People, unless educated in the use of it, know little about its deadly qualities. It can only be discovered by the touch, and that brings bodily affliction and death if there is a high voltage in the wires. Those who are engaged in the business are held by the courts to the highest degree of care in its manufacture and distribution.

The protection to be given the uninformed public, especially children, is not burdensome or expensive. Naked wires can be easily clothed—insulated. In the instant case the defendant's wires, running within 2 or 3 feet of the top of the sawdust pile, were naked "live wires," carrying a high voltage—a deadly current of electricity. It was in a community of numerous families, near a road and a place frequented by the negro boys of the community, where they played, as was their custom. This was known, or by the exercise of reasonable care ought to have been known, to defendant.

We think there was sufficient evidence to go to the jury, and the motion as of nonsuit was properly refused. On the entire record, we can discover

No error.

WILLIAM F. DELOACHE v. T. B. DELOACHE.

(Filed 8 April, 1925.)

1. Compromise and Settlement — Acceptance of Check in Full — Contracts—Parol Evidence—Statute of Frauds.

Upon the controversy as to whether the plaintiff and defendant were partners in the sale of certain real estate, entitling the plaintiff to his share of the profits therein, depending upon the question of his having paid his part of the purchase price of the property, in the absence of evidence of fraud, a check drawn to the order of the defendant, endorsed to be in full settlement of the disputed difference, and accepted by him as such, concludes the defendant so accepting the check upon the issue (C. S., 895), and also excludes parol evidence as contradictory of the writing under the statute of frauds.

2. Same—Fraud—Issues—New Trials.

Upon the record in this appeal: *Held*, there was not evidence of fraud in the acceptance of the check as in full of the difference between the parties of the amount in dispute; and *held further*, upon the new trial an issue should be submitted to the jury under the allegation thereof in the complaint, should the evidence be sufficient.

3. Issues—Appeal and Error.

Error on appeal will not be held for the submission of issues to the jury when the party appealing has suffered no disadvantage and has been afforded opportunity of fully presenting his case thereunder.

APPEAL by defendant from judgment entered by *Cranmer, J.*, upon the verdict of a jury, at September Term, 1924, of ALAMANCE.

The plaintiff complained for the sum of $1,376.50, one-half of the profits received by the defendant in the sale of the Clapp store lot, in Burlington, pursuant to an agreement with the defendant to purchase and dispose of said property, as partnership property, each sharing equally in the profits.

The defendant denied the partnership, claiming that there was an offer, on his part, to admit the plaintiff into a partnership agreement, as to this property, upon the performance of certain prerequisites by way of payments by plaintiff, which were never performed; and the defendant further pleaded that a full and complete and final settlement with the plaintiff for all moneys paid, and for all things due him, was had on 14 April, 1923.

The jury returned the following verdict:

"1. In what amount, if anything, is the defendant indebted to the plaintiff? Answer: 'Yes, $500.' "

Two checks were given by defendant to plaintiff during these transactions, as follows:

(1) "BURLINGTON, N. C.,
4-12-1923. No. 11953.

Alamance Bank & Trust Co., 66-135.

"Pay to the order of T. B. DeLoache $500.00.
Five Hundred Dollars insured.....Dollars.
For.....

A. V. RAY BOONE, *Sec. & Treas.*
C. W."

This check contained on the back thereof the following:

"Delivered to W. F. DeLoache in payment for money spent upon the Clapp building, Burlington, N. C.

T. B. DELOACHE,
W. F. DELOACHE."

(2) "BURLINGTON, N. C.,
4-14-23. No.....

Alamance Bank & Trust Co., 66-135.

"Pay to the order of W. F. DeLoache $68.71.
Sixty-eight & 71-100.....Dollars.
For.....

T. B. DELOACHE."

This check contained on the back thereof the following:

"Received of T. B. DeLoache a complete and full settlement for sale of Clapp store and all accounts up to 4-14 day, 1923.

DELOACHES.
W. F. DELOACHE."

The record shows no challenge against the validity of the entry on the back of the first check, but the plaintiff alleges that the entry on the back of check No. 2 resulted from the defendant's intent to cheat and defraud the plaintiff, and that he falsely and fraudulently endorsed the same on the back of said check.

The plaintiff says that check No. 1 was received by him from the sale of the Clapp store, which he agreed to, and that he endorsed that check. He further said that he had paid only $450.00 on the purchase price of the Clapp store, and the $500 was for the purpose of repaying this, with interest. He further says that the entry of a complete and full settlement was on check No. 2, when he signed it.

It appears from the evidence of both the plaintiff and the defendant, that the amount, to wit, $68.71, represented by check No. 2, was arrived

at after the plaintiff and the defendant had figured for some time with a big bunch of papers, and that this is the amount that the defendant stated was the correct result of the "casting up" of the accounts between them. It appears that the papers from which they reckoned were destroyed soon thereafter, with the knowledge of both parties. The plaintiff further stated that the defendant told him at the time of the delivery of check No. 2 that, "this check will make us square for the repairs alone," and that the plaintiff replied, "Look here, this check covers everything. Looks to me like you are trying to claim this check in settlement of the store trading and everything. That does not look like business to me."

The entry on the back of the check No. 2, was read by plaintiff and the evidence for plaintiff shows further discussion of its scope and effect. The plaintiff claimed that he relied upon the defendant's statement that it only related to the repairs on the Clapp store, in accepting the check. It further appears that plaintiff cashed this check on or before 17 April, 1923.

There was much testimony tending to show the respective contentions of the parties, as to the other phases of the transactions involved.

Carroll & Carroll for plaintiff.
Coulter & Cooper for defendant.

VARSER, J. There are many exceptions appearing in the record aimed at the reception and rejection of evidence during the trial, which become immaterial in light of the views of this Court upon the plea of settlement in defendant's answer, and, inasmuch as they may not occur in another trial of this cause, they are not now decided.

The defendant's chief contention is that the trial court did not give him the full benefit of the effect of the settlement evidenced in the entry on check No. 2, as above set out, and that the court was in error in submitting to the jury, as a question of fact, the issue of debt to be determined by them from the evidence, as to whether the defendant is indebted to the plaintiff, directing them that, if they "find by the greater weight of the evidence that he is indebted to him," to answer the issue in such sum as they may so find.

The defendant also excepted to the refusal of the trial court to sustain his motion for judgment as of nonsuit. We will consider the motion for nonsuit only as it applies to the question of fraud.

This Court is of opinion that the trial court erred in its charge to the jury on the issue of debt, in so far as the same is affected by the defendant's plea of full and complete settlement of account and satisfaction, set out on check No. 2.

It appears clearly from the plaintiff's own evidence that he was fully apprised of all the facts with reference to the accounts representing the moneys paid out, by him and by the defendant, in the renovation and repairs of the Clapp store building (after he had paid his $450 on the initial payment on the purchase price), up until the sale of the Clapp store to one, Brown. This sale was made with his knowledge and consent. The $500 check received by the defendant as a cash payment from Brown, was delivered to plaintiff. This check is set out above as check No. 1. After that was done, the parties came together and were in conference for some time, "figuring up" their respective contentions, and from this, the sum of $68.71 was arrived at and paid to plaintiff by check No. 2, with the statement endorsed thereon that it was a "complete and full settlement for sale of Clapp store and all accounts up to 4-14 day, 1923."

It is admitted that these latter figures mean 14 April, 1923.

It appears that this check No. 2, is dated 14 April, 1923, and that it was paid on 17 April, 1923, and that plaintiff endorsed the same and received the proceeds thereof.

Eliminating, at present, the question of fraud, we are of the opinion that this case comes within the doctrine announced in *Kerr v. Sanders,* 122 N. C., 635. In that case there was a controversy as to amount due for certain services, and in a letter of discharge, the defendant sent to the plaintiff, a check for $75.00 with the notation thereon, "in full for services." The plaintiff endorsed thereon: "this check accepted for one month's services, beginning 4 September and ending 4 October, 1923." He then collected the check and used the money. Plaintiff contended that he had refused this proposition a few days before that and that he, thereby, did not intend to accept this check in full settlement. The Court says: "The plaintiff must have known what was meant by the words written on the face of the check, 'in full for services,' enclosed in the letter discharging him from the service of the defendants. It is certain he was not inadvertent to this language 'in full for services,' as he would not have endorsed on it 'accepted for one month's service,' and the jury have found against him. The plaintiff had no right to change this check or to accept it for any other purpose than that stated in the letter and check." *Long v. Miller,* 93 N. C., 233; *Pruden v. R. R.,* 121 N. C., 509. The Court then makes this further statement: "This doctrine is based on the idea of contract. 'It takes two to make a contract.' The offer of the defendants and the acceptance by the plaintiff was a contract—a meeting of minds. If plaintiff were allowed to accept it for a different purpose than that stated by defendants, it would be to allow him to make a contract with defendants without their knowledge or consent."

In the instant case, the statement on the check is clear and complete and was clearly understood by the plaintiff. *Non constat,* that he was unwilling to accept it in full settlement when he cashed the check, because he questioned and disputed that it was a complete settlement when the check was first given him.

In *Moore v. Accident Assurance Corporation,* 173 N. C., on page 538, *Walker, J.,* says: "This Court has held in numerous cases that when on the face of the check is stated the purpose for which it is given, or the condition of the payment which it represents, the party to whom it is given or sent cannot accept and use it and afterwards repudiate the condition." Citing, *Kerr v. Sanders, supra; Armstrong v. Lonon,* 149 N. C., 434; *Aydlett v. Brown,* 153 N. C., 336. In the latter case, the Court says: "He will not be permitted to collect the check and repudiate the condition."

Of course, check No. 2 was, until accepted by the plaintiff, a mere offer or proposition from the defendant; it was competent for such offer to be waived or withdrawn, but, when the plaintiff accepted the check with the statement written thereon that it was in full settlement and then cashed the check, he is bound thereby. *Ore Co. v. Powers,* 130 N. C., 152; *Petit v. Woodlief,* 115 N. C., 120; *Cline v. Rudisill,* 126 N. C., 525; *Wittkowsky v. Baruch,* 127 N. C., 315; *Armstrong v. Lonon, supra; Drewry v. Davis,* 151 N. C., 295.

In *Supply Co. v. Watt,* 181 N. C., 432, the Court says in reference to a check sent in settlement of a disputed account: "There was no ambiguity or grounds for misunderstanding defendant's tender and offer of settlement. Obviously, he wanted to adjust all of their differences at one and the same time. The plaintiff had its choice, and we think it is precluded by its acceptance and election, knowingly made. The check should have been returned if the conditions of its acceptance were not satisfactory, or, at least the defendant should have been given an opportunity to say whether he would waive the conditions and allow the check to be credited on account."

In the instant case there is no evidence that the defendant waived the entry of full settlement on the back of this check.

In *Long v. Rockingham,* 187 N. C., 210, *Clarkson, J.,* says: "He could not accept the money derived from the sale and at the same time reserve the right to repudiate the sale."

Business transactions cannot be safely conducted upon secret reservations of mind that are totally inconsistent with the open acts. It was open to the plaintiff to refuse to accept check No. 2 if he was unwilling to affirm its provisions in every respect. When he accepted its proceeds he made effective and binding its every stipulation. *Ore Co. v. Powers,* 130 N. C., 152; *Aydlett v. Brown,* 153 N. C., 334.

For some time it was held that there was no consideration to support an agreement to accept less than was found, upon a later investigation, to be due, and, therefore, such agreements were invalid. At common law, as in force in 1776, this was undoubtedly true. We find this most learnedly discussed by *Hill, C. J.*, in *Dreyfus & Co. v. Roberts,* 75 Ark., 354; 87 S. W., 641.

Although this doctrine was announced by such high authority as Lord Coke, in 1602, and came to us as a part of the English Common Law when the Colonies formed themselves into an independent government, North Carolina set the question of "no consideration" at rest in 1875, when it enacted chapter 178, Laws 1874-5, now C. S., 895, and since that enactment the modern doctrine, upholding these settlements, has prevailed in this State.

Settlements help the progress of society, and tend towards the preservation of peace. It is for the interest of the State that, not only shall there be an end to litigation, but that settlements that prevent litigation, when fairly and honestly arrived at, shall be upheld. *Wittkowsky v. Baruch, supra,* says that this statute, now C. S., 895, supports and makes valid such settlements, changing the old rule as upheld in *McKenzie v. Culbreth,* 66 N. C., 534, and in *Bryan v. Foy,* 69 N. C., 46.

The plaintiff, in *Cline v. Rudisill,* 126 N. C., 524, took money tendered, and paid into court, stating in writing that he was "claiming still the balance due." This was fatal to his claim of the balance due and his action failed.

That this is, upon the instant record, eliminating the question of fraud, a question of law, is clear. As stated in *Mercer v. Lumber Co.,* 173 N. C., 49, the test is that it shall appear that, "this intent is so clear that there could be no disagreement about it."

However, it appears that this evidence on behalf of the plaintiff as to his view of the meaning and effect of the entry of settlement on check No. 2, is incompetent for another reason. It would be, to receive it, a clear contradiction of a contemporaneous written instrument, the benefits of which he had elected to take, with a full knowledge of its contents. The plaintiff not only could read, but he did read this entry of settlement and knew its scope, for he said to defendant: "Look here, this check covers everything. It looks to me like you are trying to claim this check in settlement of the store trading and everything. That does not look like business to me."

Evidence of promises made at the time of the execution of the written contract, inconsistent with such contract, is incompetent. *Slayton v. Comrs.,* 186 N. C., 695.

It is safe to hold to the rule announced in *Walker v. Venters,* 148 N. C., 388, that, "the written word abides."

In *Ray v. Blackwell,* 94 N. C., 10, *Smith, C. J.,* says: "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."

That the plaintiff could and did read the entry evidencing a settlement in full is admitted. If he had not done so he would have been guilty of negligence. *Griffin v. Lumber Co.,* 140 N. C., 514; *Dellinger v. Gillespie,* 118 N. C., 737; *School Committee v. Kesler,* 67 N. C., 443.

The plaintiff read and knew the contents of the entry signed by him, and, therefore, being fully aware of its contents and meaning, he is concluded thereby, in the absence of fraud. He pleads no other basis for relief than fraud.

This elementary rule has been declared in a phalanx of decisions in this State, too strong to upset now.

The foregoing is upon the view of the case that no fraud is shown by the evidence. If, however, fraud shall appear at the next trial, it will be open to the plaintiff to relieve himself of the effect of this entry on check No. 2.

The evidence now appearing in the record, does not, in our opinion, show fraud. *Beaman v. Ward,* 132 N. C., 68; *Printing Co. v. McAden,* 131 N. C., 178; *Irvin v. Jenkins,* 186 N. C., 752.

Inasmuch as plaintiff has pleaded fraud, in this case, he will be allowed to proceed as he may be advised.

We suggest that appropriate issues be submitted, if the evidence at the next trial will warrant, upon the question of fraud, the settlement, and the debt, separately, so that each question may stand on its merits, unmixed with the others.

The general rule appears to be to dispose of the plea in bar, whether an issue of law or fact, before proceeding further. *McAuley v. Sloan,* 173 N. C., 80; *Comrs. v. White,* 123 N. C., 534.

The plea of settlement in the instant case is clearly a plea in bar. *Jones v. Beaman,* 117 N. C., 259; *McAuley v. Sloan, supra.*

As to whether such a plea as this shall be passed on by the jury, along with the other issues, is largely a matter of discretion with the trial court, and where no disadvantage results to either party, this Court does not interfere. The same rule applies to the number and form of the issues.

"The true test is, did the issues afford the parties opportunity to introduce all pertinent evidence and apply it fairly?" *Tuttle v. Tuttle,* 146 N. C., 484. When the issues meet this test, *they are sufficient.*

It is ordered that there be a

New trial.

STATE v. T. C. BRADSHER, R. M. SPENCER, R. W. WILKERSON, AND W. J. PETTIGREW.

(Filed 8 April, 1925.)

1. Appeal and Error—Criminal Law—Bail—Statutes.

Upon conviction of a misdemeanor, the appellant may now be released, as a matter of right, upon his giving a bail bond approved by the court as to its sufficiency. C. S., 4653.

2. Same—Recognizance.

In this State the difference between a recognizance and a bail bond, on appeal in a criminal action, is not recognized, and the obligation under each is held to be identical; and where the bail bond is given, with sureties, in accordance with the order of the court, approved as required therein, and filed with the court, it becomes in legal effect a recognizance.

3. Same—Form—Approval.

A bail bond for a criminal offense is not required to be in any particular form, and an order of court in respect thereto may designate the approval of the clerk as a prerequisite, or that of some other officer thereof.

4. Same—Signing of Sureties Upon Condition—Parties—Notice—Courts.

The failure of the principal to sign a bail bond is an irregularity that does not necessarily release the sureties thereon; and *held* sufficient if the sureties signed the bond in the presence of the principal, who delivered it to the clerk of the court, and it was approved by the clerk in accordance with the order of the court, and filed by him as a court record.

5. Same—Record.

Where the court has ordered that one convicted of a criminal offense be released on bail, pending an appeal, requiring the bond to be justified by the sureties and approved by the clerk, in or out of term, etc., any conditions between the parties upon which the sureties may have signed will not be binding upon the State unless approved by the court, and the fact that the sheriff was aware of and approved these conditions is not available to the sureties seeking to avoid liability, and is not alone sufficient.

6. Same—Judgments.

Whether the facts found by the trial judge and contained in the record would entitle the appellants to consideration in the Superior Court under the provisions of C. S., 4588, is not presented on this appeal. *Semble*, one of the sureties (appellants) who signed the bail bond conditionally, who was not present when the bond was delivered to the clerk, and had no notice of the discharge of the prisoner until the next day, would not be considered to have waived his rights.

APPEAL by defendants, R. M. Spencer, R. W. Wilkerson, and W. J. Pettigrew, from judgment rendered by *Calvert, J.*, at January Term, 1925, of PERSON.

At August Term, 1924, of said court, upon the trial of defendant T. C. Bradsher on an indictment charging him with violation of the

statute relative to intoxicating liquors, there was a verdict of guilty. From the judgment upon this verdict defendant appealed to the Supreme Court. See 188 N. C., 447. Pending said appeal, defendant was required by the court to give bond, with two sureties, in the sum of $2,500, for his appearance at the next term of the court. The court ordered that at least two sureties on said bond should justify, and that the bond should be approved by the clerk of the court.

Defendant was taken into custody by the sheriff of Person County. On the same day he filed with the clerk of the court a bond, in words and figures as follows:

"State v. T. C. Bradsher. We, T. C. Bradsher, R. M. Spencer, R. W. Wilkerson, and W. J. Pettigrew, . . . justly bound unto the State of North Carolina in the sum of twenty-five hundred dollars, to the faithful payment of which we bind ourselves, our executors and administrators firmly by these presents.

"Signed and sealed, this 6 August, 1924."

This bond was upon condition that T. C. Bradsher should make his personal appearance at October Term of Superior Court of Person County or at the first term of said court after defendant's appeal had been decided by the Supreme Court, and there abide the judgment of the court in this action. This bond is signed as follows:

"R. M. SPENCER, (Seal)
R. W. WILKERSON, (Seal)
W. J. PETTIGREW. (Seal)
———————— (Seal)
———————— (Seal)

"R. M. Spencer, R. W. Wilkerson, and W. J. Pettigrew, each being duly sworn, says that he is worth the sum of twenty-five hundred dollars, over and above all liabilities and exemptions allowed by law.

R. M. SPENCER,
R. W. WILKERSON,
W. J. PETTIGREW."

Endorsed on the bond is the following:

"Subscribed and sworn to before me, this ..... August, 1924, as to Wilkerson and Pettigrew. D. W. BRADSHER, C. S. C."

Upon the filing of this bond, defendant T. C. Bradsher, with the approval of the clerk, was released from custody. At October Term, 1924, T. C. Bradsher, having failed to appear, in accordance with the condition of his bond, was called out, and, having failed to answer, judgment *nisi* on the bond was entered. It was ordered that a writ of *scire facias* be issued.

Writ of *scire facias* was duly issued and served upon appellants as sureties on said bond. At January Term, 1925, each of the appellants filed answer to the writ. The court, having heard the evidence, found the facts as hereinbefore stated, and further found:

"5. That on the day during the August Term, 1924, on which the defendant T. C. Bradsher was sentenced, he was taken into custody by the sheriff of Person County; that the defendant R. M. Spencer signed the bond set out in the record in the presence of said sheriff, after having an agreement with the defendant T. C. Bradsher that he, the said Bradsher, would procure five other men to sign the said bond, and that unless such five other signatures were procured the signature of Spencer was to be erased; that the said Spencer then asked the sheriff if he could sign the bond under such conditions, to which the sheriff replied that he could. At the time the defendant R. W. Wilkerson also appeared and signed said bond in the presence of the sheriff, and stated that he was doing so upon the same conditions upon which Spencer had signed it. That later in the same day the sheriff turned over the prisoner to his deputy, M. T. Clayton, and instructed his deputy not to consider the name of R. M. Spencer on said bond unless at least four other good men signed it.

"6. That M. T. Clayton and W. R. Gentry, both deputy sheriffs, were requested by the defendant T. C. Bradsher to take him and the two sureties, Wilkerson and Pettigrew, to see the clerk of the court to find out if the clerk would approve the bond with the signatures of Spencer, Wilkerson, and Pettigrew, so that defendant might be released until the next morning, at which time the defendant would secure additional signatures. That the said deputy, with the defendant T. C. Bradsher and Wilkerson and Pettigrew, then went to the home of the clerk of the Superior Court. The defendant T. C. Bradsher asked the clerk of the court if he would approve said bond, as it was then signed, until the next morning, so that he, the said Bradsher, would not have to go to jail that night. That the bond was then handed to the clerk, and he asked Wilkerson and Pettigrew if the signatures appearing thereon were their respective signatures, to which each replied that it was; that thereupon the clerk made the endorsement appearing on the bond; that the bond was handed back to the deputy sheriff, who asked the clerk, in the presence of Wilkerson and Pettigrew, if it would be all right to turn the defendant Bradsher loose, to which the clerk replied that it would be all right.

"8. That the bond of the defendant T. C. Bradsher was never at any time signed by him, but that the signatures of the three defendants, Spencer, Wilkerson, and Pettigrew, were all signed in the presence of T. C. Bradsher.

"9. That the deputy sheriffs, Clayton and Gentry, in the presence of Wilkerson and Pettigrew, released the prisoner, T. C. Bradsher, immediately after the foregoing conversation with the clerk, and he has not since made his appearance or been apprehended.

"10. That as to the defendant R. M. Spencer the court finds that he never appeared before the clerk to acknowledge said bond, and that the defendant T. C. Bradsher was released without his knowledge or consent, and when he discovered his release on the following day the said T. C. Bradsher had fled."

Upon the foregoing facts, the court being of the opinion that the State was entitled to recover of the defendants the penal sum of the bond, it was ordered and adjudged that the State of North Carolina have and recover of the defendants the sum of $2,500. Defendants, having excepted to foregoing judgment, appealed therefrom to the Supreme Court.

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

Nathan Lunsford and Luther M. Carlton for defendants.

CONNOR, J. Defendants, by their exception to the judgment herein rendered, present to this Court, for review, their contention that said judgment is erroneous, for that (1) the bail bond upon which it was rendered was not taken in open court; (2) the same was not signed by T. C. Bradsher, the principal; and (3) the appellants, R. M. Spencer and R. W. Wilkerson, signed the same upon conditions which were not complied with; and the appellant, W. J. Pettigrew, signed same in reliance upon the validity of the signatures of R. M. Spencer and R. W. Wilkerson. His Honor found the facts to be as contended by appellants, but was of the opinion that these facts did not, under the law, constitute a defense to the judgment *nisi*, and therefore made the judgment absolute.

Defendant T. C. Bradsher, having been convicted of a misdemeanor, appealed from the judgment of the court. The court was required by statute to allow him bail, pending the appeal. C. S., 4653. But for this statute, the allowance of bail to defendant, after conviction, would have been in the sound discretion of the court. After conviction, there is no constitutional right to bail. Article I, section 14 of the Constitution of North Carolina, in so far as it guarantees, by implication, the right to bail, does not apply. 3 R. C. L., p. 15; 6 C. J., 966. It was the duty of the court to allow bail to the defendant at the August Term, 1924, upon his conviction and appeal to the Supreme Court. The court ordered that defendant give a bail bond in the sum of $2,500, with two

sureties, who should justify, and that the bond should be approved by the clerk of the court. The bond set out in the record, in the sum of $2,500, signed by two sureties, who justified and acknowledged execution of same before the clerk, who approved same, was filed in compliance with this order, and defendant released from custody pending his appeal.

1. Appellants contend, first, that the bail bond is void because not acknowledged in open court.

There is a technical distinction between a bail bond and a recognizance. This distinction is recognized by statute and in the practice in some jurisdictions, but in most cases it is not substantial, and is ordinarily not determinable. 3 R. C. L., 15. A recognizance is a debt of record, acknowledged before a court of competent jurisdiction, with condition to do some particular act. It need not be executed by the parties, but is simply acknowledged by them, with a minute of such acknowledgment entered upon the records of the court. *S. v. Eure,* 172 N. C., 874; *S. v. White,* 164 N. C., 408; *S. v. Smith,* 66 N. C., 620; *S. v. Edney,* 60 N. C., 471; 34 Cyc., 538. "In some respects a recognizance is very similar to a bail bond. It differs from a bail bond merely in the nature of the obligation created. A recognizance is an acknowledgment of an existing debt; a bail bond, which is attested by the signature and seal of the obligor, creates a new obligation." 6 C. J., 892. This distinction does not seem to have been recognized in this State, for the obligation under each is held to be identical. A recognizance is in the nature of a conditional judgment, which may be discharged by performance of conditions, or enforced upon breach of conditions by a writ of *scire facias.* No action need be brought upon a recognizance, for it is an acknowledgment, solemnly entered upon the records of the court, of an existing debt. A bail bond, after it has been accepted by the court and filed, is regarded in this State as a recognizance. Both are conclusive, and neither can be attacked collaterally. *S. v. Morgan,* 136 N. C., 593.

A bail bond is in form similar to a recognizance. The only practical distinction seems to be that a bail bond need not be executed, whereas a recognizance must be acknowledged in open court. The parties to a bail bond are bound by their signatures; to a recognizance, by their acknowledgment; hence the requirement that a recognizance must be acknowledged in open court that a minute may be made as evidence of liability. The evidence that obligors on a bail bond are liable is their signatures, which may or may not be attested. When a bail bond, executed in accordance with the order of the court, and approved as required therein, is filed with the court, it becomes, in legal effect, for all purposes, a recognizance.

No distinction between a bail bond and a recognizance has been made or recognized in the practice in this State. *Chief Justice Pearson,* in *S. v. Edney,* 60 N. C., 471, says: "When a judge, in a proceeding initiated before him, adjudicates that the party is entitled to be discharged on giving bail, and fixes the amount, it has long been the practice in this State, if the party be not prepared with sureties, for the judge to authorize one or more justices of the peace, named by him, to take the recognizance; and recognizances, so taken, have heretofore, as far back as the memory of the members of this Court extends, always been deemed valid. This practice has prevailed so long, and is so obviously for the ease of the citizen, that we would not be justified in now putting a stop to it unless satisfied that it is in violation of some important principle of law." *S. v. White,* 164 N. C., 408; *S. v. Smith,* 66 N. C., 620. So that, although a recognizance, strictly speaking, is not valid unless acknowledged in open court, a bail bond, duly executed and acknowledged before some officer, or other person named by the judge, and filed in court, and accepted as a compliance with the order allowing bail, is in legal effect and for all purposes a recognizance, and may be enforced as such by the court.

2. Appellants further contend that the bail bond is void, and that they, as sureties, are not liable because same was not signed by T. C. Bradsher, the principal.

The bond was signed by the appellants in the presence of the principal, who delivered same to the clerk for his approval. The failure of the principal to sign same was an irregularity, but does not affect the liability of the sureties who signed the bond. They are each liable, and, the court having accepted the bond without the signature of the principal, the liability of the sureties is not affected by this irregularity. The acknowledgment by the principal would be sufficient to make him liable on a recognizance, if such acknowledgment had been made in open court. Whether the acknowledgment before the clerk, at his home, as permitted by the court in its order for the ease of the principal and his sureties, is as effectual to bind the principal as if it had been made in open court, is not presented on this record.

"Where a statute requires a bail bond for the release of a debtor to be executed by the debtor as principal and two others as sureties, the fact that it is executed by the sureties alone does not render it absolutely void, but it is an obligation against them." 45 L. R. A., 335, note. There is no statute in this State prescribing the form of a bail bond or how it shall be executed. The order of the court directed that defendant be released upon giving a bail bond, to be approved by the clerk. The clerk approved the bond tendered by appellants as a compliance with the order of the court. The bond filed in the record is the

bond signed by appellants, and, having been accepted by the court as tendered, it cannot now be attacked or impeached by appellants on the ground that it is void by reason of the failure of the principal to sign it.

3. Lastly, appellants contend that the bail bond is void, for the reason that the sureties, R. M. Spencer and R. W. Wilkerson, signed the same upon a conditional agreement with the principal, assented to by the sheriff, as found by the judge, and that appellant, W. J. Pettigrew, signed in reliance upon the validity of these signatures. Appellants contend that as the conditions were not complied with by the principal, neither of them is liable.

It is clear that no conditional agreement between the principal and his sureties, who signed the bond, affecting their liability, can be a defense for the sureties, unless the obligee in the bond had notice of such agreement. The obligee in the bond is the State of North Carolina. The terms and conditions of the bond were fixed by the court and could not be changed or altered, except by the court. Notice to the sheriff of the agreement as found by the judge was not notice to the obligee or to the court. The sheriff was not the agent of the court, and had no duty to perform with respect to the bond. It was his duty to hold the prisoner in custody until the order of the court had been complied with as to bail. There is no finding that the clerk had notice of the conditional agreement. The only duty imposed upon the clerk with respect to the bond was to approve it as to form and as to sufficiency of sureties. His authority extended no further than necessary for the performance of this duty. If appellants contend that notice to the clerk was notice to the court, and therefore to the obligee, then it was incumbent upon appellants to offer evidence that the clerk had notice of the agreement, or at least of sufficient facts to put him on inquiry. There is no finding by the court as to whether or not the clerk had notice either of the agreement or of facts sufficient to put him on inquiry. Nor is there any exception that the court failed to find that the clerk had notice.

Where the judge has, by an order made in open court, fixed and determined all the essential elements of a bail bond—the amount, the conditions and the number of sureties, and whether or not they shall justify—he may provide that the bond may be filed during recess or after the adjournment of court, provided it is approved as to form and as to sufficiency of sureties by one or more justices of the peace, named by him, in the order (*S. v. Edney,* 60 N. C., 464), or by the sheriff or any other person named by him. *S. v. Houston,* 74 N. C., 549; *S. v. Jones,* 88 N. C., 684; *S. v. Jones,* 100 N. C., 439. The officer or person, whose approval is required before the acceptance of the bond; has no duty or authority with respect to the bond, except that imposed or conferred on him by the order. No notice to such officer or person of any facts with

respect to the execution of the bond, which do not appear upon its face, will support a defense to a *sci. fa.* issued for the enforcement of the bond. When the bond has been approved as required by the court, accepted and filed in the record, it is a recognizance—that is, a debt of record, conditioned only as appears in the bond, and may be dealt with in all respects as a recognizance.

The contentions of appellants as to the validity of the bond cannot be sustained. The judgment is well supported, both on principle and by the authorities, and is affirmed.

As to whether the facts found by the judge, now appearing in the record, entitle appellants to relief, in whole or in part, from the judgment rendered by his Honor, and now affirmed by us, in accordance with the law applicable to these facts, is not presented to this Court. A petition for such relief may be presented to the judge of the Superior Court presiding at some ensuing term of court for Person County, under C. S., 4588, notwithstanding that a final judgment has been rendered. Although appellants, Wilkerson and Pettigrew, may be held to have waived a favorable consideration of the facts upon which such relief may be sought by their conduct in the presence of the clerk, it would seem that appellant, R. M. Spencer, who was not present when the bond was delivered to the clerk, and had no notice until the next day that prisoner had been discharged, would receive such consideration. There is no error, in this record, of law or legal inference, and we must so hold. The judgment is

Affirmed.

MARY WHITE NASH v. HUBERT A. ROYSTER.

(Filed 8 April, 1925.)

1. Evidence—Nonsuit—Statutes—Waiver.

Upon a motion as of nonsuit, the evidence is to be considered in the light most favorable to the plaintiff, whether offered by her or elicited on cross-examination, entitling her to the benefit of every reasonable intendment and inference to be drawn therefrom in her favor; and, under our statutes, where the defendant's motion is refused after the introduction of the plaintiff's evidence, by introducing evidence defendant waives the benefit of his exception, and the entire evidence will be considered under the rule stated.

2. Physicians and Surgeons — Principal and Agent — Substitutes—Contracts—Liability.

Where a surgeon has performed an operation upon his patient and left her under the care of another surgeon or physician for further treatment,

the former may be liable for the malpractice of the latter, proximately resulting in injury to the patient, in the absence of a special contract with the patient, or those having her in charge, that he would not be responsible therefor; and evidence of the practice in such instance is competent upon the trial.

3. Same—Questions for Jury—Trials.

A surgeon may contract only to surgically operate upon the patient and not be responsible for the treatment of another in taking charge after the operation; and where the operation has been properly performed, and injury results from the malpractice of the one taking charge of the patient thereafter, and the evidence is conflicting as to whether the latter was acting as agent for the former, or independently employed by the parents or others having charge of the patient, an issue of fact is raised for the determination of the jury.

4. Same—Damages.

A physician or surgeon who sends a substitute practitioner to treat a case, on becoming unable personally to fill a professional engagement, is not liable for the latter's negligence or malpractice, unless the substitute acts as his agent in performing the service, or due care is not exercised in selecting the substitute practitioner.

5. Same—Duration of Employment.

Where a surgeon takes charge of a case and is employed to attend the patient, in the absence of a special contract to the contrary, the relation of physician and patient will be presumed in law to continue until ended by the mutual consent of the parties, or revoked by dismissal of the physician, or until his services are no longer needed.

6. Physicians and Surgeons—Measure of Responsibility for Damages to Patient.

A surgeon or physician, in accepting a patient for treatment, implies that he has the knowledge therein of the average practitioner, and that he will diligently apply this knowledge to the proper treatment of the particular case, without neglect or omission of duty, until the term of his employment be terminated, nor is he responsible for an error in professional judgment when the opinions of those in like profession reasonably differ.

APPEAL by defendant from *Horton, J.*, at second November Term, 1924, of WAKE.

Civil action for damages, tried upon issues raised by the pleadings, on allegations and denials that plaintiff suffered great injury by reason of defendant's negligence in failing properly to care for her after an operation affecting her left knee, which, she alleges, resulted in purulent arthritis, described as "a very fatal disease."

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

W. H. Yarborough, Ben T. Holding, and J. W. Bailey for plaintiff.
Albert L. Cox, R. N. Simms, R. B. White, E. H. Malone, and A. L. Purrington, Jr., for defendant.

STACY, C. J. 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 the plaintiff's evidence, and renewed at the close of all the evidence, needs no particular elaboration. The first exception has been waived, under the express provisions of the statute. C. S., 567. The defendant had the right to rely on the weakness of the plaintiff's evidence when she rested her case; but, having elected to offer testimony in his own behalf, he did so *cum onere,* and only the exception noted at the close of all the evidence may now be urged or considered. *Harper v. Supply Co.,* 184 N. C., 204.

It is the settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered 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." *Christman v. Hilliard,* 167 N. C., p. 6; *Oil Co. v. Hunt,* 187 N. C., p. 159; *Davis v. Long, ante,* p. 131.

In the present case the evidence is conflicting on the main issue, as to whether plaintiff received proper care and attention from defendant, under the circumstances. This makes it a question for the jury. *Loggins v. Utilities Co.,* 181 N. C., 221. We deem it unnecessary to set out the testimony of the several witnesses in detail. It is somewhat voluminous, and, to state it fairly, would require a recital of practically all of it. Hence a statement of only such portions as are pertinent and decisive of the legal questions involved will be undertaken.

There was evidence to the effect that on 12 August, 1921, the plaintiff, a girl about 15 years of age, was brought by her parents, at the suggestion of their family physician, from Franklin County, N. C., where they live, to Rex Hospital, in the city of Raleigh, and placed under the care of Dr. H. A. Royster for treatment. She was suffering, at the time, from inflammation and swelling above her left knee. The swelling continued to increase until pus manifested itself in a "head," from 2 to 2½ inches above the knee joint; and on 21 August the defendant made an incision on the inside of plaintiff's thigh, removed the pus, and put in a small drain. That night the defendant left Raleigh for Rochester, Minnesota, to attend one of the Mayo clinics, and was gone for about two weeks. In the meantime plaintiff's condition grew worse, the

knee joint became affected, and on 29 August a second operation was performed by Drs. Wilkerson and Thompson, the latter being called in for consultation by the former, though plaintiff's father testified that he employed Dr. Thompson independently of any other arrangement. This operation was for purulent arthritis, described as "a very fatal disease." In answer to a question as to whether plaintiff's condition was rendered worse by the delay in performing the second operation, Dr. Thompson said: "I think, of course, it would have been better earlier, but you could not do it until you knew that it had to be done." He further stated that he thought the proper course of treatment had been pursued by Dr. Royster.

The plaintiff left Rex Hospital on 19 September, 1921, and was carried to a hospital in Rock Hill, S. C., where she could be treated by her uncle, Dr. Lyle. She is lame and now has a stiff knee joint, due to the infection which had lodged there, and she also has what is termed by the medical profession a weight-bearing leg.

There was evidence from the defendant tending to show that after the operation on 21 August, he had a talk with plaintiff's parents, Mr. and Mrs. Nash, in the presence of Drs. Wilkerson and Lawrence, in which he informed them of his intention to leave town. The defendant told them that the plaintiff had responded well to the operation; that there was no immediate cause for alarm, and that Dr. Wilkerson, a skillful and competent surgeon, would look after the patient while he was away. No objection was interposed to this arrangement. Dr. Wilkerson and Dr. Lawrence corroborated these statements in their testimony, but they were denied by the plaintiff's evidence.

It was further in evidence that the results obtained by plaintiff from the treatment received were as good as could be expected. Hence it was contended on behalf of the defendant that no damage had been proved, and that no act of his had been shown to have proximately resulted in injury to the plaintiff.

Damages were awarded by the jury on the theory that the defendant had negligently left the case, which resulted in injury to the plaintiff, or that Dr. Wilkerson negligently delayed the second operation, thereby producing harmful results, for which the defendant was held responsible under the following portion of his Honor's charge:

"If the jury find from the greater weight of the evidence that, upon leaving, after the first operation on Miss Nash, for a two-weeks absence, Dr. Royster, without consent of plaintiff or her parents, put Dr. Wilkerson in charge of her, this would constitute Dr. Wilkerson as Dr. Royster's agent; and if the jury should find from the greater weight of the evidence that Dr. Wilkerson failed to give Miss Nash in her condition such reasonable skill, care and diligence as are ordinarily exercised

by members of his profession in similar cases, such failure on Dr. Wilkerson's part would be imputed to Dr. Royster under the law of principal and agent, and a principal being liable for defaults and failures of his agent, acting within the scope of his authority."

As to whether Dr. Wilkerson was the agent of Dr. Royster, in looking after the plaintiff's case, during the defendant's absence, was a question of fact to be determined by the jury; and we think the court erred in holding, as a matter of law, that the relation of principal and agent necessarily followed from what took place, unless the arrangement had been consented to by the plaintiff or her parents. Neither the consent of the plaintiff nor her parents, nor the lack of such, is perforce the determining factor as to whether the relation of principal and agent existed between the defendant and Dr. Wilkerson. Agency could exist with the plaintiff's knowledge and consent as well as without it. This is not the test. Whether an agency in fact has been created is to be determined by the relations actually existing between the parties under their agreements or acts. 21 R. C. L., 819; 31 Cyc., 1215. The evidence is not very direct on this point. Apparently the question was not mooted on the trial until the judge referred to it in his charge. In this respect we think the evidence of Dr. Anderson touching the subject of custom among local physicians, excluded on the hearing, was competent as bearing on the question of agency, or the relation existing between Drs. Royster and Wilkerson, so far as it had to do with their treatment of the plaintiff's case.

By the clear weight of authority, a physician or surgeon who sends a substitute practitioner to treat a case, on becoming unable personally to fill a professional engagement, is not liable for the latter's negligence or malpractice, unless the substitute acts as his agent in performing the service, or due care is not exercised in selecting the substitute practitioner. *Moore v. Lee,* 109 Tex., 391; *Gross v. Robinson,* 203 Mo. App., 118; *Mullins v. DuVall,* 25 Ga. App., 690; *Stokes v. Long,* 159 Pac. (Mont.), 28; *Gillette v. Tucker,* 67 Ohio St., 106; 65 N. E., 865; *Keller v. Lewis,* 65 Ark., 578; *Hitchcock v. Burgett,* 38 Mich., 501; *Myers v. Halborn,* 58 N. J. L., 193; 21 R. C. L., 395.

It has been held that a physician or surgeon is responsible for the negligence or carelessness, which proximately results in injury to another, of his apprentice (*Hancke v. Hooper,* 7 Car. & P. (Eng.), 81), of his agent (*Landon v. Humphrey,* 9 Conn., 209), of his assistant (*Trist v. Welker,* 7 Ohio N. P., 472), of his partner (*Hyrne v. Erwin,* 26 S. C., 226), of an associate under certain conditions (*Stokes v. Long, supra*), or of any one in his employ while acting in the scope of such employment. And there may be a distinction, depending on the character of the engagement, between sending a substitute practitioner to take

full charge of a case, and sending him only for the purpose of looking after the patient during the absence of the sender. See *Moore v. Lee, supra,* as reported in 4 A. L. R., 185, and annotation.

The duty which a physician or surgeon owes to his patient must be measured and determined primarily and in the first instance by the contract of employment. A physician or surgeon may agree to perform an operation without undertaking or rendering himself responsible for the subsequent treatment of the case. He thus contracts against liability beyond the exercise of reasonable care, diligence and skill in the performance of the operation and for such services as are contemplated by both parties to the special or limited contract. A physician or surgeon is not bound to render professional services to every one who applies, and he may, therefore, by notice or special agreement, limit the extent and scope of his employment. Such is the simple law of contract. *Clancy v. Overman,* 18 N. C., 402; *Gillette v. Tucker, supra.*

But when a physician or surgeon takes charge of a case and is employed to attend a patient, unless the terms of employment otherwise limit the service, or notice be given that he will not undertake, or cannot afford, the subsequent treatment, his employment, as well as the relation of physician and patient, continues until ended by the mutual consent of the parties, or revoked by the dismissal of the physician or surgeon, or until his services are no longer needed. And he must exercise, at his peril, reasonable care and judgment in determining when his attendance may properly and safely be discontinued. *Ballou v. Prescott,* 64 Me., 305; *Mucci v. Houghton,* 89 Iowa, 608; *Dashiell v. Griffith,* 84 Md., 363.

As a general rule, in the absence of any special agreement limiting the service, or reasonable notice to the patient, when a surgeon is employed to perform an operation, he must not only use reasonable and ordinary care, skill and diligence in its performance, but, in the subsequent treatment of the case, he must also give, or see that the patient is given, such attention as the necessity of the case demands. *Gillette v. Tucker, supra.* Even in the time of Blackstone it was held for law "that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him to perform it with integrity, diligence, and skill. And if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case." 3 Bl. Com., 165. And such is the substantive law today.

Ordinarily, when a physician or surgeon undertakes to treat a patient without any special arrangement or agreement, his engagement implies three things: (1) that he possesses the requisite degree of learning, skill and ability necessary to the practice of his profession, and which

others similarly situated ordinarily possess; (2) that he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to the patient's case; and (3) that he will exert his best judgment in the treatment and care of the case entrusted to him. *Thornburg v. Long,* 178 N. C., 589; *Brewer v. Ring,* 177 N. C., 476; *Mullinax v. Hord,* 174 N. C., 607; *Long v. Austin,* 153 N. C., 512; *McCracken v. Smathers,* 122 N. C., 799; *Whitsett v. Hill* 37 L. R. A. (Iowa), 830; 21 R. C. L., 381; Note: 93 Am. St. Rep., 657. The law, therefore, holds him answerable for any injury to his patient proximately resulting from a want of that degree of knowledge and skill ordinarily possessed by others of his profession, or for the omission to use reasonable care and diligence in the practice of his art, or for the failure to exercise his best judgment in the treatment of the case. *Mullinax v. Hord, supra; Long v. Austin, supra; Pike v. Housinger,* 155 N. Y., 201; *Moon v. McRae,* 111 Ga., 206. And in an action against a physician or surgeon for malpractice, where no question is raised as to his possession of the requisite degree of learning, skill and ability, his liability may yet be made to depend upon whether he failed to use ordinary care and diligence, or neglected to exercise his best judgment in the treatment of the case. *Cayford v. Wilbur,* 86 Me., 414. It can make no difference whether injury proximately results from a want of skill or from a want of its application, the physician or surgeon is, in either case, equally responsible. *Mullinax v. Hord, supra; Ritchey v. West,* 23 Ill., 385; *Long v. Morrison,* 14 Ind., 595.

But the law does not require of a physician or surgeon absolute accuracy, either in his practice or in his judgment. It does not hold him to a standard of infallibility, nor does it require of him that utmost degree of skill and learning known only to a few in the profession. *Mullinax v. Hord, supra; Long v. Austin, supra; Van Skike v. Potter,* 53 Neb., 28. He is not answerable for mere errors of judgment, where good judgments may differ. *Pepke v. Grace Hospital,* 90 N. W. (Mich.), 278. But he is supposed to exercise an enlightened judgment, and it must be founded on his intelligence. He engages to bring to his patient's case a fair, reasonable and competent degree of skill, and to apply it with ordinary care and diligence in the exercise of his best judgment. *Jackson v. Burnham,* 39 Pac. (Col.), 579; *West v. Martin,* 31 Mo., 375; 80 Am. Dec., 107. Liability may attach for errors of judgment, however, where they are so gross as to be inconsistent with that degree of skill and competence which it is the duty of every physician or surgeon to employ in the treatment of a case. *Johnson v. Winston,* 94 N. W. (Neb.), 607. Thus it has been held that where a physician or surgeon waits too long before undertaking a necessary operation,

when ordinary prudence would have prompted earlier action, and injury results therefrom, such conduct is properly imputable to his negligence, rendering him liable for the resultant damage, as he must have known, in the exercise of a reasonable judgment, the probable consequences of such delay. *DuBois v. Decker,* 130 N. Y., 325.

The following very satisfactory statement of what we conceive the law to be is taken from the opinion of *Vann, J.,* in the case of *Pike v. Honsinger,* 155 N. Y., 201:

"Upon consenting to treat a patient, it becomes his duty (the duty of a physician or surgeon) to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment. The rule in relation to learning and skill does not require the surgeon to possess that extraordinary learning and skill which belong only to a few men of rare endowments, but such as is possessed by the average member of the medical profession in good standing. Still he is bound to keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions may have been. The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and to render a physician and surgeon liable it is not enough that there has been a less degree of care than some other medical man might have shown, or less than even he himself might have bestowed, but there must be a want of ordinary and reasonable care, leading to a bad result. This includes not only the diagnosis and treatment, but also the giving of proper instructions to his patient in relation to conduct, exercise and the use of an injured limb. The rule requiring him to use his best judgment does not hold him liable for a mere error of judgment, provided he does what he thinks is best after careful examination. His implied engagement with his patient does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise reasonable care and to exert his best judgment in the effort to bring about a good result."

Tested by the foregoing rules and standards, we think the following instruction must also be held for error on the present record:

"The court charges you that upon the employment of a physician or surgeon for treatment of a patient, there is an implied contract that the physician will use all known and reasonable means to accomplish

the object for which he is called to treat the patient, and that he will attend the patient carefully and diligently; that there is no guaranty that he will cure the patient or that he will not commit an error of judgment."

A physician or surgeon is not required to use "all known and reasonable means" to accomplish the object for which he is employed, unless by specific contract he obligates himself to do so. *Mullinax v. Hord, supra; Sims v. Parker,* 41 Ill. App., 284; *Howard v. Groves,* 28 Me., 97; *Getchell v. Hill,* 21 Minn., 464; *Langford v. Jones,* 18 Or., 307. Of course, "as a man consents to bind himself, so shall he be bound." Elliott on Contracts (Vol. 3), sec. 1891. But there is no evidence on the present record of any special contract obligating the defendant to use "all known and reasonable means" in treating the plaintiff's case. And such is not implied by law under a general contract of employment. Note: 37 L. R. A., 830.

Mr. Thompson, in his valuable work on Negligence, Vol. 5, sec. 6711, speaking to this question, says: "The possession of the highest degree of learning and skill is not demanded. A physician or surgeon is not required to possess that extraordinary learning and skill which belong only to a few men of rare endowments, but rather the learning and skill possessed by the average member of the medical profession in good standing; and this is to be determined by the state of the profession at the time," citing a number of authorities in support of the text.

Every person who enters upon the practice of a learned profession undertakes to bring to that profession the exercise of a reasonable degree of care and skill. He does not, however, if he be a physician or surgeon, guarantee to effect a cure or warrant a recovery, or promise to use the highest possible degree of skill or all known means to accomplish such result. There may be others of higher education and greater advantages than he has had. But he does undertake to bring to his employment a fair, reasonable and competent degree of skill; and, in an action against him for malpractice, where the method or manner of his treatment has proximately resulted in injury to another, the question for the jury to determine is whether he possesses the requisite skill, or, possessing it, negligently failed to apply it to the case.

There are other exceptions appearing on the record, worthy of consideration, but as they are not likely to arise on another hearing, we shall not consider them now.

For errors in the charge, as indicated, there must be a new trial, and it is so ordered.

New trial.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 8 April, 1925.)

1. Evidence—Nonsuit.

The evidence, upon defendant's motion to nonsuit thereon, will be considered in the light most favorable to the plaintiff, and the motion will be denied if thus considered it is legally sufficient to support a verdict in plaintiff's favor.

2. Carriers—Employer and Employee—Master and Servant—Railroads—Wrongful Death—Homicide—Vice-Principal—Evidence—Nonsuit.

A railroad company is held liable for the homicide of its employee on its railroad yard by another employee, when its vice-principal thereon was or should have been aware beforehand of the intended killing, and should with the exercise of proper care have prevented it, and where the evidence is conflicting as to whether the killing could have been thus prevented by the defendant's vice-principal acting for the defendant at the time, the question should be submitted to the jury, whether the deceased was engaged in interstate commerce at the time of his death, or in intrastate commerce.

3. Employer and Employee—Master and Servant—Vice-Principal—Torts.

As a general rule, a principal who intrusts an employee with authority to control other employees, is held responsible for the manner in which this authority is exercised.

VARSER, J., not sitting.

APPEAL by plaintiff from a judgment of nonsuit rendered by *Grady, J.*, at October Term, 1924, of NEW HANOVER.

On 18 July, 1922, plaintiff's intestate, a locomotive engineer employed by the defendant, at the end of his run from Fayetteville to Wilmington, carried his engine to the roundhouse and after attending to duties incident to the day's work started home. While yet on defendant's premises and going along the usual exit, about 7 p. m., he was shot with a pistol and killed by H. E. Dallas, who was assistant yardmaster and special policeman during a strike. At the conclusion of plaintiff's evidence the defendant's motion to dismiss the action as in case of nonsuit was allowed, and the plaintiff excepted and appealed. The material facts are stated in the opinion.

Clayton Grant, Weeks & Cox and Dye & Clark for plaintiff.
Rountree & Carr, Thos. W. Davis and V. E. Phelps for defendant.

ADAMS, J. In the complaint neither the Federal Employers' Liability Act nor the State statute (C. S., 3466) is specifically pleaded, but in the answer it is alleged that at the time of the intestate's injury and

death the defendant was engaged and the intestate was employed in interstate commerce. The only testimony on the question was that of E. L. Fonvielle, a witness for the plaintiff. He said that the deceased was the engineer on train No. 322, hauling freight from Fayetteville to Wilmington, and that in the train were cars which were to be carried from places within to places without the State. The carriage of these cars, the defendant argues, constituted commerce among the states. *Pennsylvania Co. v. Donat,* 239 U. S., 49, 60 Law Ed., 139; *Pennsylvania Co. v. Sonman Co.,* 242 U. S., 120, 61 Law Ed., 188; *York Mfg. Co. v. Colley,* 247 U. S., 21, 62 Law Ed., 963; *R. R. v. Zachary,* 232 U. S., 248, 58 Law Ed., 591. It is also contended that the deceased was employed in interstate commerce at the time he was shot by Dallas, though he was then leaving the defendant's yards after his day's work. *Erie Railroad v. Winfield,* 244 U. S., 170, 61 Law Ed., 1057; *So. Ry. Co. v. Puckett, ibid.,* 571, 61 Law Ed., 1321; *R. R. v. Zachary, supra; Hinson v. R. R.,* 172 N. C., 646; *Davis v. R. R.,* 158 N. W. (Minn.), 911; *Easter v. R. R.,* 86 S. E. (W. Va.), 37; *R. R. v. Walker's Admr.,* 172 S. W. (Ky.), 517. See, also, Annotation, 10 A. L. R., 1184.

Upon these propositions the defendant rests its contention that it was engaged in interstate commerce and that the intestate was employed in such commerce at the time of his injury, and that the controversy must therefore be determined in accordance with the Federal law. It is further insisted that under the Federal act the right of recovery is always predicated only upon proof of injury or death proximately resulting from the defendant's negligence, and never upon proof of wilful homicide committed by the defendant's officer, agent, or other employee. *R. R. v. Winfield,* 244 U. S., 147, 61 Law Ed., 1045; *Davis v. Green,* 260 U. S., 349, 67 Law Ed., 299; *Roebuck v. R. R.,* 162 Pac., 1153; *Roberts v. R. R.,* 143 N. C., 176; *Belch v. R. R.,* 176 N. C., 22; *Capps v. R. R.,* 178 N. C., 558; U. S. Compiled Sts. sec. 8657 *et seq.*

If we resolve these questions in favor of the defendant we are yet to determine whether there is any evidence of its actionable negligence, for it is settled law that a motion to dismiss an action as in case of nonsuit will be denied if there is evidence which, most favorably considered, will support a verdict for the plaintiff. C. S., 567 and citations. A deliberate review of the record has convinced us that there is evidence of the defendant's negligence which should have been submitted to the jury. A master owes his servant the same duty to respect his person that he owes third persons and is required to exercise due care for his safety. Jaggard on Torts, 280 (92), 992. Cooley states the principle in these words: "The rule that a master is responsible to persons who are injured by the negligence of those in his service, is subject to the general exception: that he is not responsible to one person in his employ

for an injury occasioned by the negligence of another in the same service, unless generally or in respect of the particular duty then resting upon the negligent employee, the latter so far occupied the position of his principal as to render the principal chargeable for his negligence as for personal fault. Torts, 3 ed., 1173.

It is obvious, then, that the question of the defendant's liability, in part at least, involves the relation existing between the defendant and Fonvielle and between Fonvielle and Dallas at the time the shot was fired. There is evidence tending to show that at this time Southwell, Dallas and Fonvielle were still on duty.

True, some of the witnesses testified that Dallas was not in the discharge of his duties after four o'clock; but others said that he went to the office and used the telephone in an effort to find a trainman just a few minutes before the homicide, and that calling the crew was one of the duties assigned him. Lewis was yardmaster; Dallas was his assistant; and Fonvielle was general yardmaster, in authority superior to Dallas. In fact, Fonvielle testified that his subordinates who were on the defendant's premises were subject to his orders as to any work to be done for the company, and that all employees were subject to orders while on duty. There is evidence that he and Dallas were together several minutes immediately preceding the shooting and that he knew of "unpleasant remarks and threats that had occurred several days prior thereto between Dallas and Southwell." As he and Dallas walked from the butting block to the gate in front of the superintendent's office he had his arm around Dallas, knew Dallas was armed with a pistol, and asked him to go to the office. Dallas had told him he wanted to talk to Southwell "and ask him to lay off me and let me alone." Fonvielle saw Dallas and Southwell approaching each other and feared an altercation. He said he wanted to be close to them if anything unpleasant should occur, but after passing through the gate instead of going towards them he turned away and walked in the direction of the station master's office.

As a dying declaration (C. S., 160) Southwell made this statement: "I was coming from my engine and as I approached the truck Mr. Dallas and Mr. Fonvielle stepped from behind the truck and Mr. Dallas raised a gun and Mr. Fonvielle walked in the opposite direction from Dallas."

These and other circumstances favorable to the plaintiff should have been submitted to the jury on the questions whether Dallas and the others were on duty, whether Fonvielle occupied as to the defendant the relation of vice-principal, whether at the time Dallas was subject to Fonvielle's orders, and whether upon the entire evidence the defendant failed in the performance of a legal duty to protect Southwell from

a sudden assault which the defendant through its vice-principal should have foreseen and prevented. "The courts, as a whole, require the master to answer for the negligence of a vice-principal whenever the default complained of consists in the omission to take such precautions as a prudent man would, under the circumstances, have taken for the purpose of protecting the injured subordinate against some peril of the transitory class, against which he had no adequate means of guarding himself." 4 Labott, Master & Servant, 4308, sec. 1471. The general rule that a principal who intrusts an employee with authority to control other employees is held responsible for the manner in which it is exercised and for the omission properly to exercise it is sustained in numerous decisions. *Tanner v. Lumber Co.*, 140 N. C., 475; *Shaw v. Mfg. Co.*, 146 N. C., 235; *Holton v. Lumber Co.*, 152 N. C., 68; *Walters v. Lumber Co.*, 165 N. C., 388; *Hollifield v. Tel. Co.*, 172 N. C., 714.

We think the judgment of nonsuit should be set aside and a new trial awarded, and for this reason we refrain from a discussion of the other alleged grounds of liability.

Error.

VARSER, J., not sitting.

SOUTHERN DISTRIBUTING COMPANY v. H. T. CARRAWAY ET AL.

(Filed 8 April, 1925.)

1. Estates—Entireties—Husband and Wife—Judgments—Execution.

Execution against the lands of husband and wife, held by them in entireties, will not be issued under a consent judgment against them individually upon a debt due by one of them to the judgment creditor.

2. Same—Consent Judgment—Individual Liability — Contracts—Courts.

A consent judgment is the act of the parties entered of record with the sanction of the court; and where the wife and another have incurred an obligation, trading as a partnership, and a consent judgment has been entered against them as a partnership and individually, and also against her husband individually, who likewise consents as a party to the action, the use of the word "individually" excludes lands held by the husband and wife by entireties, and the same is not subject to be sold under the execution of the judgment.

VARSER, J., took no part in the decision of this case.

APPEAL by defendants, Henry T. Carraway and Willie G. Carraway, from *Midyette, J.*, at December Term, 1924, of GREENE.

Upon objections presented, there was an order directing a sale of lands held by the defendants, Henry T. Carraway and Willie G. Carra-

way, husband and wife, as tenants by the entirety, to satisfy the judgment rendered in this cause, from which the two defendants appeal, assigning said order as error.

Martin & Sheppard and Eastwood D. Herbert for plaintiff.
George M. Lindsay for defendants.

STACY, C. J. Following a compromise between the parties, a consent judgment was entered in this cause against "Emma R. Carraway and Willie G. Carraway, trading as East Carolina Supply Company, and Emma R. Carraway, Henry T. Carraway, and Willie G. Carraway, individually," for $7,894.59, with interest and costs.

The defendants, Henry T. Carraway and Willie G. Carraway, are husband and wife; they own a tract of land as tenants by the entirety. The sheriff has been directed to sell said property. The appeal presents the question as to whether this particular tract of land may be sold under an execution to satisfy the judgment rendered herein. We think not. *Johnson v. Leavitt,* 188 N. C., 682; *Davis v. Bass,* 188 N. C., 200.

It will be observed that, so far as Henry T. Carraway and Willie G. Carraway, husband and wife, are concerned, the judgment is rendered against them individually, or separately, and not jointly, as upon a joint obligation. It is specifically designated in the judgment that it is entered against these defendants "individually." Their liability is not joint and several, as was the case in *Martin v. Lewis,* 187 N. C., 473, *Frey v. McGaw,* 127 Md., 23, and *Ades v. Caplin,* 132 Md., 66.

It is evident from the record that the judgment, which was entered by consent and as a compromise between the parties, was based upon an indebtedness of the partnership, composed of Emma R. Carraway and Willie G. Carraway, and for the payment of which, it would seem, Henry T. Carraway was only secondarily liable.

It was no doubt the purpose of the defendants to exclude the property, held by them as tenants by the entirety, from execution under this judgment, for they consented that same might be entered against them individually and not otherwise. It is the law with us that 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 individually, nor can the interest of either be thus sold. *Hood v. Mercer,* 150 N. C., 699. "The unity of the husband and wife as one person, and the ownership of the estate of that person prevent the disposition of it otherwise than jointly." *Merrimon, C. J.,* in *Bruce v. Nicholson,* 109 N. C., 204, quoted with approval in *Ray v. Long,* 132

N. C., p. 896, and other later cases. "It requires the coöperation of both to dispose of it effectually." *Bank v. McEwen,* 160 N. C., p. 419.

The present judgment is against each individually, or separately, and, for purposes of lien and execution, it is tantamount to a personal and separate judgment against each defendant, so far as Henry T. Carraway and his wife are concerned. In *Hupfel's Sons v. Getty,* 299 Fed., 939, two separate judgments were entered, at the same term of court, against Bernard Lucke and Marie Lucke, husband and wife, on an indebtedness for the payment of which the husband's liability was original and the wife's secondary, and it was held that their entirety estate was not subject to be taken under an execution issued on either judgment.

"Individually" means separately and personally, as distinguished from jointly or officially, and as opposed to collective or associate action or common interests. Century Dictionary. *Oil Co. v. Bank,* 255 S. W. (Tex.), 219. Suppose a judgment were rendered against John Doe and Richard Roe individually, this would not be a judgment against them as members of the partnership firm of "Doe & Roe," nor would it be a lien upon the property belonging to such copartnership in the absence of a statute making it so. *Willis v. Hill,* 19 N. C., 231; *Street v. Meadows,* 33 N. C., 130; *Chemical Co. v. Walston,* 187 N. C., 817.

Where lands are conveyed to husband and wife, to be held by them individually, they would take the same by moieties, as tenants in common, and not by the entirety. *Davis v. Bass, supra.* Hence, a judgment rendered against husband and wife individually or separately should not be held as a joint obligation, rendering an estate held by them as tenants by the entirety liable therefor. *Johnson v. Leavitt, supra.*

In the instant case it can hardly be said the defendants have acted "jointly" in allowing the present consent judgment to be entered against them, so as to affect their entirety estate, for it is expressly stipulated, as a part of the compromise between the parties that the judgment is to be rendered against "Emma R. Carraway and Willie G. Carraway, trading as East Carolina Supply Company, and Emma R. Carraway and Henry T. Carraway and Willie G. Carraway, individually," and it was so rendered. *Expressio unius est exclusio alterius. Dunlap v. Hill,* 145 N. C., p. 316. Nor can it be said that the word "individually" was used simply to include the personal liability of the defendants, as distinguished from the partnership liability of Emma R. Carraway and Willie G. Carraway, trading as the East Carolina Supply Company. It is not so nominated in the judgment, but, as written, it applies equally among the individual defendants as well as between the members of the partnership firm, as such, and the defendants in their individual capacity. *Bank v. McEwen, supra.*

The judgment before us, being a "consent judgment," is to be construed as if the parties had entered into a written contract, duly signed and delivered, embodying therein the terms of said judgment. *Bunn v. Braswell,* 139 N. C., 135. It stands as the agreement of the parties, made a matter of record at their request, and with the permission and approval of the court. Speaking to the question in *Wilcox v. Wilcox,* 36 N. C., 36, *Gaston, J.,* says a consent judgment "is in truth the decree of the parties"; and *Dillard, J.,* in *Edney v. Edney,* 81 N. C., 1, defines it as follows: "A decree by consent is the decree of the parties, put on file with the sanction and permission of the court; and, in such decree, the parties, acting for themselves, may provide as to them seems best concerning the subject-matter of the litigation." *Vaughan v. Gooch,* 92 N. C., 524. "Consent judgments are in effect merely contracts of the parties, acknowledged in open court and ordered to be recorded"—*Clark, C. J.,* in *Bank v. Comrs.,* 119 N. C., p. 226. "A judgment by consent is not the judgment or decree of the court. It is the agreement of the parties, their decree, entered upon the record with the sanction of the court. It is the act of the parties rather than that of the court"—*Brown, J.,* in *Belcher v. Cobb,* 169 N. C., p. 694. See, also, *Harrison v. Dill,* 169 N. C., 545; *Lynch v. Loftin,* 153 N. C., 270; *Henry v. Hilliard,* 120 N. C., 479; 15 R. C. L., 645.

The execution should be withheld in so far as it undertakes to subject the entirety estate of Henry T. Carraway and Willie G. Carraway to the satisfaction of the present judgment.

Error.

VARSER, J., took no part in the decision of this case.

RICHARD HARDIN v. THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LTD.

(Filed 8 April, 1925.)

1. Insurance, Fire — Contracts — Policies — Stipulations — Provisions— Waiver—Knowledge.

Where a policy of fire insurance has been issued under the statutory standard form, the condition therein of sole and unconditional ownership of the insured cannot be held to have been waived by the insurer or its agent in the absence of knowledge that the insured's ownership was otherwise than stated in the policy contract.

2. Insurance, Fire—Contracts—Policies—Statutes—Parol Agreements—Sole Ownership.

In the absence of fraud an insurance company cannot be held liable upon a parol contract alleged to have been made by its agent, which is contradictory of and totally inconsistent with the standard form prescribed by statute, C. S., 6436, 6437.

3. Same—Tender—Unearned Premiums—Trials.

Where a contract of fire insurance provides that the insurer shall return the unearned portion of the premium to invalidate the policy under the condition that the insured had not the sole and unconditional ownership of the property insured without proper provision to that effect appearing in the written policy: *Held*, in an action upon the policy to recover the loss thereunder, a tender of the unearned premium made upon the trial is sufficient.

VARSER, J., having been of counsel did not sit, and took no part in the decision of this case.

APPEAL by plaintiff from *Calvert, J.*, at December Term, 1924, of ROBESON.

On 26 August, 1921, the defendant issued to the plaintiff a certain policy of insurance covering his dwelling-house situated on the east side of the Fayetteville road seven miles north of Lumberton. The policy was of the standard form (C. S., 6437) and contained the statutory provisions, among which were these:

"This entire policy shall be void, unless otherwise provided by agreement in writing added hereto, (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 (3) if this policy be assigned before a loss.

"Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damages occurring: (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 (b) while the hazard is increased by any means within the control or knowledge of the insured.

"No one has power to waive any provision or condition of this policy except such as by the terms of the policy may be the subject of agree-

ment added hereto, nor shall any such provision or condition be waived unless the waiver is in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be waived by any requirement, act or proceeding on the part of this company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by the rider added hereto." It contained also the usual provision in reference to the proof of loss.

At different dates the plaintiff executed deeds of trust on the property insured as follows: On 17 September, 1920, a deed of trust to T. L. Johnson, trustee for H. J. Wessell, and on 12 February, 1921, a deed of trust to Dickson McLean, trustee for R. D. Caldwell & Son, both of which were outstanding and uncanceled at the time the policy was issued. Without notice to the defendant the plaintiff on 27 December, 1921, executed an additional deed of trust to I. K. Biggs, trustee for K. M. Biggs covering the same property.

The proof of loss signed by the plaintiff contained this paragraph: "The property insured belonged to Richard Hardin, and no other person or persons had any interest therein except . . ."

At the close of the evidence his Honor announced that he would instruct the jury to return a negative answer to the issue, "Is the defendant indebted to the plaintiff?" Upon this intimation the plaintiff excepted, submitted to a nonsuit, and appealed.

F. Ertle Carlyle and McLean & Stacy for plaintiff.
Johnson, Johnson & McLeod for defendant.

ADAMS, J. The defendant resisted recovery on the ground that the plaintiff at the time he procured the policy was not the sole and unconditional owner of the insured property, although in his proof of loss he made oath that no other person was interested in it. In his complaint the plaintiff declared on the contract of insurance, but in his reply to the answer he alleged that the defendant had waived the pleaded provision that the ownership of the property must be sole. The basis of the alleged waiver is laid in the plaintiff's testimony, the material part of which is substantially as follows: "I told him (the agent) I would leave it absolutely to him for protection and he wrote me a policy. He said he would put me in a company that would absolutely protect me from any loss by fire in any way. When I told him I would leave it absolutely with him what policy to write he told me not to be uneasy, he would put me in a company that would protect me from any fire whatever, to rest easy. He didn't ask me about any mortgages whatever. . . .

When the policy came back to me I put it in my trunk. I am not an educated man. I am an Indian and can read a little bit, not good. I cannot understand the terms of the policy. I cannot read it well enough to tell what it was. I just thought it was all right. I relied upon the statements made to me by the agent of the insurance company that it would protect me. I never did read it over. I wouldn't understand the clause stating that the interest of the insurer would be "unconditional sole ownership" would prevent me from giving a mortgage."

The plaintiff does not contend that the agent made any false representation which would avoid the policy, but rather that he waived the provisions of the written contract regarding the sole ownership of the property and that the defendant for this reason is liable to the plaintiff for the loss he sustained.

The generally accepted definition of a waiver is the intentional relinquishment of a known right. It is a voluntary act and implies an election by the party to dispense with something of value or to forego some advantage which he might at his option have demanded and insisted on. 27 R. C. L., 904. In *Mfg. Co. v. Building Co.,* 177 N. C., 103, it is said that a party cannot waive that of which he has no knowledge. It is also said that there are several essential differences between waiver and estoppel; that waiver involves both knowledge and intention, the one being essential to the other and exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right. Pages 106, 107. There is no evidence that the agent had any information of the outstanding deeds of trust, and the doctrine of waiver cannot be invoked on the ground that the defendant with knowledge of their existence issued the policy with intent to waive the requirement of sole ownership.

The plaintiff, however, rests his contention on another proposition. He argues that the agent negligently failed to make any inquiry as to the ownership of the land or as to any encumbrances upon it, that the plaintiff did not comprehend the form and meaning of the policy and relied upon the agent's promise fully to protect him; and that by accepting the premium the defendant contracted in any event to save the plaintiff harmless from loss by the burning of the property insured. The contention involves two propositions: (1) that it was the duty of the agent particularly to inquire into the question of sole ownership, and (2) that his failure to do so combined with the plaintiff's evidence amounted substantially to an unconditional contract of insurance by the terms of which the defendant without regard to the stipulations in the policy became absolutely liable for the plaintiff's loss.

We cannot approve the position that in the absence of a request it was the agent's legal duty to explain the meaning and effect of all the provisions in the policy, or that his failure to inquire as to outstanding mortgages was a waiver of the requirement of sole ownership. We do not understand the cases cited by the plaintiff as warranting this conclusion. In *Modlin v. Ins. Co.*, 151 N. C., 35, the validity of the policy was recognized after the adjustment and appraisal of loss by remittance to the local agent and notice to the assured; and in *Ins. Co. v. Lumber Co.*, 186 N. C., 269, the agent who wrote the policy knew at the time that the property was owned by the assured and others. It clearly appeared that the defendant with full knowledge had waived the provisions of the policy pleaded in avoidance of the recovery; and the principle was upheld in *Bullard v. Ins. Co., ante,* 34. In these and other similar cases the insurer in effect admitted liability with knowledge of the facts constituting a breach of the provisions.

In the case before us another principle may be applied. The plaintiff was not an educated man, but he could read and write. He did not read the policy or request the agent to read it. A person who can do so is generally required to read a written contract before signing or accepting it and ordinarily his failure to do so is negligence for which the law affords no redress. This principle, of course, would be modified in case of positive fraud, but here no fraud is alleged or relied on. *Leonard v. Power Co.*, 155 N. C., 10; *Carson v. Ins. Co.*, 161 N. C., 441.

It is obvious, then, that the substance of the plaintiff's contention when analyzed is this: that the plaintiff and the defendant's agent entered into a parol contract, utterly at variance with and contradictory of the written contract, by which the defendant unconditionally insured the plaintiff against loss by fire. Can such a contract be enforced under the facts disclosed by the record?

The policy sued on is of the standard form prescribed by statute. It is provided that no fire insurance company shall issue fire insurance policies on property in this State other than those of the standard form duly filed and designated as the standard fire insurance policy of the State. C. S., 6436, 6437. This form of policy contains a provision against waiver, and a waiver of the stipulations or conditions in the policy has been permitted only under circumstances similar to those in the cases of *Modlin v. Ins. Co.* and *Bullard v. Ins. Co., supra,* and has never been extended in this jurisdiction to the approval of a contract entirely separate and distinct from the standard form. To sanction the power to make such a contract would be equivalent to the destruction or abolition of the form prescribed by law.

In our opinion there was no waiver by the defendant of the conditions in the policy, and the fact that the sole and unconditional ownership

of the insured property was not in the plaintiff and that the defendant knew nothing of the outstanding deeds of trust was sufficient under the decisions of this Court to invalidate the contract of insurance. *Hayes v. Ins. Co.*, 132 N. C., 703; *Weddington v. Ins. Co.*, 141 N. C., 234; *Modlin v. Ins. Co., supra; McIntosh v. Ins. Co.*, 152 N. C., 50; *Lancaster v. Ins. Co.*, 153 N. C., 285; *Watson v. Ins. Co.*, 159 N. C., 639; *Bank v. Ins. Co.*, 187 N. C., 97.

During the argument it was urged by the plaintiff that there had been no return or tender of the premium paid by the plaintiff. The judge suggested an amendment of the complaint but the plaintiff for obvious reasons declined to make the amendment. The defendant in open court then tendered the amount of the premium and the interest thereon from the date of the policy. The course pursued by the defendant was approved in *Weddington v. Ins. Co., supra,* in which it is said: "It is argued, though, that the company should have returned or at least tendered the unearned portion of the premium before it could insist upon a forfeiture. The policy expressly provides that the unearned portion of the premium shall be returned on surrender of the policy. This is the contract of the parties, and we are not permitted to change it. There has been no surrender of the policy, but the complaint is drawn and the trial proceeded, upon plaintiff's part, upon the theory that the policy was valid and would not, therefore, be surrendered. The condition precedent to the return of the premium has not been performed, but a refusal to comply with it is to be clearly implied. It has been held in a number of cases that in a case of a breach of condition which invalidates the policy, the company is not bound at its peril, upon notice of such breach, to declare the policy forfeited or to do or say anything to make the forfeiture effectual, and a waiver will not be inferred from mere silence or inaction on its part. It may wait until claim is made under the policy, and then rely on the forfeiture in denial thereof or in defense of a suit brought to enforce payment of it. 6 A. & E. (2 ed.), 939; *Dowd v. Ins. Co.*, 1 N. Y. Supp., 31; *Ins. Co. v. Brecheisen,* 50 Ohio St., 542; *Harris v. Assn. Society,* 3 Hun., 725; *Flynn v. Ins. Co.*, 78 N. Y., 569; *Ins. Co. v. Hull,* 77 Md., 498; *Todd v. Ins. Co.*, 100 N. W., (Mich.), 442. The principle is distinctly recognized and approved by this Court in *Perry v. Ins. Co.*, 132 N. C., 283."

We find

No error.

VARSER, J., having been of counsel did not sit and took no part in the decision of this case.

FANNIE E. FAIRCLOTH v. L. O. JOHNSON.

(Filed 8 April, 1925.)

1. Instructions—Evidence—Appeal and Error.

The charge of the trial court to the jury will be sustained on appeal when it is supported by any evidence upon the trial, taken in the most favorable light to the appellee, and the principles of law arising thereon are correctly applied.

2. Deeds and Conveyances — Mortgages — Registration—Delivery—Presumption.

The registration of a mortgage irrebuttably presumes its delivery to the mortgagee in favor of a bona fide purchaser.

3. Deeds and Conveyances—Mortgages—Cancellation—Statutes.

It is only those named in the statute, (*not the mortgagor*) who may require the register of deeds to cancel the instrument upon his record on endorsement of payment and satisfaction, to wit: the payee, mortgagee, trustee, or assignee of the same, etc., and where a subsequent purchaser has acquired the mortgaged lands relying upon a proper cancellation of this character, his title is not affected by any undisclosed agreement or understanding between the original parties.

4. Same—Presumptions.

Where an entry is made by the register of deeds upon the margin of a registered mortgage "the original being exhibited to me marked paid in full, I adjudge the same null and void, and it is hereby canceled of record," *presumes, no evidence appearing to the contrary, that it* was exhibited by the mortgagee or the proper person designated by the statute.

5. Contracts—Infants—Disaffirmance of Contracts—Actions.

An executory contract of an infant is voidable by him and not absolutely void, and he, after coming of age, may repudiate an executory contract he has theretofore made within a reasonable time, and recover such amounts of money as he may have paid thereunder, or restore such benefits as he may have received and still enjoys, and three years are regarded as a reasonable time, and an action to rescind the contract brought by the infant within a year after he has reached his majority is *held* to be a sufficient disaffirmance by the infant of his contract.

APPEAL by defendant from *Daniels, J.*, and a jury, at September Term, 1924, of SAMPSON.

The plaintiff, Fannie E. Faircloth, a daughter of T. Jarvis Smith, instituted this action against the defendant, L. O. Johnson, for the purpose of having the alleged unpaid balance of a note, to wit: $1,250, with interest thereon from 1 January, 1923, declared a lien upon the lands described in a mortgage deed appearing of record in Sampson County, in Book 236, page 319, excepting therefrom 14 acres sold by

order of court to J. D. Johnson, and for foreclosure. The defendant admitted that he purchased the lands described in this mortgage deed from T. Jarvis Smith, and alleged payment of value therefor, and that plaintiff's alleged mortgage, "was never in fact a mortgage as it was not executed for a valuable consideration or to cover any form of indebtedness, as there was nothing due by the said T. J. Smith to his daughter, Fannie E. Faircloth, and that if said instrument was ever executed by the said T. J. Smith, that it was never delivered to the plaintiff or to any person for her, but remained at all times in the possession of the said T. J. Smith and, therefore, he had the right and authority to cancel the same of record, which he did."

The verdict was as follows:

"1. Is the entry upon the margin of the record where the mortgage sued on is recorded a proper and legal cancellation thereof? Answer: 'No.'

"2. If not, how much, if anything, is still due and unpaid on said mortgage indebtedness? Answer: '$1,250 with interest from 1 January, 1923.'"

The court charged the jury that, if they found "the facts to be as testified to by the witnesses, to answer the first issue, 'No.' And the second issue, '$1,250 with interest from 1 January, 1923.'"

The chief controversy in this case was as to the legality of the marginal entry appearing on the record of the mortgage sued on in these words: "The original mortgage being exhibited to me marked paid in full, I adjudge same null and void and is hereby canceled of record. This 13 September, 1915. J. H. Packer, Register of Deeds."

The mortgage deed from T. Jarvis Smith, to plaintiff, was filed for registration 24 November, 1913, and registered 28 November, 1913, in Book 236, page 319, in the office of the register of deeds of Sampson County.

The deed from T. Jarvis Smith and Rossie Smith, his second wife, to the defendant, was probated 8 October, 1915, and filed for registration 12 October, 1915, and registered 22 October, 1915, in Book 270, page 1, in the office of register of deeds for Sampson County.

There was no evidence of any payment on the mortgage indebtedness except $250 arising from the sale of the 14 acres of the mortgaged land to J. D. Johnson, a release of the same pursuant to an order of court. The mortgage deed was in due form and registered one year, ten months and eighteen days before the defendant's deed was registered.

The defendant relied chiefly on the marginal entry, claiming this to be, as to him, a purchaser for value, a valid discharge and release of the land. The other evidence on behalf of the defendant tended to show

that it was improbable that the mortgage indebtedness was incurred for money, either loaned, or had and received.

The court was of opinion that the marginal entry did not constitute a valid release of the land from the mortgage.

From the judgment entered upon this verdict, the defendant appealed.

Butler & Herring and Fowler & Crumpler for plaintiff.
Faircloth & Fisher for defendant.

VARSER, J. The charge of the trial court is to be sustained if, upon any view of the evidence taken in its most favorable light for the defendant, but yet found to be true in its entirety, it supports the verdict.

In order to constitute a valid cancellation under subsection 2 of C. S., 2594, on 13 September, 1913, the "endorsement of payment and satisfaction appearing thereon (on the mortgage and note) by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the State of North Carolina," contemplates clearly that such payee or mortgagee must be *sui juris*.

In the first paragraph of the complaint it is alleged, and not denied by defendant, that the plaintiff attained her majority 15 September, 1922. Hence, it necessarily follows that, on 13 September, 1915, the date of the marginal entry in question, she was only 14 years old, less 2 days.

The *mortgage indebtedness* became due 1 January, 1923, and this action was tried at the September Term, 1924, of Sampson Court.

The defendant testified: "*I have known the plaintiff all her life,* and knew her financial circumstances up to the date of this mortgage." And on cross-examination, he further said: "At that time I knew neither the plaintiff nor her father had money enough to pay this mortgage that I knew of." Other witnesses offered by defendant testified as to the *non-age* of the plaintiff.

Therefore, it appears, not only from the admission in the pleadings, but from the testimony, which the jury has found to be true, that the defendant has, at all times, been fully cognizant of the plaintiff's non-age.

In *Chandler v. Jones,* 172 N. C., 569, *Allen, J.,* says: "The contract of an infant is voidable and not void, and it may be either ratified or disaffirmed upon attaining majority at the election of the infant. If money is paid to an infant upon a contract and it is consumed or wasted, the infant may recover the full amount due under the contract." *Rawls v. Mayo,* 163 N. C., 177; *Hogan v. Utter,* 175 N. C., 332; *Gaskins v. Allen,* 137 N. C., 430; *Baggett v. Jackson,* 160 N. C., 31.

In *Weeks v. Wilkins,* 134 N. C., 522, three years after arrival at majority, is held to be a reasonable time in which an infant is required to disaffirm, or he will be held to have affirmed his contract.

Gaskins v. Allen, 137 N. C., 426; *Chandler v. Jones, supra; Baggett v. Jackson,* 160 N. C., 26.

If the infant has received money under such contract during his minority, he must, if he has it, or any part thereof, return it upon his disaffirmance, but if he does not have it, or the benefits therefrom, he need not return it or offer to put the parties *in statu quo. Chandler v. Jones, supra; Baggett v. Jackson, supra.*

In *Jackson v. Beard,* 162 N. C., 105, an infant husband was allowed, upon attaining his majority, to disaffirm his consent to a sale of his wife's land which he had during his minority signified by joining in her deed, with the result that her deed became thereby void.

In the case of *Phillips v. Hoskins,* 128 Ky., 371, the same doctrine as held in *Jackson v. Beard, supra,* is held.

That an infant may disaffirm a contract fully executed by both parties is held in *Gannon v. Manning,* 42 App. D. C., 206.

In *MacGreal v. Taylor,* 167 U. S., 688, the Court held it not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed *in statu quo.*

A disaffirmance after full age, of a contract made in infancy, will discharge a trust lien given to secure payment of the consideration. *Hobbs v. Hinton Foundry and Machine Co.,* 74 W. Va., 443; 82 S. E., 267; Anno. Cas., 1917 D, 410.

The defendant contends upon this evidence there was no delivery of the mortgage so as to make it effective. There was a prima facie case of delivery made out by the registration. *Linker v. Linker,* 167 N. C., 651.

A presumption of delivery arises from registration. *Smithwick v. Moore,* 145 N. C., 110.

This is sufficient to support a verdict, even against opposing proof. *Buchanan v. Clark,* 164 N. C., 56; *Fortune v. Hunt,* 149 N. C., 358.

The subsequent acts or declarations of grantor are not admissible to rebut presumption of delivery arising from registration. *Helms v. Austin,* 116 N. C., 751.

Retaining possession of a deed, and the land conveyed thereby, will not overcome the presumption of delivery arising from registration, as between father and wife and children. *Helms v. Austin, supra.*

Of course, nobody denies the right and the power of the father, T. Jarvis Smith, nothing else appearing, to give his daughter the $1,500 note and mortgage in controversy herein, and since he registered it

prior to the sale of the lands in controversy to the defendant, which sale, as against the plaintiff, only took place at the time of the registration of the defendant's deed, we see no ground upon which the defendant can justly complain, in the light of his actual knowledge all the time of the non-age of the plaintiff.

In the instant case, the cancellation on the original papers must have been entered by the payee and mortgagee named therein, there being no evidence and no contention that the same had been marked canceled by any assignee or North Carolina bank. In fact, it would seem that, if such had been the case, the same rule as to disaffirmance by an infant would, also, apply. It would be totally unnecessary to cite authority to prove that the plaintiff's suit to obtain benefits of the note and mortgage is an acceptance thereof and a disaffirmance of any cancellation that she had made, even if such cancellation by her was supported by the evidence. On the contrary, the defendant alleges that the mortgage in controversy remained in the possession of the mortgagor, the father of the plaintiff, and that he, therefore, had the right and authority to cancel the same of record, which he did. Under the statute C. S., 2594, subsec. 2, there is no authority given to the register of deeds to enter cancellation of record upon the cancellation thereof by the mortgagor. It is expressly therein provided otherwise. *Guano Co. v. Walston,* 187 N. C., 667; *Bank v. Sauls,* 183 N. C., 165

In *Tate v. Tate,* 21 N. C., 22, the Court, upon facts quite similar to the instant case, rendered a like judgment to that entered herein.

We find it unnecessary to pass upon the very interesting question discussed in this case with reference to the form of the marginal entry. In any event, the infancy of the plaintiff is a sufficient shield to protect her against the cancellation pleaded by the defendant.

Recently the question of infancy has been thoroughly considered and discussed with cogent reasoning and abundant authority in *Morris Plan Co. v. Palmer,* 185 N. C., 109, and in *Hight v. Harris,* 188 N. C., 328.

The instant case comports with the reasoning in these cases and in *Jackson v. Beard, supra,* in which it is said: "The basic reason for permitting infants to avoid these deeds and contracts is that until they are 21 they are not supposed to have the mental capacity to make them."

Upon the record in this case, it is apparent that, on account of the admitted infancy of the plaintiff, the charge of the trial court was correct. Therefore, we hold that there is

No error.

JOHN W. CRAWFORD, EXECUTOR AND TRUSTEE UNDER THE WILL OF J. H. CRAWFORD, DECEASED, v. R. G. ALLEN, JAMES M. ALLEN, AND W. H. ALLEN, AND

CAPITAL REALTY COMPANY v. JOHN W. CRAWFORD, EXECUTOR AND TRUSTEE UNDER THE WILL OF J. H. CRAWFORD, DECEASED, AND LOUIS SAMUELS AND ALEXANDER LEVY.

(Filed 15 April, 1925.)

1. Contracts—Bargain and Sale—Covenants—Breach.

Where the owner of lands, for a valid consideration, enters into an unconditional contract for the sale thereof, at a fixed price, and the other party unconditionally contracts to purchase the same at a future time, it is an executory contract of sale and purchase, whereunder each of the parties acquire rights and equities for performance upon complying with its terms, and where the purchaser agrees to pay a certain per cent of the purchase money in lieu of interest, and the taxes and insurance, these considerations are to be regarded as covenants, and not conditions the breach of which will work a forfeiture of his right to specific performance.

2. Same—Equity—Liquidated Damages.

Where an executory contract for the sale and purchase of land expressly provides for the purchaser's payment of a certain amount of liquidated damages in the event of his failure to perform its terms, and it appears upon the breach of the contract that the seller has not been damaged, no liquidated damages are recoverable; and where the purchaser has received the specified amount of liquidated damages, the courts of equity will apply such damages to the consideration for the transaction provided for in the contract.

3. Same—Forfeitures.

Courts of equity do not favor forfeitures; and where a contract of sale and purchase of lands provides for the payment of liquidated damages by the purchaser in breach of its terms, this provision will not be enforced where there has been no injury and no loss.

4. Same—Time of the Essence.

A provision of a contract for the sale and purchase of land that "time is of the essence of the contract" will be disregarded in equity when it is apparent, under the application of equitable principles to the case in hand, that it was not of the essence thereof.

5. Same—Payment—Accounting.

Equity will decree specific performance in favor of a purchaser under a contract for the sale and purchase of lands who has failed to perform certain covenants therein required of him as to payments of certain moneys and the balance of the purchase price, and reasonably extend the time for payment when at the institution of the vendor's suit for damages he is ready, able and willing to pay the amounts chargeable against him; and upon a disagreement as to this amount, an accounting between the parties may be taken.

6. Lis Pendens—Notice—Title to Lands—Registration.

When the title of the owner of leased lands is in litigation at the time of making the lease, in the county wherein the lands lie, it is notice to the lessees of the title adversely claimed, and the question of *lis pendens* of proceedings in another county affecting the title does not apply.

7. Appeal and Error—Record—Courts—Jurisdiction.

The jurisdiction of the court in the determination of an action does not arise on appeal when the record is silent as to the facts whereon the motion is based, and the matter is called to the attention of the Supreme Court, by demurrer, the first time.

APPEAL by John W. Crawford, executor and trustee, and Louis Samuels, from judgment rendered by *Horton, J.*, at Fall Term, 1924, of WAKE.

The first action, entitled as above, was begun in the Superior Court of Wake County, on 1 February, 1924. Plaintiff alleged that defendant, R. G. Allen, had breached a contract for the purchase and sale of a lot of land, situate on Fayetteville Street, in the city of Raleigh, entered into by plaintiff and said defendant, in writing, dated 13 January, 1920, and extended from time to time, by mutual agreements, to 1 January, 1924, said extension agreements being in writing, signed by the parties, and setting forth the terms and conditions upon which same were entered into; and that plaintiff had been damaged by breach of said contract by defendant in the sum of $6,279.20. Plaintiff demanded judgment that he recover of defendant, R. G. Allen, and his codefendants, sureties on his bond, as alleged in the complaint, the said sum as damages.

Defendants, in their answer, filed on 8 March, 1924, admitted the execution of the contract and of the extension agreements, and also of the bond, as alleged. Defendants allege that said contract is still in full force and effect; that R. G. Allen had paid $2,000 on the purchase price of said lot, leaving a balance due, after said payments, of $43,000; that during the existence of said contract, plaintiff and said defendant had had dealings with each other, with respect to the lot, the subject-matter of said contract, as provided in the extension agreements, involving rents and income arising therefrom, and expenditures for taxes, insurance and repairs made thereon, and that defendants were ready, willing and able to pay the balance due on the purchase price for said lot when same had been ascertained and determined by an accounting between the parties. Defendants prayed that plaintiff be required to execute deed conveying to R. G. Allen, or his assigns, the said lot upon payment by defendants to plaintiff of the balance due on the purchase money.

The second action, entitled as above, was also begun in the Superior Court of Wake County, on 12 September, 1924. The plaintiff, Capital

Realty Company, alleged that on 28 June, 1923, R. G. Allen had assigned to plaintiff, for a valuable consideration, all his interest in the contract between the said R. G. Allen and defendant, John W. Crawford, executor and trustee under the will of J. H. Crawford, deceased, relative to said lot, and had conveyed to plaintiff all his right, title and interest in and to said lot by virtue of said contract, and that said assignment and conveyance had been duly registered on said date; that said contract was in full force and effect, and that plaintiff was ready, willing and able to pay the balance due on the purchase price for said lot in accordance with said contract; that in June, 1924, the said Crawford undertook to lease the said lot for a term of ten years to his codefendants, Louis Samuels and Alexander Levy; that said Samuels and Levy had notice of the contract under which plaintiff claimed and took the said lease, subject to the rights of plaintiff in and to said lot; that said Samuels and Levy were about to make certain repairs to and alterations in the building on the said lot, which would materially affect the value thereof. Plaintiff prayed for an order enjoining and restraining defendants from making any repairs to or alterations in said building.

Defendants in their answers deny that plaintiff has any right, title or interest in or to said lot, alleging that R. G. Allen had, prior to the date of the lease, forfeited all rights under the contract by breaches of the same, and that plaintiff acquired no rights with respect to the said lot by the alleged assignment or conveyance to it from R. G. Allen. Defendants Samuels and Levy deny that they had any notice, actual or constructive, of any claim of plaintiff to said lot, and both defendants pray that the prayer of plaintiff be denied, and that said lease be declared in all respects valid and binding.

By consent of all parties, these two actions were consolidated for the purpose of the hearing. A trial by jury was duly waived, and the judge, by consent, found the facts from the evidence offered at the hearing. The findings of fact and conclusions of law are set out in the record. The judge, upon an accounting between John W. Crawford, executor and trustee, and R. G. Allen, finds that the balance due on the purchase price for said lot, on 1 January, 1924, is $50,881.24, and orders, adjudges and decrees (1) that Capital Realty Company shall, on or before the date fixed in the decree, pay into the office of the clerk of the Superior Court of Wake County the sum of $50,881.24, with interest from 1 January, 1924, less the sum of $333.33 for each and every month from and including January, 1924, until said sum of money is paid, with interest on said monthly payments from the last day of each month; (2) that upon payment of said sum of money into the said office, John W. Crawford, executor and trustee, shall execute a

good and sufficient deed, conveying said lot in fee simple to Capital Realty Company or its assigns; (3) that the lease from John W. Crawford, executor and trustee, to Louis Samuels and Alexander Levy be and the same is canceled as against the rights of Capital Realty Company; (4) that John W. Crawford, executor and trustee, and said Samuels and Levy, shall deliver possession of said lot to Capital Realty Company or its assigns upon payment of said sum of money into the clerk's office, as required in the judgment and decree.

John W. Crawford, executor and trustee, and Louis Samuels except to said judgment and decree, and appealed therefrom to the Supreme Court, assigning errors.

Robert C. Strong, R. N. Simms, W. Tolman Shaw, and Manning & Manning for John W. Crawford.

Pou & Pou and J. L. Emanuel for Louis Samuels.

W. H. Yarborough, J. W. Bailey, and J. Crawford Biggs for Capital Realty Company and R. G. Allen, James M. Allen, and W. H. Allen.

CONNOR, J. The questions presented on this appeal by John W. Crawford, executor and trustee, as stated by his counsel in the brief filed in this Court, in his behalf, are:

1. Whether the contract between Crawford, executor and trustee, and R. G. Allen is sufficient to entitle R. G. Allen, or his assigns to the equitable remedy of specific performance.

2. If so, whether by the terms of the said contract, all rights thereunder, in or to the said contract or the lot, the subject-matter thereof, have been forfeited by R. G. Allen by his failure to perform and comply with the said terms.

3. If so, whether Crawford, executor and trustee, upon the facts found by the judge, is entitled to judgment against R. G. Allen and the sureties on his bond for damages, as alleged by him.

These questions are fairly presented by the exceptions and assignments of error, appearing in the statement of the case on appeal and discussed in appellant's brief. Answers to these questions will be determinative of this appeal.

The judge finds that "the contract of sale and purchase of the Crawford store in controversy was entered into between R. G. Allen and John W. Crawford, executor and trustee, on 13 January, 1920, and said contract was duly recorded in the office of the register of deeds of Wake County; that the date for payment of the balance of the purchase money was extended from time to time to 1 January, 1924, as per the agreements attached to the pleadings, the original contract being otherwise amended as appears in said agreements.

The evidence upon which these findings of fact are made is the contract and agreements, all of which are in writing and signed by both Crawford, executor and trustee, and R. G. Allen. It is admitted in the pleadings that John W. Crawford, executor and trustee, had authority to enter into the various contracts with the defendant. The original contract dated 13 January, 1920, recites that the agreement is made "subject to the order of the court to be hereafter obtained." It is provided in the contract dated 6 July, 1920, that "a controversy without action, under our statutes, shall be submitted to the Superior Court of Wake County, to adjudicate the title to a certain lot of land in Raleigh, North Carolina, between Fayetteville and Salisbury streets, belonging to the estate of John H. Crawford, deceased." It is alleged and admitted that the title of John W. Crawford, executor and trustee, has been favorably adjudicated. Thus the only condition precedent to the full, binding effect of the said contract has been complied with, and the parties thereto are vested with all the rights and subject to all the obligations set out therein. The contract is no longer conditional; the mutual rights and obligations of the parties are to be determined by the contract, which is in writing, signed by them. The contract was in full force and effect on 1 January, 1924, unless R. G. Allen had forfeited his rights thereunder by failure to perform and comply with the terms thereof.

Crawford, executor and trustee, contends that the contracts are not sufficient to entitle R. G. Allen or his assigns to a decree of specific performance, for that there is a want of mutuality of obligation in said contracts. This contention cannot be sustained. Crawford, executor and trustee, is by the express terms of the contract, under obligation to sell and convey, and Allen to purchase and pay for the lot. Neither has an option, each is entitled under the contract to rights, which are not dependent upon any further act of the other; these rights are enforceable by either as against the other. The contracts are bilateral, and not unilateral. It is a contract of purchase and sale. As said by *Justice Stacy,* of the contract involved in *Howell v. Pate,* 181 N. C., 117: "The agreement contains the necessary elements of an executory contract, to wit, mutuality of obligation and remedy." *Davis v. Martin,* 146 N. C., 281. *Pollock v. Brookover,* 6 L. R. A. (N. S.), 403; *Rucker v. Sanders,* 182 N. C., 607; See *Solomon v. Sewerage Co.,* 142 N. C., 439. Bispham's Equity, p. 377.

Nor can the contention that the contract is not enforceable by a decree of specific performance, because it provides for the payment, upon its breach by R. G. Allen, vendee, to Crawford, executor and trustee, vendor, if liquidated damages, be sustained. In the contract dated 13 January, 1920, Crawford, executor and trustee, acknowl-

edges the receipt from R. G. Allen of five hundred, "to bind the trade." It is therein provided that in the event Allen refuses to pay the purchase price upon the conveyance of title by Crawford, "the said sum of five hundred dollars, given to bind the trade, is to be regarded as liquidated damages to cover the expenses that Crawford may have been put to, but that upon said Allen's performance of his part of the contract, the said five hundred dollars is to be allowed as a credit on the purchase price." In the contract, dated 6 July, 1920, it is agreed that upon default by Allen in the payment of the purchase price, "then said Allen shall pay the said Crawford, executor and trustee, the sum of one thousand five hundred dollars as liquidated damages for the breach of his contract." Upon the execution of this contract Allen deposited with a bank designated by Crawford, the sum of one thousand five hundred dollars, to be held in trust for said purpose. In the contract dated 1 April, 1921, providing, primarily, for an extension of the time for payment of the purchase price by Allen, it is recited that the balance due on the purchase price is $43,000, "the said sum being the original purchase price ($45,000) less the sum of two thousand dollars which Allen has paid thereon, which includes fifteen hundred dollars paid by Allen just before the expiration of this contract. In the last agreement, dated 16 December, 1922, extending time of payment to 1 January, 1924, the balance due on the purchase price is stated as $43,000, it being agreed that the deposit of $1,500 "is to be continued to be held in trust as liquidated damages." In their brief, attorneys for Crawford concede that these sums should be deducted from the amount which he demands as damages.

Whether, notwithstanding the reference, in the contracts, to the five hundred and the fifteen hundred dollars as liquidated damages, in view of the application of these sums by the parties to the contract as payments on the purchase price, a court, exercising equitable jurisdiction, considering the substance and not the form, will regard them as deposits to cover liquidated damages, need not now be determined. A court of equity, which does not favor forfeitures, and will not enforce penalties, but seeks to do justice in accordance with the rights of both parties, as determined by an enlightened conscience, will not be swift to sustain an undertaking to pay liquidated damages, where there has been no injury and no loss. Appellant's insistence that he ought not to be decreed to convey this property to Allen or his assigns, because it has greatly enhanced in value during the pendency of the contract relations of the parties, is hardly consistent with his demand for liquidated damages, because Allen failed to pay him the purchase price agreed upon. If he could sustain his contentions in this action, and thus be relieved of his obligations under the contract, he would suffer no loss,

for he now contends that the property which he sold in 1920, for $45,000 is worth $75,000 or more.

In *Gordon v. Brown,* 39 N. C., 399, *Ruffin, C. J.,* says: "It is true, as the defendant says, the penalty was the *law* of their contract, limiting the sum which could have been recovered from the defendant in an action of debt. But equity disregards penalties. If the penalty here had been ten times as much, the defendant would have then thought it reasonable and equitable, that he should be relieved from it by performance of the act, upon the nonperformance of which the penalty accrued by strict law. So the other side is not restricted to his legal remedy by an action on the penalty, but may claim an execution of the contract, as it is understood by the Court; that is, as a stipulation, without reference to the penalty, to do the several things stated in the condition." In that case the value of the property for the recovery of which the action was brought was much larger than the penal sum of the bond. The bond was for the return of the property, and the obligor contended that, it being found that he could not return the property, the recovery by the obligee was limited to the amount of the bond; the Court held that the obligation of the defendant was to return the property, and not primarily to pay the penalty of the bond. There the obligor was required to perform his contract by payment of the full value of the property and was not relieved by his obligation to do so by payment of the penal sum of his bond. Here, the vendor is entitled only to his actual damages, which could be readily ascertained, in accordance with a well established principle of law, fixing the measure of his damages, notwithstanding a provision in the contract for payment of a sum of money, arbitrarily fixed, as liquidated damages. Even if the provision in the contract, relative to liquidated damages is enforceable, it does not affect the equity of R. G. Allen or his assigns to specific performance. 36 Cyc., 571. It does not destroy the mutuality of obligation, for R. G. Allen would not be relieved of his primary obligation to purchase and upon conveyance to him of the lot, to pay the purchase price, by the payment of the sums, called liquidated damages. Nor does the provision affect Allen's right to enforcement of the obligation of Crawford, executor and trustee. See Fry's Specific Performance, sec. 142 *et seq.*

A full and careful consideration of the various contracts and agreements between the parties does not disclose that "time was of the essence of the contract," although there is a recital to that effect in the contract dated 6 July, 1920. From and after that day, it is manifest that neither of the parties so regarded it. Allen assumed possession of the property on 6 July, 1920, and thereafter of the collection of the rents and the payment of all expenses of maintaining it. He indemni-

fied Crawford, executor and trustee, from any loss that might be caused by fluctuations in the price of Liberty bonds, in which Crawford intended to invest the proceeds of the sale of the property, and this he is required to do by the judgment and decree of his Honor. He guaranteed to Crawford a stipulated monthly rental for the property. On 1 April, 1921, he renewed his obligation with respect to the Liberty bonds, and "in lieu of interest and also to compensate Crawford, executor and trustee, for trouble and expense," he agreed to pay a sum equaling 10 per cent per annum of $43,000, in equal monthly installments, and that he is required to do by the judgment and decree. On 7 November, 1921, he gave bond, in the sum of $10,000, conditioned for the performance by him of the terms and stipulations provided in the former agreements or any agreements for extension that might thereafter be made from time to time.

"It is the general doctrine in equity, in considering the rights of vendor and vendee under a contract of bargain and sale, that time is not of the essence of the contract. In cases in which it is seen really to be essential—that is, where it must have been understood by the parties at the time of the contract—that events would probably happen in which interest would not be a compensation because the title to the property or its value might be greatly affected by those events, and one of them holds back until the contemplated contingency happened, that person cannot apply to enforce the contract which he has violated, and violated in bad faith, and as to a main ingredient of the bargain." *Ruffin, C. J.,* in *Falls v. Carpenter,* 21 N. C., p. 278. Even if time was deemed by the parties as a material element in the contract, on 6 July, 1920, the parties, by their subsequent conduct, could waive it. The extension of time for performance of the contract by Allen results in Crawford, executor and trustee, receiving 10 per centum per annum of the purchase price, rather than the small returns from Liberty bonds while he was guaranteed against loss by fluctuations in the price of the bonds.

The relation of Crawford, executor and trustee, and R. G. Allen, with respect to this lot of land, was that of vendor and vendee. It has been repeatedly held that this relation is substantially that subsisting between a mortgagor and mortgagee, and that it is governed, with respect to their mutual and reciprocal rights and duties, by the same general rules. *Ellis v. Hussey,* 66 N. C., 501; *Jones v. Boyd,* 80 N. C., 258; *Killebrew v. Hines,* 104 N. C., 182; *Allen v. Taylor,* 96 N. C., 37; *Bank v. Pearson,* 119 N. C., 494.

We must therefore hold that on 1 January, 1924, the contract on its face was valid and binding, and that each party thereto was entitled to have the same enforced by a decree of specific performance, unless by some act of default he had forfeited his rights to this equitable remedy.

"It is established in this jurisdiction that, in the absence of fraud, mistake, undue influence, or oppression, a binding contract to convey land will be specifically enforced by the court." *Flowe v. Hartwick,* 167 N. C., 448; Bispham's Eq., sec. 364. Equitable defenses must be specifically pleaded; otherwise, they cannot be proved. *Goodman v. Robbins,* 180 N. C., 239; *Harper v. Battle,* 180 N. C., 375. In the last case cited *Chief Justice Hoke* says that when the right to specific performance is properly established, it must be enforced as the parties have made it, or as far as practicable under existent circumstances.

Upon the evidence, and the facts found therefrom, the court was of the opinion, and held, "that the contract had not been forfeited or abandoned in 1923, but that it was in full force on 1 January, 1924, and that the failure of the Capital Realty Company (assignee of R. G. Allen) to tender the balance of the purchase money on 1 January, 1924, did not work a forfeiture of the contract of sale, in view of the claim of Crawford, executor and trustee, on 1 January, 1924, of the prior forfeiture of said contract, and his denial of said contract and the claim by him of an excessive amount (even if the contract was in force) and the failure of Crawford to tender a deed."

The judge found as a fact that the Capital Realty Company (assignee of R. G. Allen) is ready, able and willing to pay the balance of the purchase money.

The failure of R. G. Allen, in accordance with his agreement, to pay the monthly installments of $358.33 from 1 March, 1923, to 1 January, 1924, making a total, with interest, of $3,681.96, as one of the considerations for the extension granted on 1 April, 1921, did not work a forfeiture of his rights under the contract, nor make the extension agreement void. His Honor deducted the total of the rents collected by Crawford during that period, and included the balance, to wit, $1,412.35, in the amount which he requires the Capital Realty Company (assignee of R. G. Allen) to pay. His Honor also includes in said amount all sums paid by Crawford during that period for taxes, insurance and repairs on the property, amounting to $1,392.74.

The judge further found that the difference between the price of Liberty bonds which could have been bought by Crawford, executor and trustee, on 6 July, 1920, and on 1 January, 1924, is $5,076.15, and this amount he also requires Capital Realty Company to pay.

The holding of his Honor upon this phase of the case, and the inclusion of these items in the amount which he requires the vendee to pay, is fully supported by well-established principles of equity, and meets the requirements of justice.

"The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition prece-

dent to his obtaining the remedy that he has done, or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to the terms." Pomeroy's Eq. Jurisprudence (3 ed.), sec. 1407.

In *Hudson v. Cozart,* 179 N. C., 247, specific performance was denied because it was neither averred nor proved that plaintiff could or would perform the stipulation in the contract, which was the chief consideration for its execution by defendants.

Crawford, executor and trustee, having granted to R. G. Allen an extension of time for payment of the balance of the purchase price to 1 January, 1924, the failure of Allen to pay the rent, taxes and insurance, and to pay for the repairs on the building, did not work a forfeiture of his rights under the contract or the extension agreement. The agreement of Allen to make these payments were not conditions upon which the extension was granted, but covenants to be thereafter performed by him. He was liable in damages for breaches of his covenants, but such breaches did not affect his rights under the contract; so that, on 1 January, 1924, the contract was in full force and effect. Crawford, executor and trustee, was under obligation to convey, and Allen (or his assignee) was under obligation to pay the balance due, upon an accounting, on the purchase price of the lot.

The exact amount due on the purchase money on 1 January, 1924, could not be determined until an accounting had been had. The Capital Realty Company, assignee of R. G. Allen, on said day, requested the accounting, and, the judge finds, was ready, willing and able, as it still is, to pay the said amount. Crawford, executor and trustee, denied his obligation on the contract, and declined to offer compliance with same by tendering deed. He will not now be relieved upon his contention that the Capital Realty Company did not strictly comply with the contract. "One of the reasons why the remedy of specific performance was introduced in equity was because at law the plaintiff is obliged to show on his part precise compliance with all the terms of the agreement, whereas chancery would sometimes afford relief, although he was unable to prove this exact fulfillment. Courts of equity grant this relief by two methods, viz., one by decreeing performance with compensation for defects, and the other by giving time for the performance of the agreement." Bispham's Eq., sec. 488.

The first two questions presented by Crawford, executor and trustee, having thus been determined in the negative, it becomes unnecessary to consider the third question. The decree as to him is approved and the judgment affirmed.

The judge finds that Samuels and Levy took the lease from Crawford, executor and trustee, with full notice of the rights of the Capital Realty Company, and adjudges that said lease is invalid and should be canceled as to said Capital Realty Company. To this finding, appellant, Samuels, excepted and assigns as error the conclusion of law on which this portion of the judgment is based. The assignment of error is not sustained.

The contract between Crawford, executor and trustee, and R. G. Allen, was duly recorded in Wake County on 13 January, 1920. The assignment and conveyance by R. G. Allen to the Capital Realty Company was duly recorded in said county on 28 June, 1923. The lease from Crawford, executor and trustee, to Samuels and Levy was executed in June and recorded on 18 July, 1924. Appellant, Samuels, therefore, had constructive notice, at least, of the rights of the Capital Realty Company and of its assignor, R. G. Allen, when he and Levy took the lease. Such rights as they acquired in and to the lot were subject to the rights of the Capital Realty Company, under said recorded contracts. The law as to *lis pendens,* so fully and interestingly discussed in the brief filed by counsel for appellant, does not necessarily apply.

The contention of both appellants that the Superior Court of Wake County is without jurisdiction, is not sustained by any facts appearing in the record. There are no allegations in the pleadings in either case, and no finding of fact by the judge upon which to base this contention. It is admitted that Crawford, executor and trustee, had authority to make the contracts; that his title had been favorably adjudicated by the court. It cannot now be contended that Crawford, executor and trustee, was without authority to extend the time for the payment by R. G. Allen of the purchase money, certainly in the absence of evidence supporting the contention. It appears from his report, filed as late as 21 February, 1924, in the Superior Court of Harnett County, that he had granted extension to 1 January, 1924, and that the court was notified of such extension. The first action, begun on 1 February, 1924, against R. G. Allen and the sureties on his bond, given pursuant to the agreement for extension, dated 16 December, 1922, was founded upon the allegation by Crawford, executor and trustee, that the contract had been extended to 1 January, 1924. Appellant, Samuels, admits in his answer that on 13 January, 1920, J. W. Crawford, executor and trustee, under the will of J. H. Crawford, deceased, had power and authority to sell and convey the lot of land, the subject-matter of this action.

The findings of fact made by the judge are supported by competent evidence; his conclusions of law are correct, and the judgment and decree are

Affirmed.

MAHONEY-JONES COMPANY, SOUTHWEST VIRGINIA GROCERY COMPANY, PEERY GROCERY COMPANY, BRISTOL GROCERY COMPANY, MARLER, DALTON, GILMER COMPANY, EAGLE MANUFACTURING COMPANY, HAMILTON-BACON-HAMILTON COMPANY, WEST JEFFERSON HARDWARE AND SUPPLY COMPANY, PHILLIPS & DILLARD, AMERICAN WHOLESALE CORPORATION, BLUMBERG BROTHERS COMPANY, MANHATTAN BARGAIN HOUSE ET ALS. V. JAMES OSBORNE AND FIELDEN OSBORNE, DOING BUSINESS UNDER STYLE AND FIRM NAME OF JAMES OSBORNE & COMPANY, AND H. L. ROTEN.

(Filed 15 April, 1925.)

1. Evidence—Letters—Secondary Evidence.

Where the issuable matter in the controversy is whether the defendant was a member of a partnership and thus liable for its debts, original letters addressed to the defendant asserting he was a member are the best evidence of their contents, and not collateral to the issue, and the admission of parol evidence of their contents is reversible error, in the absence of legal notice to the defendants to produce them or other evidence or findings of the trial court required as a prerequisite thereto.

2. Same—United States Mail—Presumptions.

Where a letter from the plaintiff is primary evidence of its contents, upon the trial of an issue, evidence that it had been properly addressed, stamped and mailed prima facie presumes its delivery to the defendant; but before secondary evidence of its contents is properly admitted, the lawful prerequisites as to its admissibility must be observed.

3. Same—Notice—Appeal and Error—Findings of Fact.

In an action to fix liability on defendant for the debts of a partnership as a member thereof, plaintiff relied upon a letter he had written to the defendant charging him with this connection, and properly addressed, stamped and mailed it, but received no reply. There was evidence that defendant had left the State and consequently the jurisdiction of our courts and he was absent from the trial. In the absence of due notice to defendant to produce the letter: *Held*, the burden of proof was on the plaintiff to show that the defendant had the letter or that it was under his control or he had lost the same, and that diligent search had ineffectually been made in the proper place or places, or sufficient to establish the loss of the instrument, requiring the trial judge to make his findings upon the evidence and the review of the law applicable being only permissible on appeal.

4. Evidence—Replies to Letters.

Answers to letters written to a party to an action are competent as evidence therein, and prima facie presumed to be genuine.

APPEAL by defendant, Fielden Osborne, from *McElroy, J.*, at July Term, 1924, of ASHE.

This is an action by the creditors to charge Fielden Osborne with the debts of Jas. Osborne & Company. Fielden Osborne denied that he was, or ever had been, a member of this partnership, and denied liability to the plaintiffs, or any of them.

The plaintiffs contended that Fielden Osborne was the silent partner of James Osborne, his son. By virtue of the admissions of record, the whole controversy was made to depend upon the answer of the jury to the issue: "Was the defendant, Fielden Osborne, a member of the firm of James Osborne & Company, as alleged in the complaint?" The jury answered this issue, "yes," and from a judgment rendered thereon, the defendant, Fielden Osborne, appealed to this Court.

J. B. Council and Chas. B. Spicer for plaintiffs.
T. C. Bowie for defendant.

VARSER, J. There was much evidence tending to show the contentions of the respective parties. The plaintiffs introduced direct testimony tending to show that the defendant had admitted that he was a member of the firm of James Osborne & Co., with his son, James Osborne. The evidence for plaintiffs further shows that notice that James Osborne had reported to mercantile agencies that Fielden Osborne was a member of this firm had been brought to the knowledge of Fielden Osborne, and that he failed to make timely denial.

The defendant contended that he had answered all letters and requests that had come to him, except in one instance. In this instance he claims that he was advised by a friend to seek the advice of counsel, and that he had done so, and had followed such advice, and that this amounted to due care and ordinary prudence to prevent the extending of credit upon his responsibility.

The trial court permitted the plaintiffs to introduce, over defendant's objection, parol evidence of the contents of letters which the witness, Tucker, testified he wrote to the defendant, Fielden Osborne, and received no reply from him. Over the defendant's objection, this witness was allowed to state that he wrote to Fielden Osborne, at Apple Grove, his postoffice, and never received any reply to any of these letters, and that the letters written by the witness to Fielden Osborne were to the effect that the account due by James Osborne & Co. to the West Jefferson Hardware and Supply Company, of which the witness was secretary and treasurer, was past due, and that payment was demanded; and that he also wrote Fielden Osborne in these letters that James Osborne said that he, Fielden, was one of the partners (in the firm of James Osborne & Co.), and that "We were looking to him to pay the bill."

The record does not disclose that any notice was given to the defendant, Fielden Osborne, to produce the letter, or letters, or, in default thereof, that secondary evidence would be introduced; nor does the record show that the witness did not retain or have any duplicate original of this letter or copy thereof, nor that any effort, by notice or otherwise, had been made to procure the letter, or letters, from James

Osborne, or any preliminary finding that the letters were lost. James Osborne was not present at the trial, and his wife testified that he was now living in the State of Washington.

There is no evidence tending to show any effort in search for either a duplicate original, or any copy, carbon or press, of these letters. The court found no facts as a basis upon which to introduce this secondary evidence.

The plaintiffs contend that this evidence is competent, for that the letter is collateral to the issue, and therefore the "best-evidence" rule does not apply. *Holloman v. R. R.*, 172 N. C., 372. This case announces that the familiar doctrine contained in *Ledford v. Emerson,* 138 N. C., 502, that "the rule excluding parol evidence as to the contents of a written instrument applies only in actions between parties to the writing and when its enforcement is the substantial cause of action."

We are of the opinion that defendant's exception in the instant case presents the very test, as to the collateral character of the letters to Fielden Osborne, required in *Ledford v. Emerson, supra.* The action is between the parties to the writing, and the cause of action in the instant case is for the purpose of enforcing obligations which the plaintiffs seek to establish against Fielden Osborne by virtue of such letters, and his failure to reply thereto. The contents of the letters related directly to the only question at issue. If the situation had presented the converse view, by offering the contents of a letter from Fielden Osborne to the plaintiffs, admitting that he was a partner, or agreeing to pay these debts, it would have been admittedly not collateral to the issue. The same effect is contended for by showing a letter from the plaintiffs to him, and an implied admission resulting from his failure to answer, and the very same direct proof is produced.

When a letter, properly addressed, with the requisite postage thereon, is placed in the mail, a presumption arises that it was received by the person to whom it is addressed. *Beard v. R. R.*, 143 N. C., 137.

This, however, does not abrogate the best-evidence rule as to the proof of the contents of such letters. If this letter was received by the addressee, then the value of the contents as evidence arises out of his failure to reply, denying the partnership. Therefore, the very reason for the competency and materiality of the offered evidence is based on the receipt of such a letter, or letters, by this defendant; hence it was necessary to give him timely notice to produce such letters, to lay the foundation for secondary evidence of the contents of these letters.

It is well settled that "where the writing is in the possession of the adverse party, who *refuses* to *produce it,* secondary evidence of its contents may be given, even when the contents are directly in issue." *S. v. Wilkerson,* 98 N. C., 696; *Pollock v. Wilcox,* 68 N. C., 47.

If the writing is in the adversary's possession, notice to produce it *must* be *given* to authorize the *introduction* of *secondary evidence. Nicholson v. Hilliard,* 6 N. C., 270; *Overman v. Clemmons,* 19 N. C., 185; *Robards v. McLean,* 30 N. C., 521; *S. v. Wilkerson, supra; S. v. Kimbrough,* 13 N. C., 431.

In the *Kimbrough case* the Court, speaking through *Henderson, C. J.,* announces that the basis of secondary evidence of the contents of writing in possession of the adverse party is that the notice to produce must be given to the adverse party for his protection, in order that he may protect himself against the falsity of secondary evidence "which the law presumes may be false as its very name imports." Notice, therefore, must be given to the adverse party, who either has the possession of such writings, or, according to the prima facie showing of the party offering such evidence, ought to have the possession. This affords an opportunity of correcting the falsity of such evidence, if it should exist. Therefore, the practice has long been to include, in the notice to produce, a statement that if the writings are not produced, secondary evidence will be offered of their contents.

As applied to the instant case, the gist of the reason for requiring the production of the writing is "that the law will not trust to a frail memory of any man upon that point when the higher grade of evidence, constituted by the instrument itself, is kept back." *Threadgill v. White,* 33 N. C., 592.

A learned discussion of the notice to produce appears in paragraph 1202, Wigmore on Evidence (2 ed.). This author says the true reason upon which this rule is based is that he who offers secondary evidence of the contents of a written instrument must produce the document, if he can, and that when he says that he cannot, and shows that he cannot, because his adversary has it and will not bring it in, he has met this requirement. The courts have not been too strict in the requirement of proof that the proponent cannot bring it in when the opponent is supposed to have possession of the written instrument, and therefore they treat a simple notice, or demand, as a sufficient compliance with this requirement. The other reasons for the rule, to wit, preventing a false copy and preventing surprise on the opponent's part, have been accepted by the courts in many instances.

Smallwood v. Mitchell, 3 N. C., 144. This case holds unequivocally "that you cannot read the copy unless you have given notice to the plaintiff to produce the original." In this case a copy is treated as secondary evidence. *Bryan v. Parsons,* 5 N. C., 153; *Nicholson v. Hilliard,* 6 N. C., 270; *Whitley v. Daniels,* 28 N. C., 481; *Murchison v. McLeod,* 47 N. C., 240; *Ivey v. Cotton Mills,* 143 N. C., 189.

The policy of the law in this State has moved a long way from the rigid common-law rule when it denied the right to require the adversary

to produce writings for the benefit of a party to the suit. From this hard and fast rule, the courts of equity offered relief by way of a bill of discovery, and then the rules relaxed themselves in order to produce less delay and to bring about a trial upon the merits. C. S., 1823, 1824, and 1825, make ample provision to allow a party to obtain an inspection, or copy, of documents in his adversary's control, and also to produce, on motion and notice, books or writings containing evidence pertinent to the issue. C. S., 1825, provides the useful method of obtaining an admission of the genuineness of any paper-writing material to the action, and if the party declines to admit the genuineness, and it is finally proved or admitted on the trial, the court may tax the costs against the party who refuses the admission, unless he has good reasons for refusing. All the hardships that might otherwise result from a rigorous enforcement of the rules in this regard have been obviated under our decisions and these statutes.

If, however, the court below proceeded upon the idea that the letter in controversy was probably in the possession of James Osborne, and that he was out of the State, this reason would not be sufficient. *Davidson v. Norment,* 27 N. C., 556; *Threadgill v. White, supra.*

In *McCracken v. McCrary,* 50 N. C., 400, the Court says: "The fact that the bond was delivered to Brown, and that he had left the State, tended to show that he had it in his possession; if so, the fact of its being out of the State did not make parol evidence of its contents admissible." This case also holds that, when there is no evidence that the document is in the possession or within the control of the defendant, the notice to him to produce it amounts to nothing. It would be necessary, in the instant case, in order for notice to Fielden Osborne to support the admission of secondary evidence as to the contents of the letter, or letters, for the court to find that he had either the possession of such letter, or letters, or that they were within his control. If they were lost after receipt, another rule prevails.

If the trial court should find that the letters in controversy were never received by Fielden Osborne, and that he never knew that in such letters he was charged with being a member of the partnership, then, of course, the letters could not be competent for the purpose of showing an implied admission of the partnership.

It may be that the court may hereafter find as a preliminary question of fact that he received such letters, but was now unable to produce them in response to notice, because they were either lost or destroyed. Then it is necessary that such finding be made by the trial court as a prerequisite to the admission of secondary evidence of their contents.

In *Gillis v. R. R.,* 108 N. C., 441, the rule appears in the following statement, taken from 1 Greenleaf Ev., sec. 558: "The question whether

the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court and not by the jury."

Of course, the burden of proof to show affirmatively the existence of all facts necessary to make secondary evidence competent in such instances is upon the party offering such evidence.

Smith v. Moore, 149 N. C., 185, puts the exceptions to the best-evidence rule, and to the hearsay-evidence rule, in the same class, basing both upon the doctrine of necessity.

Inasmuch as the plaintiffs relied upon an exception to the best-evidence rule, it was necessary in the instant case for them to show either the possession or control of the letters by the defendant, Fielden Osborne, or that the same had been lost after he had received them. In the latter instance, proof that a diligent search has been made for the writing, in the proper place, or places, is sufficient to establish the loss of the instrument. Such secondary evidence will not be received on the ground that the instrument itself is lost, until it is shown that a diligent search has been made for the writing. *Avery v. Stewart,* 134 N. C., 287.

The character of the search necessary, and the *quantum* of proof, and the duty of the trial court with reference to these questions, are fully discussed in *Avery v. Stewart, supra.* It is therein stated: "In order to dispense with the production of it (written instrument), it was incumbent on the plaintiff to give all the evidence reasonably in his power to prove the loss of it"; and "it is the duty of the judge to decide the facts upon which depends the admissibility of testimony"; and "it is the duty of the judge to state the facts found by him from the evidence, if requested to do so by the party excepting to his ruling," and his findings of fact cannot be reviewed in this Court; but if he does state the facts, either of his own motion or at the request of a party, this Court can review a conclusion which is based upon the finding, for this presents necessarily the question of law.

These doctrines, as set forth in *Avery v. Stewart, supra,* have been reaffirmed in the following: *Mitchell v. Garrett,* 140 N. C., 397; *Green v. Grocery Co.,* 159 N. C., 121. In *Green v. Grocery Co., supra,* it appeared that the proper custody of the writing desired was without the jurisdiction of the court and in Richmond, Virginia, but that no sufficient search had been made in Richmond, at the proper place, for it, and the evidence was held incompetent, citing *Blair v. Brown,* 116 N. C., 631; *Avery v. Stewart, supra; Justice v. Luther,* 94 N. C., 793. In *Byrd v. Collins,* 159 N. C., 641, the same doctrine is set forth in a quotation from 3 Redfield on Wills, page 15: "But it must in all cases be shown that an exhaustive search has been made for such missing will in all places where there is the remotest possibility that it could be

found, before any secondary evidence can be received of its contents." Of course, this doctrine must be interpreted in the light of the character of the written instrument in each particular case, and the exhaustiveness of the search must be interpreted in practice in reference to the character of the papers sought; hence it is not easy to define the degree of diligence in the search that is necessary, for each case depends much on its particular circumstances; but, in general, as stated in this latter case, a party is expected to show that he has, in good faith, exhausted in a reasonable degree all sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. This doctrine is taken from 1 Greenleaf Ev., sec. 558. The same rule is announced in *Thompson v. Lumber Co.,* 168 N. C., 226.

In *Sermons v. Allen,* 184 N. C., 127, the Court announces the same rule, and, upon authority of *Beard v. R. R., supra,* holds, with reference to the notice to produce, and its timeliness, that, "generally, if the party dwells in another town than that in which the trial is had, a service on him (to produce papers) at the place where the trial is had, or after he has left home to attend the court, is not sufficient."

This rule also shows that the reasonableness of all the requirements is a necessary test.

The defendant also excepted to the introduction of letters received in reply to letters written to the defendant, Fielden Osborne, properly addressed and put in the mail, with the requisite amount of postage thereon, and the replies received in due course of mail, purporting to be in reply to the letters so written; and, in fact, the replies were written on the backs of the letters themselves.

This evidence has been held competent in *Echerd v. Viele,* 164 N. C., 122, wherein the Court says: "A letter received in due course of mail, purporting to be written by a person in answer to another letter, proved to have been sent him, is prima facie genuine, and is admissible in evidence without proof of the handwriting or other proof of its authenticity."

It therefore appears that the plaintiffs did not bring themselves within any of the provisions whereby secondary evidence of the contents of the letters to Fielden Osborne, about which the witness, Tucker, testified, may be given, and inasmuch as this evidence appeared to be relevant and material to the contested issue, we are constrained to hold that the admission of parol evidence as to the contents of such letters was prejudicial error. The matters in the other exceptions may not present themselves at another trial, and it is therefore unnecessary to discuss them.

For the reasons herein set forth, let there be a

New trial.

W. V. HARTMAN, TRUSTEE IN BANKRUPTCY FOR T. H. (SHACK) FLYNN, BANKRUPT, V. T. H. (SHACK) FLYNN AND WIFE, MATTIE FLYNN, ET AL.

(Filed 15 April, 1925.)

1. Estates—Rule in Shelley's Case.

The rule in *Shelley's case* is now well established as a rule of property, as well is a rule of law, in the jurisdiction of our State, subject to change by statute.

2. Same—Remainders—Homestead—Bankruptcy.

A devise of land to the testator's son, and then to his bodily heirs, by the application of the rule in *Shelley's case*, gives to the son a fee-simple estate, and a further devise to his wife, should she survive him, does not affect the application of this rule; and when the son has become bankrupt, his trustee in bankruptcy may maintain his action to enter into possession of the lands and sell the same for the benefit of the creditors of the estate, subject to the contingent estate of the wife and the homestead of the bankrupt.

APPEAL by defendant, T. H. (Shack) Flynn, from a judgment of *McElroy, J.*, at November Term, 1924, of FORSYTH.

The plaintiff, Hartman, is the duly appointed trustee in bankruptcy of T. H. Flynn, who is the same person as Shack Flynn.

This action is to recover a tract of land from Shack Flynn, bankrupt, and Mattie Flynn, his wife, for the use of the bankrupt estate.

It further appears that, in order to adjudicate the rights of the children of Shack Flynn in this land, those now *in esse*, as well as those who may be hereafter born, were made parties.

The plaintiff's right to recover is dependent on item 4 of the will of Thomas W. Flynn. This item is as follows:

"I give to my son, Shack, so long as he lives, and then to his bodily heirs, the Randleman plantation, lying mostly on the east side of the road leading from the river out by H. M. Scott's to the Old Richmond Road, two small strips lying on the west side of the road, one near H. M. Scott's, and the other near Sid Butner's, known as the Old Poplar Springs; this land to be valued at $1,600.00. But if he should die before his wife, Mattie, she shall hold the same plantation as long as she remains single."

The court rendered the following judgment:

"This cause coming on to be heard before his Honor, P. A. McElroy, judge presiding at the November Term, 1924, of the Superior Court of Forsyth County, and being heard upon the pleadings and the agreed statement of facts, the court is of the opinion, and so holds, that under the terms of the will of Thomas W. Flynn, which is attached to the complaint, and under item 4 thereof, the defendant, T. H. (Shack)

Flynn, was devised a title in fee simple to the lands described in item 4 of the said will, subject only to an estate to Mattie Flynn, wife of T. H. (Shack) Flynn, during her widowhood, in the event the said T. H. (Shack) Flynn dies during the lifetime of the said Mattie Flynn.

"It is therefore decreed, ordered and adjudged that the plaintiff, W. V. Hartman, trustee in bankruptcy of T. H. (Shack) Flynn, is the owner of and is entitled to the possession of the lands described in the fourth item of said will, he holding a fee-simple title thereto, subject only to the contingent interest of the said Mattie Flynn, as aforesaid, and subject to a homestead to T. H. (Shack) Flynn, as provided by law.

"And it is further ordered that the defendant, T. H. (Shack) Flynn, and wife, Mattie Flynn, surrender possession of said lands described in the fourth item of said will immediately to the said W. V. Hartman, trustee in bankruptcy of T. H. (Shack) Flynn, bankrupt, and that the said W. V. Hartman, trustee, be put in possession thereof, subject to a homestead therein, as provided by law.

"It is further ordered that the costs of this action be taxed against the defendant, T. H. (Shack) Flynn."

The defendant, Shack Flynn, contends that he was only a life tenant of the lands in controversy, while plaintiff contends that he was a tenant in fee, subject to the contingent life estate of Mattie Flynn, his wife, and that the plaintiff therefore is entitled to the said lands for the use of the bankrupt estate, subject to this contingent life estate of Mattie Flynn and the homestead rights of Shack Flynn.

Manly, Hendren & Womble and Forrest G. Miles for plaintiff.
T. W. Kallam for defendants.

VARSER, J. It is conceded that, if the rule in *Shelley's case* applies to this devise to Shack Flynn, the judgment of the trial court must be affirmed.

The rule in *Shelley's case* is imbedded in the jurisprudence of North Carolina as a well-settled rule of property. Whatever may have been its status prior to that time, it was set at rest by *Starnes v. Hill,* 112 N. C., 1. At that time it was debated, in the minds of some, that the statute, now C. S., 1739, had the effect of abolishing this rule, but this is now no longer an open question.

We find a most interesting and learned discussion of this doctrine in Mordecai's Law Lectures, Vol. 1, 649 *et seq.* An elaborate discussion also appears in 24 R. C. L., 887. A complete American judicial history of this rule appears in the very elaborate treatise in 29 L. R. A. (N. S.), 963-1170, with a list of the North Carolina cases on pages 1165-1166.

In *Hampton v. Griggs,* 184 N. C., 13, it is said: "Whatever reasons, *pro* and *con,* may have been advanced originally in support of the wis-

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

In this case the following prerequisites to the application of the rule in *Shelley's case* are collated and announced:

"(1) There must be, in the first instance, an estate of freehold in the ancestor or by the first taker; and (2) the ancestor must acquire this prior estate by, through, or in consequence of the same instrument which contains the limitation to his heirs; (3) the words 'heirs' or 'heirs of the body' must be used in the technical sense as importing a class of persons to take indefinitely in succession, from generation to generation, in the course marked out by the canons of descent; (4) the interest acquired by the ancestor and that limited to his heirs must be of the same character or quality—that is to say, both must be legal, or both must be equitable, else the two would not coalesce; and (5) the limitation to the heirs must be of an inheritance, in fee or in tail, and this must be made by way of remainder."

In the first place, the defendant asserts the nonapplicability of the rule in *Shelley's case,* because of the contingent life estate of Mattie Flynn, wife of Shack Flynn.

In *Daniel v. Harrison,* 175 N. C., 120, the identical question was decided, and the provision for Fannie A. Daw during her widowhood was held not to interfere with the application of the rule in *Shelley's case.*

In *Smith v. Smith,* 173 N. C., 124, the same question was presented. In that case the devise was: "I loan to my son, D. L. Smith, two tracts of land (describing same), to have during his life, at his death to his bodily heirs and to his wife her lifetime or widowhood."

The second intervening estate, during "her lifetime or widowhood," did not prevent the application of the rule.

In *Jones v. Whichard,* 163 N. C., 243, the rule is stated thus: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs,

or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitled the ancestor to the whole estate."

In *Nichols v. Gladden,* 117 N. C., 497, the rule as given in 1 Coke, 104, is stated thus: "That when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word 'heirs' is a word of limitation of the estate and not a word of purchase."

We see that these statements are necessarily the same. The words "either with and without the interposition of another estate" in the one perform the same office as the words "either mediately or immediately" in the other. *Ex vi terminorum* they include the contingent estate, *durante viduitate,* as provided in the instant case. *Smith v. Smith, supra.*

"The interposition of a life estate in another does not interfere with the operation of the rule, so far as the heirs are concerned, when the estate comes to them they take by descent and not by purchase, and the ancestor, or first taker, has full power of control over the property, and may sell or encumber as a full owner may, subject only to estate in remainder to the wife during her life or widowhood, and the rights incident to it." *Smith v. Smith, supra; Cotton v. Moseley,* 159 N. C., 1; *Edgerton v. Aycock,* 123 N. C., 134; *Kiser v. Kiser,* 55 N. C., 28; *Quick v. Quick,* 21 N. J. L., 13.

We therefore conclude that the contingent estate of Mattie Flynn does not prevent the application of the rule in *Shelley's case.*

It is further contended that the words "bodily heirs" are not the same as "heirs of the body." This has been adjudicated with definiteness and certainty against defendant's contention. *Blake v. Shields,* 172 N. C., 628.

In the instant case it is clear that the use of "bodily heirs" is not a *descriptio personarum,* but the use is in the technical sense. *Revis v. Murphy,* 172 N. C., 579; *Jones v. Ragsdale,* 141 N. C., 201; *Daniel v. Harrison, supra.*

In *Bank v. Dortch,* 186 N. C., 510, *Hoke, J.,* afterwards *Chief Justice,* again reviews the authorities with a wealth of learning and clearness, and decides the same contention against what is now the defendant's contention in the instant case.

In *Walker v. Butner,* 187 N. C., 535, this Court continues to reaffirm this well-established rule, and gives as a real present-day reason for its extended life by the courts, and by the sufferance of Legislature, that "it prevents the tying-up of real estate by making possible its transfer one generation earlier, and also subjecting it to the payment of the debts of the first taker."

The Court also says: "It is doubtless, for this reason, that the rule has never been repealed in North Carolina."

Accordingly, we are of opinion that the devise in the instant case comes clearly within the rule in *Shelley's case,* and had the effect to vest into Shack Flynn an estate in fee simple in the lands devised, subject to an estate in favor of Mattie Flynn, his wife, contingent upon her survival of him and during her widowhood. Inasmuch as her rights, as well as the homestead rights of Shack Flynn, are fully protected, let the judgment of the trial court be

Affirmed.

DURHAM CONSTRUCTION COMPANY v. R. H. WRIGHT.

(Filed 15 April, 1925.)

1. Contracts—Breach—Personal Service—Measure of Damages.

A contract for buying material for a building and superintending its construction is one calling for the personal services of the ones thus undertaking to furnish their services; and upon the breach thereof by the other party in otherwise constructing his building, the measure of damages is the actual net loss after payment of expenses sustained by them, as measured by the contract price and terms agreed upon, less such amount as they may have reasonably been able to reduce the amount first ascertained.

2. Same—Actions.

Where the plaintiff has breached his contract of employment of a contractor to buy the materials for and superintend his building upon a percentage basis of the cost, the defendant may elect to take the course of awaiting the completion of the building and suing for the full amount of his damages, or he may sue from time to time as payments may have become due, as provided for in the contract of employment.

3. Same—Diminution of Damages—Burden of Proof—Evidence—Trials.

Where the plaintiff seeks to have the amount of damages reduced by such sums as the defendant could have reasonably avoided upon plaintiff's breach of a contract of employment to buy material for and superintend the erection of his building, the burden of proof as to such diminution of damages is on the plaintiff, upon which it is competent to show the amount of contract work of this character the defendant had done in this locality during the life of the contract sued on.

4. Instructions — Misleading — Appeal and Error—Requests for Instruction.

Where the judge, in his charge to the jury, instructs them upon principles of law arising from the pleadings and evidence, and omits therefrom such elements of the principles involved as will render the charge he has given misleading, an exception to the charge so given is sufficient for an appeal without requiring that a special instruction thereon should have been tendered and refused.

CONSTRUCTION CO. *v.* WRIGHT.

APPEAL by defendant from *Calvert, J.*, at January Term, 1925, of DURHAM.

The plaintiff, doing a general contracting business in building houses, complained against the defendant for damages, on account of the breach of a contract by which plaintiff was to receive 7% commission on the cost of material and labor to build a store building on Main Street, in Durham. Plaintiff was to superintend the construction and buy the material and keep the laborers' time.

The defendant denied plaintiff's claim and contended that he made no contract with plaintiff for this work and was indebted to plaintiff in no sum, whatever.

The jury returned the following verdict:

"1. Did the plaintiff and defendant enter into a contract to build certain store buildings, on Main Street, for the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant breach said contract, as alleged in the complaint? Answer: 'Yes.'

"3. If so, what amount of damages is the plaintiff entitled to recover of the defendant by reason of the breach of said contract? Answer: 'Sixteen hundred dollars ($1,600).'"

The court charged the jury that, "the rule of damages under the third issue, briefly stated, would be the net profit, if any, the plaintiff construction company would have made if it had been permitted to carry out its alleged contract." The court then follows this with an explanation as to the method of finding the cost and computing thereon 7% of the total cost, and of deducting therefrom the expenses the plaintiff would have incurred in performing the contract, on its part.

The court again instructed the jury, "that, if you come to answer the third issue you will answer it what you find from the evidence and by the greater weight of it, was the net profit, if any, that the plaintiff, construction company, would have made, if the contract had been carried out as contemplated."

The defendant excepted to these instructions to the jury, and to several rulings on the competency of evidence.

Brawley & Gantt for plaintiff.
Brogden, Reade & Bryant for defendant.

VARSER, J. The rule of damages applied in this case is the object of defendant's exceptions to the charge of the trial court. This contract, as established by the verdict, calls for the personal services of the "two active members in the company," Bowles and Wilkerson, in buying material and superintending the construction of the building on Main

Street." Their personal skill, experience and ability, in so doing, were evidently among the causes for defendant to make this contract.

Burch v. Bush, 181 N. C., 125, gives, although reviewing the question from another standpoint, this suggestion: "To be sure, in the broad outlines, certain contracts are not difficult of classification. Those of a strictly personal nature, involving particular personal skill or taste, such as a contract of an author to write a book, an artist to paint a picture, a sculptor to carve a piece of statuary, a singer to give a concert, and a promise to marry, are personal contracts." Upon the same reasoning, the contract, in the instant case, to buy materials and superintend the construction of a building, calls for personal skill and service. The employment of these two men, for these purposes, by the month or by the job, payable in installments, or a lump sum, at the time agreed, would have been the same as the contract established by the verdict on the first issue.

In *Bowman v. Blankenship,* 165 N. C., 519, the Court discusses the same question and says: "If this had been a contract for plaintiff's services or even for the use of a certain mill owned and run by plaintiff, the position might be made available to defendant." The "position" referred to is the rule of diminishing the damage to the extent of the work done for other persons within the period covered by the contract.

The distinction between the cases requiring the personal service of the contractor, and those not requiring it, is discussed upon the question of assignability of executory contracts, in *Schlesinger v. Forest Products Co.*, 30 L. R. A. (N. S.), 347; *R. R. v. R. R.,* 147 N. C., 368; *Simmons v. Zimmerman,* 1 A. & E. Ann. Cas., 850. In an elaborate note to the latter case, the authorities are collected.

In *Foster v. Callaghan,* 248 Fed., 944, it is held that, the contract between an author and publisher is personal, requiring the personal services of the publisher.

Since it appears conclusively, not only as a matter of law, that the contract, in the instant case, calls for the personal services of the plaintiff's active officers, but from the record, it also appears that this is true as a matter of fact, and it necessarily follows that, the rule of damages, applicable to the instant case, is the rule covering contracts for personal services, and that compensation for the *loss* sustained is the true rule.

In *Hassard-Short v. Hardison,* 114 N. C., 482, *Avery, J.,* says: "The defendants had a right to demand that the jury consider in diminution, any profit which it had been shown the plaintiff realized, or might, by reasonable diligence, have realized, by purchasing logs from others, or by entering into any new agreement with defendants and continuing to saw during the same period. It is the duty of one who is the sufferer

from a breach of contract to act like a man of ordinary prudence, and reduce his damage as far as he can reasonably do so." *Coal Co. v. Ice Co.*, 134 N. C., 574; *Oldham v. Kerchner*, 79 N. C., 106; *Hendrickson v. Anderson*, 50 N. C., 247; *Tillinghast v. Cotton Mills*, 143 N. C., 269.

In *Smith v. Lumber Co.*, 142 N. C., 26, *Walker, J.*, with his usual diligence and learning, collects the authorities and formulates the four remedies, among which the employee may elect, when the employer has wrongfully breached the contract of employment; and the rule applicable to the instant case, is as follows: "He may wait until the end of the contract period, and then sue for the breach, and the measure of damages will be prima facie the salary for the portion of the term unexpired when he was discharged, to be diminished by such sum as he has actually earned, or might have earned by a reasonable effort to obtain other employment." *Markham v. Markham*, 110 N. C., 356.

Of course, this rule is not invoked out of any undue concern for the party who breaches his contract without a valid excuse, but the courts are chiefly concerned, when the wrongful breach of a contract has been properly established, in making the plaintiff whole and in securing to him his rights under the contract. *Advertising Co. v. Warehouse Co.*, 186 N. C., 197.

However, such concern, on the part of the courts, will not let them permit the plaintiff to recover more damages than his actual loss is; consequently, the plaintiff has lost nothing, except the contract price, less the expenses that he would have incurred in performing it, on his part, and less the amount that he would have earned during the same period in such other employment as he could have obtained by the exercise of ordinary prudence and diligence.

In *Mills v. McRae*, 187 N. C., 707, *Justice Stacy* (now *Chief Justice*) uses this impressive language: "It is a sound principle of law, and certainly approved in morals, that one who is injured in his person or property by the wrongful or negligent act of another, whether arising *ex delicto* or *ex contractu*, is required to protect himself from loss, if he can do so with reasonable exertion, or at trifling expense; and ordinarily he will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided."

While the burden is on the defendant to show matters in diminution of plaintiff's damages (*Hendrickson v. Anderson*, 50 N. C., p. 250), we perceive from the instant record, that it was in evidence that the plaintiff has continued in business as a general contractor in building houses, in the city of Durham, at all times since the treaty began with the defendant, concerning the contract established by the verdict herein, and that the defendant was entitled to have this view of the case submitted to the jury.

The plaintiff challenged the right of the defendant to present this question in an exception to the charge, because the defendant did not ask, in writing, for any special instructions on this question. It appears to us not to be necessary, in the instant case, in order to present this question, that a written request should have been made. The true rule appears in *Strunks v. Payne,* 184 N. C., 582.

Whenever the trial court attempts to state the rule of law applicable to the case, he should state it fully and not omit any essential part of it. The omission of any material part is, necessarily, error of an affirmative or positive kind. Therefore, it may be taken advantage of on appeal, by an exception to the charge, without a special request for the omitted instruction.

The defendant also seeks to present the question as to whether the plaintiff's damages are prospective, and are such as have not yet accrued; and that, therefore, he was entitled to invoke the doctrine known as the "present-worth rule." The instant record does not, in our opinion, present this question with sufficient certainty for the Court now to pass upon it. It would appear that all the plaintiff's damages had accrued when this action was instituted, but, inasmuch as this is not certain, and this question may not arise upon the next trial, it is not decided.

For the reasons pointed out, upon the issue of damages only, let there be a

New trial.

SAMUEL H. SHEARER & SON v. JOHN F. HERRING.

(Filed 15 April, 1925.)

1. Pleadings—Counterclaims—Judgments—Nonsuit.

While ordinarily where no complaint is filed, there can be no demurrer or answer upon which to file a counterclaim or cross action, and plaintiff may take a voluntary nonsuit, it is otherwise where a judgment has been taken by defendant in his counterclaim set up in answer to the affidavit in claim and delivery in the action, and set aside for excusable neglect, wherein the plaintiff showed a meritorious cause of action and obligated himself to plead the same if thereafter permitted to do so.

2. Same—Statutes.

Where the defendant in answer to the affidavit of the plaintiff in claim and delivery in the action has set up and recovered judgment upon his counterclaim in the absence of the plaintiff, who has thereafter had the judgment set aside for excusable neglect, and thereafter fails to file answer to the defendant's counterclaim, the plaintiff may not take a voluntary nonsuit as of right, and a judgment in defendant's favor upon his counterclaim is properly rendered. C. S., 519, 521, 522. *Whedbee v. Leggett,* 92 N. C., 470, cited and applied.

SHEARER *v.* HERRING.

APPEAL by plaintiffs from *Grady, J.*, at October Term, 1924, of PENDER.

The material facts will be set forth in the opinion.

J. T. Bland, Sr., for plaintiff.
Stevens, Beasley & Stevens for defendant.

CLARKSON, J. The plaintiffs, wholesale lumber dealers, who reside in Philadelphia, Pa., were engaged for sometime prior to 14 April, 1916, in manufacturing lumber in Pender County, N. C. The defendant, to secure the payment of certain indebtedness due by him to plaintiffs, executed to plaintiffs a chattel mortgage on his saw mill outfit and equipment. Plaintiffs, through their attorney, brought suit on 14 April, 1916, against the defendant in the Superior Court of Pender County, N. C., and at the same time sued out a writ of claim and delivery in accordance with law, as agent of plaintiffs made necessary affidavit and gave bond. The summons was returnable to June Term, 1916, of Pender County. The sheriff of Pender County served the summons and writ on defendant and seized the property mentioned in the claim and delivery covered by the chattel mortgage. Defendant gave replevin bond and retained possession of the property.

The plaintiffs filed no complaint in the suit. The defendant, on 26 December, 1921, filed an answer to the claim and delivery affidavit and set up a counterclaim against the plaintiffs for $2,172. At March Term, 1922, the plaintiffs not being represented, the defendant recovered judgment against the plaintiffs in the sum of $1,924 and interest from 14 April, 1916, and costs, aggregating near $3,000.

The plaintiffs had no knowledge or notice of this judgment until a Philadelphia attorney in June, 1923, gave them notice and made demand on them for payment of the judgment.

The plaintiffs, upon notice from said attorney, employed counsel to make motion to set aside said judgment. The motion was made after notice upon affidavits at September Term, 1923, of Pender County, before Cranmer, J., to set aside and vacate the judgment; and upon the hearing, the court rendered the judgment as appears in the cause vacating and setting aside the judgment. The defendant excepted to the findings of fact and judgment of Judge Cranmer, setting aside the said judgment and appealed to the Supreme Court. Upon hearing the appeal at Spring Term, 1924, the Supreme Court rendered a *per curiam* opinion as follows:

"The facts in evidence and the findings of his Honor are in full support of the order setting aside the judgment for irregularity. There are also facts in evidence tending to uphold his Honor's present judg-

ment on the ground of surprise and excusable neglect. On careful perusal of the record, we are of opinion that there is no error, and the judgment of the lower court is affirmed." *Shearer v. Herring,* 187 N. C., 855.

After the judgment of the Supreme Court was certified down to the Superior Court of Pender County, and after the June Term of Superior Court of said county, counsel for plaintiffs, before the clerk of the Superior Court, submitted to a voluntary nonsuit, which is set out in the record. After the Superior Court calendar for October Term, 1924, was set, the defendant, by his counsel, over the protest of plaintiffs' counsel, had the cause placed on the trial calendar, and upon motion of the defendant, the court below rendered the following judgment:

"This cause coming on to be heard before his Honor, H. A. Grady, judge, at the October Term, 1924, of Pender Superior Court, upon a motion to set aside a judgment of nonsuit rendered by S. V. Bowen, clerk Superior Court, and being heard, the plaintiffs being represented by Bland & Bland, attorneys, and the defendant being represented by H. L. Stevens and C. D. Weeks, and it appearing to the court that the plaintiffs instituted an action against the defendant in the Superior Court of Pender County, on 14 April, 1916, and the summons therein was duly served upon the defendant, and the sheriff of Pender County seized in said action certain property described in the plaintiff's affidavit, and under orders of the court made from time to time in this action allowing the plaintiffs to file their complaint and the defendant to file answer thereto, and the plaintiffs failing to file their complaint in this action, and under the said orders the defendant having filed a cross action and set up a cause of action and counterclaim therein against the plaintiffs, and the plaintiffs having taken a nonsuit before the clerk of the Superior Court of said county as to their cause of action against the defendant long after filing of said defendant's cross action and counterclaim against the plaintiffs:

"It is now on motion, considered and adjudged that the defendant is the owner of the property seized in this action by the sheriff of Pender County and replevied by the defendant, and that the defendant is owner of said property;

"It is further considered and adjudged that the defendant be and is hereby allowed to amend his complaint and file the same within thirty days from the adjournment of this term of court, and that the plaintiffs be allowed 30 days thereafter to file answer.

"And by consent, this cause is set for trial as the first civil case at the March Term of Court, 1925."

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

The plaintiffs contend in their brief: "Under our code and practice the first pleadings of the plaintiff is a complaint, which, with the summons, constitutes the basis of the action. The contents of the complaint are set out in detail. See Clark's Code. If no complaint is filed there is nothing to demur to or to answer, and certainly there can be no counterclaim. The remedy of the defendant, if no complaint is filed, is by motion of judgment of nonsuit." Ordinarily this contention is correct, but not from the facts here.

On the hearing of the motion to set aside the judgment obtained by defendant against plaintiffs, which was granted before Cranmer, J., and affirmed on appeal to this Court, Wm. P. Shearer, surviving partner of the plaintiffs' firm, made affidavit at the hearing, and section 11 is as follows:

"That Samuel H. Shearer & Son have a good and meritorious defense to the matters and things set up in the answer and counterclaim, which they desire in good faith to interpose to the said answer and counterclaim, if the court shall adjudge that the defendant, under the circumstances of this case, is entitled to file such answer and counterclaim."

Mainly on the affidavit of Wm. P. Shearer, the former judgment of defendant was set aside. We think, under the language of the affidavit, plaintiffs should not now be allowed to "blow hot and cold." Wm. P. Shearer testified, in substance, that if the court would set aside the judgment against the plaintiffs they had a meritorious defense to the matters and things set up by defendant in the answer and counterclaim. They, for all intents and purposes of this action, treated the allegations made in their affidavit to obtain claim and delivery—ancillery remedy—as a complaint, and testified that they have "a good and meritorious defense" to the answer and counterclaim, "which they desire in good faith to interpose to the said answer and counterclaim."

Plaintiffs should have fulfilled their obligation to the court below, and when the judgment was set aside and affirmed by this Court, filed their defense in the Superior Court at term, as Wm. P. Shearer, surviving partner, testified plaintiffs would do—in good faith. Plaintiffs did not do this, but, on the contrary, attempted to take a nonsuit before the clerk.

C. S., 519, is as follows: "The answer of the defendant must contain:

"1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

"2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

C. S., 521. "The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a

several judgment might be had in the action, and arising out of one of the following causes of action:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

C. S., 522. "The defendant may set forth by answer as many defenses and counterclaims as he has, whether they are of a legal or equitable nature, or both. They must be separately stated and numbered, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished."

Ashe, J., in *Whedbee v. Leggett,* 92 N. C., 470, said: "There is a distinction in counterclaims set up as a defense under sec. 244 of The Code (now C. S., 521, *supra*), which has not been taken or adverted to in the decisions upon that subject heretofore made, that, we think, should be observed. The first subdivision under that section is 'a cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of plaintiff's claim, or connected with the subject of the action,' and second, 'In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.' The distinction is this. When a counterclaim such as is authorized by the first subdivision is set up, then we think the plaintiff should not be permitted to enter a nonsuit without the consent of the defendant, for the reason that as it is a connected transaction and cause of action the whole matter in controversy between the parties should be determined by the one action. But when the counterclaim is an independent cause of action arising on contract, such as is provided by the second subdivision, then we can see no reason why the plaintiff may not enter a nonsuit if he should choose to do so. But when the plaintiff in such a case does enter a nonsuit, the defendant should be permitted at his election, to withdraw his counterclaim, which would terminate the action, or proceed to trial with his counterclaim, if it is traversed, or move for judgment against the plaintiff if its allegations are not denied, as in actions upon contracts by a plaintiff against a defendant." *McNeill v. Lawton,* 97 N. C., p. 16; *McLean v. McDonald,* 173 N. C., p. 429; *Cohoon v. Cooper,* 186 N. C., p. 26.

We think the court below, under the facts and circumstances of this case, had the authority to render the judgment, and the same is hereby

Affirmed.

EUGENE IRVIN ET AL., ADMINISTRATORS OF H. C. HARRIS, v. W. C. HARRIS ET AL.

(Filed 15 April, 1925.)

1. Bankruptcy—Estates — Relinquishment of Assets—Election—Courts.

Where a trustee in bankruptcy has determined that certain of the lands of the deceased bankrupt were valueless to the estate and would be a burden rather than an asset in his administration, and for this reason turns them over to the administrator of the deceased bankrupt to be used by him in settling his estate, which the bankrupt court has approved, his election so to do is irrevocably binding upon him, and upon the lands thereafter becoming valuable he may not claim the same as a part of the assets of the bankrupt estate.

2. Same—Questions for Jury—Trials.

Held, upon conflicting evidence in this case as to whether the trustee in bankruptcy had turned over to the administrator of the deceased certain lands as valueless, etc., or whether he had done so only for the purpose of administration and payment of debts, the question of full release or relinquishment of the lands was settled by the affirmative verdict of the jury.

3. Same—Intervention—Actions—Guardian and Ward.

Where the controversy is made to depend upon whether the widow of the deceased in her action was entitled to a certain fund in the administrator's hands of her deceased husband as against the trustee in bankruptcy of his estate, an intervener, in behalf of herself and her two children, as between the widow and her children, the better practice would be an independent adversary proceeding or the same may be determined in the present action by having a guardian *ad litem* appointed for the children who are minors.

APPEAL by intervener, Ira R. Humphreys, trustee in bankruptcy of W. C. Harris, from *Finley, J.*, at November Term, 1924, of ROCKINGHAM.

Civil action tried upon the following issues:

"1. Is Ira R. Humphreys trustee in bankruptcy of W. C. Harris? Answer: 'Yes.'

"2. Did said trustee elect to surrender possession of the Wells tract of land as onerous or burdensome property, and not to administer the same in the bankruptcy court? Answer: 'Yes.'"

From a judgment on the verdict, the trustee in bankruptcy appeals.

Humphreys & Gwyn for intervener, appellant.

J. M. Sharp, P. W. Glidewell and Manly, Hendren & Womble for defendants.

STACY, C. J. The question presented for decision arises out of the intervention, in the present proceeding, of Ira R. Humphreys, trustee in bankruptcy of W. C. Harris, and it is this: Did the said trustee in bankruptcy, as such, elect to relinquish all his right, title and interest in and to a certain tract of land, known as the Wells place, which passed by the will of H. C. Harris to his son, W. C. Harris, on the ground that said property was valueless to the estate of the bankrupt and would therefore prove to be a burden rather than a benefit? The jury has answered the question in the affirmative and we think without error appearing on the record.

The facts are these: H. C. Harris died 11 April, 1911, leaving a last will and testament in which he devised to his son, W. C. Harris, a farm known as the Wells place. The son entered into possession of this farm after his father's death. In July, 1913, W. C. Harris was adjudged a bankrupt, and Ira R. Humphreys was chosen as trustee of his estate. Immediately upon qualification, the trustee in bankruptcy took possession of the land in question and remained in possession thereof for about two years, when he surrendered the same to the administrators of the estate of H. C. Harris, deceased, with the consent and approval and by order duly entered of the court of bankruptcy.

The present proceeding, in which the trustee in bankruptcy of W. C. Harris has intervened and set up claim to the property, was instituted 7 September, 1915, by the administrators of the estate of H. C. Harris, deceased, for the purpose of selling all the real property belonging to said estate to make assets with which to pay the debts of the decedent. When this proceeding was started and the trustee in bankruptcy relinquished possession of the farm in question, it was thought by all interested in the matter that the estate of H. C. Harris, deceased, was utterly insolvent. But an unexpected advance in the price of real estate, and the rejection, as a result of litigation (182 N. C., 656, and 184 N. C., 547), of a group of claims filed against the estate, made it possible for the administrators to sell the lands of H. C. Harris, including the Wells tract, for more than enough to pay all of the debts of the deceased, and there was left from the proceeds of the sale of this particular tract of land, over and above the amount required for the payment of debts, the sum of $11,206.34. The present controversy is over the distribution of this fund, which has been paid into the clerk's office to await final judgment herein.

The trustee in bankruptcy claims the fund as a part of the estate of W. C. Harris, bankrupt. W. C. Harris died in 1915, and his widow, Mrs. Janie M. Harris, in her own right, and as guardian of her minor children, heirs at law of W. C. Harris, deceased, claims said fund by reason of the election of the trustee in bankruptcy to surrender said

property to the administrators of the estate of H. C. Harris, deceased, which election, she says, was irrevocably made. 1 Loveland on Bankruptcy (2 ed.), p. 372.

On the evidence, the case has been resolved by the jury in favor of the widow and children of W. C. Harris, deceased bankrupt.

It was suggested, during the progress of the trial, that the trustee in bankruptcy had probably been discharged, and was therefore *functus officio* and without authority to act in the matter, but upon the evidence it was agreed that the first issue should be answered by the court, leaving only the second issue for the jury.

The chief exception presented by the record relates to the sufficiency of the evidence to support the verdict.

Eugene Irvin, one of the administrators of the estate of H. C. Harris, deceased, speaking of the circumstances under which the alleged surrender and abandonment of the Wells place took place, said: "There was some controversy as to who should have possession of it. At that time it was considered more of a burden than an asset, and as Mr. Humphreys stated, he took possession of it and operated it that year and one other year, and he wanted to turn it over to us verbally. Under these circumstances we didn't care to take charge of it. That is why we got this paper-writing (order of the bankruptcy court confirming the surrender). Our attorneys advised us not to take possession unless we got it through the proper channels. This was in 1915. At that time the debts of H. C. Harris far exceeded the total value of his assets. There were claims filed in excess of $75,000.00, and the estimated value of the assets was about $40,000. It was under these conditions that he surrendered the Wells place."

The trustee in bankruptcy testified as follows: "I surrendered possession to Eugene Irvin and R. S. Montgomery, administrators. It was necessary to sell the land to pay the debts of H. C. Harris. I turned the land over to them, into the custody of the Superior Court of Rockingham County, to be administered. I did not surrender all rights to it. I turned it over to the Superior Court to take it and administer it and pay the debts, if it took all, to take it and do whatever was proper to do, because I had no right to administer the man's estate in the Federal Court. I thought it very doubtful that there would be anything left. I have so expressed myself."

The whole case was made to turn on which one of these contentions should prevail. Without further detailing the evidence, we think it was amply sufficient to warrant the verdict, and when properly considered with reference to the pleadings, the evidence, and charge of the court (*Kannan v. Assad,* 182 N. C., 77), it would seem to be determinative of the rights of the intervener.

It is well settled that a trustee in bankruptcy may refuse to take possession of onerous or burdensome property. *Sessions v. Romadka,* 145 U. S., p. 39. Upon his election to reject, the title to such property remains in the bankrupt; and it has been held that a failure on his part to elect within a reasonable time is deemed an election to reject. *Mesirov v. Innis Speiden & Co.,* 88 N. J. L., 548; *Sparhawk v. Yerkes,* 142 U. S., 1.

In *Cunningham v. Long,* 188 N. C., 613, the following was quoted with approval from *Dushane v. Beall,* 161 U. S., 513:

" '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.' "

So far as the appellant is concerned, this opinion might well be closed here; but we observe the judgment also undertakes to settle the respective claims of the widow and her children to the fund in question. As against the trustee in bankruptcy, they have made a common defense, but since the rendition of the verdict herein, their interests are no longer identical. Agreeable with the suggestion of counsel for defendants, we think the better practice would be to have the conflicting claims of the defendants determined in an adverse proceeding. This may be done in the present action by the appointment of a guardian *ad litem* for the minor children, as was the procedure in the case of *Carraway v. Lassiter,* 139 N. C., 145.

Judgment on the verdict will be affirmed, but vacated as between the widow and her children, and the cause remanded for further action not inconsistent with the above suggestion.

Affirmed in part and remanded.

EDGAR SCALES v. CITY OF WINSTON-SALEM.

(Filed 15 April, 1925.)

Government—Municipal Corporations—Agency—Principal and Agent—Negligence—Torts—Damages.

An incinerator operated by a city for the burning of its garbage comes within the authority conferred upon it by statute—C. S., 2787 (5), (6), 2799—and, its operation being a purely governmental function, exercised as a local agency of State government, the city is not liable for an injury caused by defects therein to an employee, in the absence of statutory provision to the contrary.

APPEAL by defendant from an order of *Schenck, J.*, overruling a demurrer to the complaint, at February Term, 1925, of FORSYTH.

The plaintiff alleged that the defendant had constructed an incinerator within its corporate limits for the purpose of burning trash and refuse collected in the city, and set forth a minute description of the furnace and the method of its operation, which it is not necessary to recite. He alleged that the defendant had negligently constructed the furnace, in the following respects: (1) It had not equipped the various doors with a screen to prevent the cinders and other contents from coming through the doors, when opened, and injuring the face and eyes of the operator; (2) it had not built the doors above the base of the grates, so as to prevent the falling of hot ashes, etc., in the face and eyes of the person in charge of the plant; (3) it had not made a proper opening to the ash-pan, so as to provide for removing the contents in that way; (4) it had not furnished the plaintiff any kind of protection for his eyes; (5) it had failed to provide adequate appliances for removing the contents of the furnace, and had negligently constructed the brick walls surrounding it; (6) it had not provided for the plaintiff a safe place in which to work. He alleged that, in consequence of the defendant's negligence, he had sustained personal injury; that his eyesight had been impaired and would probably be lost; that he had undergone physical and mental suffering and had suffered pecuniary loss.

The defendant demurred, on the ground that the construction and operation of the incinerator was a governmental function, for which a private action would not lie in favor of the plaintiff. The demurrer was overruled, and the defendant excepted and appealed.

S. E. Edwards and Holton & Holton for plaintiff.
Parrish & Deal for defendant.

ADAMS, J. Negligence cannot be imputed to the sovereign, and for this reason, in the absence of a statute, no private action for tort can

be maintained against the State. It follows that such an action will not lie against a municipal corporation for damages resulting from the exercise of governmental functions as an agency of the sovereign power. "The rule is firmly established in our law," says McQuillin, "that where the municipal corporation is performing a duty imposed upon it as the agent of the State in the exercise of strictly governmental functions, there is no liability to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents thereunder, unless made liable by statute. In other words, unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for 'neglect to perform or negligence in performing' duties which are governmental in their nature, and including generally all duties existent or imposed upon them by law solely for the public benefit." Municipal corporations, sec. 2623; *Hill v. Charlotte,* 72 N. C., 55; *Moffitt v. Asheville,* 103 N. C., 237; *McIlhenney v. Wilmington,* 127 N. C., 146; *Peterson v. Wilmington,* 130 N. C., 76; *Fisher v. New Bern,* 140 N. C., 506; *Harrington v. Greenville,* 159 N. C., 632.

Difficulty is often encountered in drawing the distinction between these two branches of municipal activity, the one sometimes apparently impinging on the other. Without undertaking to lay down any definition which would be universal in its application, or to explain the apparent want of uniformity in some of the "border-line cases," we may say that in its public or governmental character a municipal corporation acts as an agency of the state for the better government of that portion of its people who reside within the municipality, while in its private character it exercises powers and privileges for its own corporate advantage. Its governmental powers are legislative and discretionary, and for injury resulting from a failure to exercise them, or from their negligent exercise, the municipality is exempt from liability; but it may be liable in damages for injury proximately caused by negligence in the exercise of its ministerial or absolute duties. In *Moffitt v. Asheville, supra, Mr. Justice Avery* stated the principle as follows: "When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will inure to the general benefit of the municipality. Shearman & Redfield on Neg., secs. 123 and 126; Dillon on Mun. Corp., 966 and 968; Thompson on Neg., 734; *Meares v. Wilmington,* 31 N. C., 73; *Wright v. Wilmington,* 92 N. C., 156; Wharton Law of Neg., sec. 190, 10; Myers

Federal Decisions, sec. 2327. The grading of streets, the cleansing of sewers and keeping in safe condition wharves, from which the corporation derives a profit, are corporate duties. Whitaker's Smith on Neg., 122; *Barnes v. District of Columbia,* 1 Otto, 540-557; *Treightman v. Washington,* 1 Black., 39; Wharton Neg., sec. 262.

"On the other hand, where a city or town is exercising the judicial, discretionary or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence. *Hill v. Charlotte,* 72 N. C., 55; *S. v. Hall,* 97 N. C., 474; 2 Dillon Mun. Cor., secs. 965 and 975; *Dargan v. Mayor,* 31 Ala., 469; *Richmond v. Long,* 17 Grattan, 375; *Stewart v. New Orleans,* 9 La., 461; Wharton Neg., secs. 191 and 260; *Hill v. Boston,* 122 Mass., 344; Shearman & Redfield Neg., sec. 129."

The nonliability of a municipal corporation for injury caused by negligence in the exercise of its governmental functions may be illustrated by cases in which it is held that a city is not liable for a policeman's assault with excessive force, or for the suspension of a town ordinance indirectly resulting in damage to property, or for injury to an employee while in the service of the fire department, or for failure to pass ordinances for the public good, or for the negligent burning of trash and garbage, or for personal injury caused by the negligent operation of a truck by an employee in the service of the sanitary department of a city. *Hill v. Charlotte, supra; Moffitt v. Asheville, supra,* p. 255; *Peterson v. Wilmington, supra; Hull v. Roxboro,* 142 N. C., 453; *Harrington v. Greenville, supra; Hines v. Rocky Mount,* 162 N. C., 409; *Snider v. High Point,* 168 N. C., 608; *Howland v. Asheville,* 174 N. C., 749; *Mack v. Charlotte,* 181 N. C., 383; *James v. Charlotte,* 183 N. C., 630. See, also, 14 A. L. R., 1473, annotation, and 32 A. L. R., 988, annotation.

In applying these principles we must hold that the incinerator was built in the discharge of a governmental function. The power to maintain public works, buildings and improvements; to remove garbage, and to provide for the health, comfort and welfare of the people, is conferred by statute upon the cities and towns of the State. C. S., secs. 2787 (5, 6) and 2799. It was in pursuance of this legislation that the furnace was constructed; and, as suggested in *Snider v. High Point, supra,* the acts complained of were in the performance of duties authorized by law solely for the public benefit, governmental in character and not merely private and corporate. There was error in overruling the demurrer.

Reversed.

AMANDA SATCHELL, ADMINISTRATRIX OF ROBERT SATCHELL, v. JOHN F. MCNAIR AND J. J. MCKAY, TRADING AND DOING BUSINESS AS WACCAMAW SHINGLE COMPANY.

(Filed 15 April, 1925.)

1. Employer and Employee—Master and Servant—Parent and Child—Negligence—Instructions—Appeal and Error.

The parent is the natural guardian of her 15-year-old lad; and upon evidence that her son, employed to work in the woods for a shingle company, was put to work by his employer, against her instructions, as a "tripper" at the saw table, a place attended with danger, and with which he was inexperienced, it is a breach of duty of the defendant, and is actionable negligence when proximately causing the death of the boy, though not a matter of contract between the company and the parent; and a peremptory instruction that the jury should not consider it upon the issue is reversible error.

2. Employer and Employee — Master and Servant — Negligence — Evidence—Instructions—Appeal and Error.

The plaintiff's intestate, a lad of 15 years of age, was employed by the defendant to work as a "tripper" at a shingle saw, under the sawyer, with allegation and evidence tending to show that it was necessary for the sawyer to see the plaintiff's intestate when the latter was operating the saw carriage, in order that the intestate might work in safety, and that a board was suspended about 5 inches above the saw in such a manner as to obstruct this view, and in consequence the intestate's death was caused: *Held*, reversible error for the trial judge to instruct the jury to disregard the evidence of this obstruction in passing upon the question of defendant's actionable negligence.

3. Employer and Employee — Master and Servant — Negligence — Evidence—Instructions—Appeal and Error.

Where there is allegation and evidence tending to show that the death of plaintiff's intestate was caused by the negligent failure of the defendant, his employer, to furnish him a safe place to work at its shingle saw, and to instruct him, an inexperienced boy, in this dangerous work, it is reversible error for the trial judge to fail to instruct the jury in the law arising from the evidence as to the defendant's duty thereunder.

ADAMS, J., not sitting.

APPEAL by plaintiff from judgment rendered by *Grady, J.*, at September Term, 1924, of BRUNSWICK.

Action to recover damages for death of plaintiff's intestate, alleged to have been caused by the negligence of defendants (1) in failing to provide for said intestate a safe and suitable place in which to work as an employee of defendants, and (2) in failing to warn and instruct said intestate of the dangers incident to the work for which he was employed. It is further alleged that at the time intestate received the fatal injuries he was 15 years of age and had been at work as a tripper at defendants'

mill only two weeks; that prior to this time he had worked for defendants in other positions; that plaintiff, mother of said intestate, had requested defendants not to put her son at work as a tripper, because of the dangers attendant upon the performance of the duties of this position, and that defendants had promised to comply with this request. All the material allegations in the complaint are denied in the answer. The jury having answered the first issue, to wit, "Was plaintiff's intestate killed by the negligence of defendants, as alleged in the complaint?" "No," judgment was rendered that plaintiff recover nothing of defendants, and that the action be dismissed. From this judgment plaintiff appealed, assigning errors.

Herbert McClammy and Robert W. Davis for plaintiff.
Rountree & Carr and C. Ed Taylor for defendants.

CONNOR, J. In his charge to the jury his Honor instructed them as follows:

"This case, gentlemen, that we are trying, is not based upon a contract; it is not based upon any agreement made between the plaintiff and the defendants, and any agreement that may have been made between Amanda Satchell and the defendants, or Mr. Long, or any other person representing the defendants, would have nothing to do with the case and nothing to do with your verdict." Plaintiff excepted to this instruction; this exception is presented upon this appeal as the basis of the sixth assignment of error.

At the time he was killed, Robert Satchell, plaintiff's intestate and son, was 15 years of age. He was at work at defendants' mill as a tripper, having been thus employed for about two weeks. Prior to this time, he had been working for defendants, with his mother's consent, in the woods. It is admitted in the answer that the duties of a tripper at a sawmill are such as to require care and prudence on the part of the employee for his own safety. Defendant, J. J. McKay, testified that he did not consider the position of a tripper as *very* dangerous. He said: "I would not pick up a man without any experience and put him in one of the mills as a tripper, but this fellow had worked around the mill and knew how to pull off boards."

Plaintiff alleges in her complaint that on several occasions prior to the death of her son, she talked with Mr. J. J. McKay and also to the foreman, Mr. Long, and told him that she did not want her son to do the tripping or to work at the mill; that she requested them not to place him at this work, because it was dangerous for a boy of his years to do. She testified that her son had been working for defendants in the woods, and that one day Mr. Long called him and hired him to work at the

mill as a tripper; that she went to Mr. Long and told him not to hire Robert to trip, and he said, "I won't put him to tripping any longer." This was about a week before Robert was killed. Mr. Long, testifying as a witness for defendants, denied that plaintiff had this conversation with him.

It is true, as his Honor instructed the jury, that this action is not based upon a contract; but the peremptory instruction that the agreement between Amanda Satchell and Mr. Long, foreman of the mill, if the jury should find that such an agreement was made, would have nothing to do with the case and nothing to do with the verdict, cannot, upon the evidence in this case, be sustained. The mother, and natural guardian of the infant, having forbidden defendants to employ him as a tripper, according to her testimony defendants violated a duty to the infant when they employed him and put him to work in this position. Their act in so employing him, and in so putting him to work as a tripper, was in itself a breach of this duty, and if it was the proximate cause of the injury, was actionable negligence. His Honor failed to instruct the jury in accordance with the law applicable to the facts, which the jury might find from the evidence. *Haynie v. Power Co.*, 157 N. C., 503. In his opinion in this case *Justice Brown* says: "The sum and substance of the many cases cited in these notes (30 L. R. A. (N. S.), 311) are that it is a general rule that an employer putting a minor servant, against his parent's consent, to do the work by which the child is injured, commits an actionable wrong, for which the employer is liable, although there is no other evidence of negligence upon his part." *R. R. v. Fort*, 17 Wallace, 553, and cases cited in Rose's notes annotating this case. See, also, *Ensley v. Lumber Co.*, 165 N. C., 687. By this instruction, plaintiff was deprived of any consideration by the jury of the facts in this regard, as she contended them to be, and of the benefit of well-settled principles of law applicable to such facts.

His Honor further instructed the jury as follows: "Now, the plaintiff alleges in her complaint, and it is contended here upon the trial, that there was a board suspended over the saw, something like 18 inches in width, and that this board prevented Mr. Long from seeing the boy; but it is my duty, gentlemen, to charge you that there is no evidence in this case which would justify you in finding this contention to be true, because the witnesses for the plaintiff have testified that each one of the parties in question—that is, the boy and Long—were in plain view of the other; that the boy could see Long and that Long could see the boy; in other words, that the board in question was not between them at the time of the accident. Therefore, gentlemen, you cannot find as a fact that there was any negligence on the part of the defendants in this respect, and a verdict based upon such presumption would be entirely

erroneous, and it would be my duty to set it aside if it were so rendered." Plaintiff excepted to this instruction; this exception is the basis of the seventh assignment of error.

Plaintiff alleges in her complaint that, just before his death, Robert Satchell, in the performance of his duties as tripper, was in the act of taking from the carriage a board which had just been cut from a log on the carriage; that the sawyer was standing in his position, about 6 feet from Robert, waiting for him to take the board off the carriage and adjust the "dogs," as it was his duty to do, before reversing the lever and thus causing the carriage to return for another "cut"; that while Robert was thus engaged, the sawyer "recklessly, carelessly and negligently pulled the lever back while not looking towards said deceased, and recklessly, carelessly and negligently neglected to observe, as he was required to do, and by reason of the obstruction of his view by a board between the sawyer and said deceased, did not and could not see him, and thereby caught his clothing by the 'dog' and threw the deceased into the machinery, where his body was torn and mangled," thus causing his death.

There was evidence "that there was a board hanging over the saw, between the sawyer and the tripper, 3 or 4 feet long, hanging straight down, right above the saw, from the joist; that the board was about a foot and a half wide, and was there to keep the sawdust from flying; that the bottom of the board was about 5 inches from the teeth of the saw. The sawyer stood about 18 inches or more from a straight line in front of the saw, and the tripper about 2 feet or more from a straight line in the rear of the saw, and it was practically open between the sawyer and the tripper. There wasn't any obstruction, except the board hanging over the saw. Satchell could see the sawyer all the time, and the sawyer could see Satchell." The sawyer testified that the board did not come between him and where the tripper was standing; that Robert took the last two boards off the carriage, and that he saw that the carriage was clear; that he turned his head to look at the pedal under his foot, and that when he turned his head to look back up, Robert was on the saw, turning over.

This evidence should have been submitted to the jury, in order that they might find whether or not, at the time the sawyer reversed the lever, the board obstructed his view and prevented him from seeing Satchell. There is error in the peremptory instruction, and the assignment is sustained.

We have examined the charge, which is set out in full, in the statement of case on appeal, with care. We fail to find therein any instruction as to the duty which upon the facts as the jury might find them from the evidence the defendants owed to the plaintiff's intestate. His

Honor instructed the jury as follows: "I charge you, as a matter of law, that you cannot guess—you are not permitted to guess—at anything, but you must find the facts from the evidence, and if the evidence in this case is of such character and quality as to satisfy you by the greater weight that there was some particular duty owing to the dead boy by defendants, and that duty was violated, and as a direct and proximate result of such violation he was killed, it would be your duty to answer this issue 'Yes'; otherwise, you should answer it 'No.'" We are unable to find in the charge any instruction as to the duty which the law imposed upon defendants with respect to plaintiff's intestate, who, it is admitted, was their employee and was of the age of 15 years. It was the duty of the judge to so instruct the jury. *Bowen v. Schnibben,* 184 N. C., 248; *Hauser v. Furniture Co.,* 174 N. C., 463; *S. v. Merrick,* 171 N. C., 788. There must be a

New trial.

ADAMS, J., not sitting.

N. LUNSFORD ET AL. v. IDA E. YARBROUGH ET AL.

(Filed 15 April, 1925.)

1. Advancements.

An advancement is a provision made by a parent on behalf of a child for the purpose of advancing this child in life and to enable him to anticipate his inheritance to the extent of such advancement.

2. Same—Wills—Devise—Interest—Estates—Remainders.

The ordinary rule that an advancement bears interest from the death of the parent does not control the intent manifestly appearing from the parent's will to the contrary; nor will the death of the testator control in instances where his express intent is to postpone an equal division among his children until after the death of his wife, to whom the estate is thus given, for in such cases interest on the advancements commences from the death of the life tenant. C. S., 3234, providing that the existence of the widow's life estate is no bar to the rights of vested remainders, has no application.

APPEAL by defendants from *Calvert, J.,* at January Term, 1925, of PERSON.

Special proceeding for partition of lands and for an accounting by the children of N. Lunsford, Sr., who have received advancements from their father during his lifetime.

Advancements were made by N. Lunsford, Sr., during his lifetime, to four of his children, if no more. The value of each advancement was fixed by him at the time of its making, and it was specifically designated as an advancement. He died 4 September, 1904, leaving a last will and testament, in which he disposed of his property as follows:

"I will that my wife, Mary J. Lunsford, take all of my estate, both real and personal to her own proper use so long as she remains my widow meting out to our children Equal Justice at her death or marriage all of my estate to be equally divided between my children, each one accounting for advancements, share and share alike."

Mary J. Lunsford died 8 August, 1923, without having married a second time.

In dividing the testator's property, after the death of his widow, the trial court was of the opinion, and so ordered, that the advancements made by N. Lunsford, Sr., to some of his children during his lifetime should be charged with interest from the date of his death, 4 September, 1904.

Defendants appeal.

N. Lunsford and William D. Merritt for plaintiffs.
C. A. Hall for defendants.

STACY, C. J., after stating the case: N. Lunsford, Sr., made certain advancements to several of his children during his lifetime, and fixed the specific value of each advancement at the time it was made. In his last will and testament he provided for an equal distribution of his property among all of his children, after the expiration of a life estate given to his wife therein, and stipulated that said advancements should be accounted for in the final settlement of his estate. The single question presented for decision is whether the trial court erred in allowing interest to be charged on these advancements from the date of the death of testator, 4 September, 1904, till the actual division of his estate following the death of his widow in 1923. There is no contention that such advancements should bear interest from the time they were made. *Tart v. Tart,* 154 N. C., 502. But it is the contention of the defendants that, under the above clause in the testator's will, equal division of his estate was not to be had until the death or remarriage of his widow, and that as their enjoyment of the property was thus postponed, the advancements should be considered as of this date without any accrued interest. They say the time when the shares of all the children were to be made equal, under the provisions of their father's will, was at the death of their mother, the life tenant. We think the defendants are correct in this position. *Puryear v. Cabell,* 65 Va., 260; *Kyle v. Conrad,* 25 W. Va., p. 774.

An advancement may be defined as a provision made by a parent on behalf of a child for the purpose of advancing said child in life, and to enable him to anticipate his inheritance to the extent of such advancement. C. S., 1654, rule 2; *Thompson v. Smith,* 160 N. C., 256; *Kyle v.*

Conrad, supra. Ordinarily, the value of an advancement is to be determined as of the date of its making. *Ward v. Riddick,* 57 N. C., 22; *Shiver v. Brock,* 55 N. C., 137; *Lamb v. Carroll,* 28 N. C., 4; *Stallings v. Stallings,* 16 N. C., 298. And, on an accounting, no interest is to be charged against an advancement prior to the death of the testator or intestate, or the time fixed for division, where, by will, it is extended beyond the death of the parent or testator. *Tart v. Tart, supra; McNairy v. McNairy,* 1 Shannon's Tennessee Cases, p. 341.

Usually, the time for distribution is at the death of the parent. But here the time for division was postponed by the testator until after the death or remarriage of his widow. He made the advancements during his lifetime, and in his will he fixed the death of his widow as the time for the ultimate division of his estate. It is not to be presumed that he misunderstood the provisions of his will. But, on the other hand, his intention, clearly expressed, is controlling in the matter. *Kyle v. Conrad, supra.*

We are not considering a case where actual division has been delayed beyond the time fixed for distribution, either by law or by the testator. There a different rule may apply during the time of such delay. *McNairy v. McNairy, supra.*

The decision in *Daves v. Haywood,* 54 N. C., 253, is not at variance with this position, for in that case three of the children, or ultimate takers, borrowed upon their interests and took what they called "advancements" from the executrix and life tenant after the death of the testator. They were, therefore, properly charged with interest on these loans.

We are not unmindful of the argument that the position taken by the defendants should not be allowed to prevail, because, under C. S., 3234, the existence of the widow's life estate was no bar to the right of vested remaindermen to have the remainder sold for division or actually partitioned, subject to the right of possession of the life tenant during the continuance of her estate (*Baggett v. Jackson,* 160 N. C., 26); but this was not done, and the time for division is fixed by the will of the testator at the date of the falling in of the life estate. The defendants were under no greater obligation to proceed under this statute than the plaintiffs, even if it be pertinent or have any bearing on the question before us, which is not conceded.

There was error in allowing interest to be charged on the advancements prior to the time fixed for the final division of the estate, which was at the death of the life tenant.

Error.

FARMERS BANK AND TRUST COMPANY v. W. M. MURPHY AND W. H. MALPASS.

(Filed 15 April, 1925.)

1. Actions — Claim and Delivery — Possession — Title — Principal and Agent—Parties—Statutes.

Where one has intervened (C. S., 829) in an action, and is allowed to plead that the property attached in the action was his own, and in his possession at the time of the levy under the attachment, and there was evidence thereafter introduced, by affidavit and otherwise, that the possession and ownership was claimed by the intervener, as agent of another who had purchased for value from the defendant in the original action: *Held*, on motion to make such third person a party, the refusal of the motion is not a matter of discretion with the trial court, but should have been granted to have all the parties at interest before the court and determine the matters involved in one and the same action. C. S., 460.

2. Same—Merchandise in Bulk—Sales—Instructions—Appeal and Error.

The failure to comply with the provisions of C. S., 1013, in attempting to make a sale of merchandise in bulk, makes the sale void as to existing creditors, etc., of the vendor, and not as to subsequent creditors after the merchandise has been taken over by the purchaser through his agent and the business has been thus continued; and an instruction is reversible error upon evidence of this character that failure to comply with C. S., 3288, rendered the transaction void, and C. S., 3291, making such failure a misdemeanor, does not affect the result.

APPEAL by defendants from judgment rendered by *Grady, J.*, at October Term, 1924, of PENDER.

On 15 September, 1921, defendant W. M. Murphy executed notes, aggregating $5,125, payable to the order of O. B. Malpass. These have been transferred to and are now owned by plaintiff. Subject to a credit of $1,000, they are now due. This action was begun on 21 February, 1922, to recover of said defendant the balance due on these notes. By virtue of a warrant of attachment, issued in this action, the sheriff of Pender County levied upon and seized a certain stock of merchandise and certain seed potatoes, fertilizer and crates, located in a store building in Rocky Point, as the property of W. M. Murphy. Defendant thereupon filed an affidavit, in which he set forth that said seed potatoes, fertilizer and crates seized by the sheriff were the property of Samuel Snell, a commission merchant and produce broker of Philadelphia, and were, at time of seizure, in his possession as agent of said Samuel Snell. Said potatoes, fertilizer and crates were thereupon, pursuant to an order of court, released from the levy of the sheriff upon the filing of the bond required.

W. H. Malpass filed an affidavit in this action, setting forth that he is the owner of the stock of merchandise seized by the sheriff, having

purchased same from W. M. Murphy on 1 August, 1921. Upon his motion, he was allowed to intervene in the action and was made a party defendant. Said stock of merchandise was thereupon, pursuant to an order of court, released from the levy of the sheriff upon the filing of the bond required.

Upon the trial of the action the issues submitted to the jury, with answers thereto, were as follows:

"1. Is W. H. Malpass the owner of the stock of merchandise referred to in the warrant of attachment? Answer: 'No.'

"2. What was the value of said stock of goods on the date of the attachment? Answer: '$1,800.'

"3. What was the value of the seed potatoes, fertilizer and strawberry crates seized by the sheriff at the time of the seizure? Answer: '$1,029.94.' "

From the judgment rendered on this verdict defendants appealed to the Supreme Court, assigning errors based upon exceptions duly noted.

Gavin & Boney, George R. Ward, and C. E. McCullen for plaintiff.
Bland & Bland for W. M. Murphy.
Weeks & Cox for W. H. Malpass.

CONNOR, J. There was evidence that the seed potatoes, fertilizer and strawberry crates seized by the sheriff under the warrant of attachment as the property of W. M. Murphy were the property of Samuel Snell, of Philadelphia, and were in the possession of Murphy at the time of the seizure as agent of Snell. Upon the ruling of his Honor that certain evidence offered by Murphy was not competent because Samuel Snell had not intervened and was not a party to this action, defendant Murphy moved that said Samuel Snell be allowed to intervene as a party defendant. The deposition of Samuel Snell had been taken and had been introduced in evidence by defendant Murphy. Motion denied. Defendant excepted. Attorney for defendant Murphy, who was also attorney for Samuel Snell, then moved that the pleadings be amended to show that Snell, by his agent, Murphy, intervenes. Motion denied. Defendant excepted.

Defendant Murphy assigns as error the refusal by his Honor of these motions. This assignment of error must be sustained upon the authority of *Temple v. Hay Company,* 184 N. C., 239. The motion was not addressed to the discretion of the court; it was made as a matter of law, upon the facts which the evidence tended to show. Its refusal is reversible error. *Hoke, J.,* in the opinion for the Court in *Temple v. Hay Company,* says: "In various and well-considered decisions of this Court on the subject, it is recognized as the policy and expressed pur-

pose of our present system of procedure that all matters in a given controversy should, as far as possible, be settled in one and the same action." *Guthrie v. Durham,* 168 N. C., 573; C. S., 460. If the facts be as the deposition of Samuel Snell and the testimony of W. M. Murphy tend to show, defendant W. M. Murphy held the property levied upon, and sought to be subjected to the payment of plaintiff's debt, as agent of Snell. Snell was a necessary party for a final and complete determination of the ownership of the property. The property attached was claimed by Snell, as appears from his deposition. He had the right to intervene or interplead. C. S., 829. Murphy, in whose possession the property was levied upon by the sheriff, denied that he owned the property, and testified that he held it as agent of Snell. The motion should have been allowed, and the issue thus raised determined by the jury.

There was evidence tending to show that defendant, W. H. Malpass, purchased the stock of merchandise from W. M. Murphy on 1 August, 1921. There is no evidence that C. S., 1013, known as "The Bulk Sales Act" was complied with, nor is there any evidence that on said date W. M. Murphy had any creditors. The notes upon which this action is brought were executed on 15 September, 1921. His Honor instructed the jury that failure to comply with C. S., 1013, in the sale of the stock of merchandise by Murphy to Malpass, rendered the sale void, that no title to same passed from Murphy to Malpass and that if they believed all the evidence in this case, they could not find that Malpass was the owner of the stock of merchandise at the date of the seizure by the sheriff. Defendants excepted to and assign this instruction as error. This assignment of error must be sustained. C. S., 1013, has no application to this case. Failure to comply with its provisions renders the sale void only as against creditors of the seller. The provision for notice to creditors, at least seven days before a contemplated sale, as one of the requirements for its validity, shows clearly that the statute applied only to existing creditors of the seller. It cannot be construed as applying to a subsequent creditor, certainly where there are no creditors at time of sale.

There was evidence tending to show that prior to the sale on 1 August, 1921, W. H. Malpass had been adjudged a bankrupt, and that he was not discharged from bankruptcy until after the sale. There is also evidence that after the sale Malpass continued to carry on the business under the name of W. M. Murphy, buying goods, and depositing money in the bank in the name of W. M. Murphy. He signed checks on deposits, "W. M. Murphy by W. H. Malpass." There was no evidence that W. H. Malpass filed in the office of the clerk of the Superior Court of Pender County the certificate as required by C. S., 3288, or otherwise complied

with the provisions of said statute. His Honor instructed the jury that failure by W. H. Malpass to comply with C. S., 3288, rendered the transaction between him and Murphy void as to creditors of the parties. Defendants excepted to and assign this instruction as error. This statute manifestly is for the protection of creditors of persons who fail to comply with its provisions, or of others who do business with them. The consequences of a violation of the statute are prescribed by C. S., 3291. They seem to be limited to punishment as a misdemeanor for it is expressly provided that failure to comply with C. S., 3288 shall not prevent a recovery in a civil action by the person who shall violate the statute. This assignment of error must be sustained.

For errors assigned by appellants and sustained by this Court, there must be a new trial. If the motion to make Samuel Snell a party is renewed, it should be allowed so that an issue as to whether he is the owner of the seed potatoes, fertilizer and crates seized by the sheriff may be determined by a jury. The burden of this issue, will, of course, be upon him as an interpleader. There must be a

New trial.

J. MARVIN HUNT v. N. L. EURE, PAUL WEBB, JOHN J. SHERRIN, AND DR. J. H. WHEELER.

(Filed 22 April, 1925.)

1. Bills and Notes—Nonnegotiable Instruments—Recitations for Value—Prima Facie Case—Presumption.

There is no presumption of a consideration for a nonnegotiable instrument, and upon the plaintiff in an action thereon rests the burden of proof throughout the trial of showing a sufficient consideration; and the same ruling applies when the instrument makes out a prima facie case by the recital of value when its execution and delivery are shown.

2. Same—Burden of Proof—Instructions.

Where in an action to recover upon a nonnegotiable note the plaintiff has made out a prima facie case by showing the execution and delivery of the instrument, the burden of disproving the issue does not shift to the defendant, and recovery in the action will be denied if taking all the evidence into consideration the jury may find it sufficient to sustain a verdict in the defendant's favor, or that notwithstanding the presumptive evidence in the plaintiff's favor it had not satisfied the jury by its greater weight that he was entitled to recover thereon, or if the evidence in defendant's favor has been sufficient to balance in the minds of the jury the prima facie presumption in the plaintiff's favor.

3. Courts—Issues.

While the framing of issues is left largely to the discretion of the trial judge, and no error will be found if the issue permit the parties to present

every phase of their contentions and evidence relating thereto without prejudice to their rights, yet the trial judge should, in the exercise of his discretion, clarify the issuable matters so that the jury, in the exercise of their intelligence, may correctly decide them upon the evidence under correct instructions of the court as to the principles of law applicable.

4. Evidence—Prima Facie Case—Appeal and Error—Prejudice—Harmless Error.

The rules of evidence are important to the establishment of the rights of litigants, and a disregard of the rules establishing a presumptive right or prima facie case wherein a litigant has been substantially prejudiced, may not be regarded as a mere technical or harmless error, and an instruction that erroneously places the burden of the issue upon the defendant when it should have remained on the plaintiff in a civil action, is reversible error.

5. Instructions — Burden of Proof — Prima Facie Case — "Satisfy the Jury"—Appeal and Error—Reversible Error.

Where the burden of the issue in a civil action remains with the plaintiff throughout the trial, an instruction that requires the defendant to satisfy the jury in his behalf is equivalent to requiring him to establish his defense by the preponderance of the evidence, and is reversible error.

THE defendants, N. L. Eure and J. H. Wheeler, appealed from a judgment of *McElroy, J.*, entered upon a verdict of a jury at January Term, 1925, of GUILFORD.

The contest is upon a $2,000 note, executed by defendants to plaintiff on 20 July, 1920, payable "sixty days from date."

The defendants, Eure and Wheeler, admitted the execution of the note, but defended on the ground that it was an accommodation paper.

This case was considered by this Court on a former appeal, and is reported in 188 N. C., p. 716.

Wilson & Frazier; King, Sapp & King for plaintiff.
Bynum, Hobgood & Alderman for defendants.

VARSER, J. In the former opinion in this case it was held that the note sued on was nonnegotiable, and, therefore, under the former rulings in this State (*Stronach v. Bledsoe,* 85 N. C., 473, 476; *Carrington v. Allen,* 87 N. C., 354), "A consideration is not presumed and must be both averred and proved. In such case the burden of proving a consideration is on the plaintiff."

It is also held that the recital of value in the note itself makes out a prima facie case when the execution and delivery are shown; and 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 greater weight of all the evidence that the contract is supported by a valuable consideration.

After charging the jury as to the prima facie case made out by plaintiff, the trial court said to the jury: "And the burden of proof, not the burden of the issue, shifts to the defendants. The term 'prima facie' means that which suffices for the proof of a particular fact until contradicted or overcome by evidence. If the plaintiff then makes out a prima facie case and the burden of proof shifts to the defendants, then the defendants, in order to defeat a recovery by the plaintiff, must show to the satisfaction of the jury, and not by the greater weight of the evidence, that said note was given as an accommodation to the plaintiff, and was without valuable consideration; and if such facts are shown to the satisfaction of the jury, the plaintiff would not be entitled to recover." This charge is assailed in defendants' exceptions.

The issue submitted was in the usual form in debt.

The terms, "the burden of the issue," and "the burden of proof," and "the duty to go forward with the evidence," have given much perplexity to both the trial and appellate courts. The definition of the office of these terms, and their application to concrete cases, have been "often blurred by careless speech." (*Hill v. Smith,* 260 U. S., 592.)

In the former decision this Court said: "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." *Non constat,* that he should be required to assume the "burden of proof" to show to the "satisfaction" of the jury, but not by the greater weight of the evidence, that the note was not given "for value," in order to defeat a recovery.

In *Board of Education v. Makely,* 139 N. C., 30, on page 35, the Court discusses the terms, "burden of proof," "burden of issue," and "prima facie case," as follows: "Plaintiffs are, therefore, as we have said, the actors, and they allege the affirmative of the issue to be the truth of the matter." *McCormick v. Monroe,* 46 N. C., 13. "The burden of the issue was upon them from the beginning to the close of the case, although the burden of proof may have shifted during the trial from one side to the other, and even repeatedly back and forth. The distinction between the burden of the issue and the burden of proof is thus stated by an eminent law writer: "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." 1 Elliott on Ev., 139; *Fitzgerald v. Goff,* 99 Ind., 28.

White v. Hines, 182 N. C., 275, contains a collection of the authorities, with many conflicts pointed out, in the light of the effect of the doctrine of *"res ipsa loquitur," "prima facie* case," "burden of proof," and the "burden of the issue." The only solvent for the apparent conflicts in the many decisions on this subject is suggested in this case by *Mr. Justice Adams* in holding, in effect, that there is a wide difference in the use of the expression of "burden of proof" in the sense of proving or establishing the issue, or case, as distinguished from the use of this term as an expression of the practical necessity of going forward or proceeding with evidence or proof. If we use these terms in this sense, keeping in mind the difference and restricting each to its proper office, it is possible that the true rule may be applied without injury to either party to the controversy. Practical experience, however, teaches us that these shades of meaning are not well suited to controversies in the trial courts, and that often they bring about prejudicial error.

In the instant case, construing the charge contextually and not in detached portions (*Cherry v. Hodges,* 187 N. C., 368; *In re Mrs. Hardee,* 187 N. C., 381), we perceive that the trial court, in charging the jury, "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 a recovery by the plaintiff must show to the satisfaction of the jury, and not by the greater weight of the evidence, that said note was given as an accommodation to the plaintiff and was without valuable consideration, and if such facts are shown to the satisfaction of the jury, the plaintiff would not be entitled to recover," improperly placed upon the defendant, as a matter of law, the burden of proof, and that such an instruction was tantamount to placing upon the defendant the burden of proof in the sense of ultimately proving his defense of insufficient consideration as distinguished from the mere election, which arose upon the introduction of the note with a recital of a valuable consideration therein, either to go forward with evidence rebutting the declaration in the note, or to take the risk of an adverse verdict in the absence of such evidence, from the defendant.

In *Speas v. Bank,* 188 N. C., 524, the same doctrine is reconsidered with these statements: "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 Assn. 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 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, supra.* 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."

In the light of these clearly reasoned opinions, well fortified by both authorities and experience in every-day affairs, it must be held that the burden of the issue and the burden of proof always rests upon the actor, and never upon the *reus.* This is true when these terms are used in the sense of the ultimate establishment of the case, or the specific matter affirmatively and necessarily alleged in order to obtain the desired relief.

Inasmuch as there has grown up such a divergent use of the term "burden of proof," which has, in legal parlance, two offices (which ought to be, but are not) entirely distinct, we suggest that, in instructions to juries, trial courts use the term, "burden of proof," only in the sense of the burden of the issue, and, thereby, the "burden of the issue" and the "burden of proof" become interchangeable and coextensive terms. This suggestion is for the purpose of bringing order out of seeming confusion. It is but proper that instructions to juries should be couched in language of which the meaning in legal parlance

is the same as the meaning in every-day affairs. All instructions are intended for the guidance and aid of the juries.

Going forward with evidence, or the right to elect to go forward, or not to go forward, and prima facie case, as well as presumptions of fact, which are largely mere inferences with varying degrees of probative force, are largely questions that affect the litigants and counsel in the management of the cause before it is submitted to the jury, and are not matters for the consideration of a jury until submitted to them. Whether, when a prima facie case has been established by the plaintiff, the defendant will go forward with evidence, or offer evidence, or rely upon the weakness of the plaintiff's showing, is, until a verdict is rendered, a matter to be determined by the litigant and his legally constituted advisors. Of course, prior to the adoption of our statute, C. S., 564, these questions were more serious, because the judges then had the right to express an opinion upon the facts under the common law. Now, the jurors are the only and absolute triers of the facts, and these questions have lost much of their ancient use. So far as the court is concerned, if the evidence offered by one party, if found to be true, is sufficient to support the verdict, the judge's duty, as to the weight of the evidence and his opinion in regard thereto, suspends itself until he comes to consider, in his discretion, a motion to set aside the verdict. Much confusion as to proceeding with evidence, when a prima facie showing has been made, is eliminated by a proper application of C. S., 564. Under our system, the trial court, during the production of the evidence, must, necessarily, proceed upon the theory that the jury has a right to find as true, all the evidence submitted by either party.

Much confusion also arises from loose pleading and from the mixing of distinct issues into one issue.

Unless the complaint contains "a plain and concise" statement of the facts constituting a cause of action, without unnecessary repetition (C. S., 506), and the answer contains "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief," and "a statement of any new matter constituting a defense of counterclaim, in ordinary and concise language," courts will be hampered in determining what are the proper issues, both as to form and to number. The principles of good pleading are retained under our present system. *Hartsfield v. Bryan,* 177 N. C., 166; *Blackmore v. Winders,* 144 N. C., 216; *Lassiter v. Roper,* 114 N. C., 17; *Stokes v. Taylor,* 104 N. C., 394; *Knowles v. R. R.,* 102 N. C., 65; *Junge v. MacKnight,* 135 N. C., 110; *Pierce v. R. R.,* 124 N. C., 98; *McElwee v. Blackwell,* 94 N. C., 261; *Hussey v. R. R.,* 98 N. C., 34; *Rountree v. Brinson,* 98 N. C., 107; *Kiff*

v. Weaver, 94 N. C., 278; *Hammond v. Schiff,* 100 N. C., 161; *Womble v. Leach,* 83 N. C., 84; *Jones v. Mial,* 82 N. C., 252; *Gorman v. Bellamy,* 82 N. C., 496; *Moore v. Hobbs,* 77 N. C., 66.

In the instant case, the pleadings clearly met this requirement, and, since the burden of the issue is upon the plaintiff, when the execution and delivery of the note sued on are admitted, and the only issue in reality is the consideration of the note, the issue submitted is in proper form. In fact, when each element contained in an issue, whether one or more, is such that the burden of proof rests upon the same party as to all of these elements, one issue may contain as many controverted questions of fact as the court may desire to include therein, but when the issue submitted to the jury contains elements upon which the burden of ultimately establishing the same is upon different parties, confusion will most likely occur. This is left to the sound discretion of the trial court, and is, evidently, one of the reasons for vesting such discretion in the trial court.

A desire to remedy this situation, *In re Herring's Will,* 152 N. C., 258, led the trial court to submit to the jury three issues, instead of one. In this case the Court says: "The number and form of issues rests in the discretion of the court, if every phase of the contention could have been and was presented." *Patterson v. Mills,* 121 N. C., 266; *Rittenhouse v. R. R.,* 120 N. C., 544; *Humphrey v. Church,* 109 N. C., 132; *Denmark v. R. R.,* 107 N. C., 185; *Deaver v. Deaver,* 137 N. C., 246; *Warehouse Co. v. Ozment,* 132 N. C., 839; *Lance v. Rumbough,* 150 N. C., 25; *Bank v. Ins. Co.,* 150 N. C., 775. But it is the duty of the trial court to submit such issues as will make easy the elucidation of the facts to the jury. C. S., 584. *In re Herring's Will, supra.*

Wigmore on Ev. (2 ed.) paragraphs 2483-2498, contains an elaborate and learned discussion of the basic principles underlying this doctrine of the burden of proof in its several relations. The learned author suggests tests by which these questions may be determined in practice. We commend the following statement taken therefrom: "The important practical distinction between these two senses of 'burden of proof,' is this: 'The risk of nonpersuasion operates when the cases come into the hands of the jury while the duty of producing evidence implies a liability to a ruling of the judge disposing of the issue without leaving the question open to the jury's deliberation.'" The author puts the basis of the burden of proof, or burden of the issue, when used in the same sense, upon the risk of nonpersuasion, which follows the party asserting the affirmative of the issue throughout the case; and we conceive the foregoing statement to be correct when interpreted in the light of the limitation upon the trial courts in this State, in C. S., 564, and

with further rule that the trial judge assumes that the jury may find, as they have a right to do, that all the evidence, of either party, is true.

In *Page v. Mfg. Co.,* 180 N. C., 330, the rule is illustrated, as applied to the instant case, when the burden was placed on the defendant after plaintiff had made out a prima facie case instead of the recognition of the defendant's duty or right, either to go forward with evidence, or take the risk of an adverse verdict, according to the probative value of the evidence, as determined by the jury. As stated in *Page v. Mfg. Co., supra,* a prima facie showing merely takes the case to the jury, and upon it, alone, they may decide with the actor or they may decide against him, and whether the defendant shall go forward with evidence or not, is always a question for him to determine.

In this State this question has been considered in many phases. In *Speas v. Bank,* 188 N. C., 524, the present *Chief Justice* says: "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,* 173 N. C., 33. "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."

In that case, the court only stated the rule to be, that he against whom a prima facie case is made, may win if, upon the whole evidence, the scales are balanced in the minds of the jurors, or, to state it concisely, when, upon all the proof, the case is put in equipoise.

A presumption of negligence, when establishing a prima facie case is still only evidence of negligence for the consideration of the jury, and

the burden of the issue remains on the plaintiff. *McDowell v. R. R.*, 186 N. C., 571. Other cases in North Carolina, treating this subject are as follows: *Cox v. R. R.*, 149 N. C., 117; *Overcash v. Electric Co.*, 144 N. C., 573; *Furniture Co. v. Express Co.*, 144 N. C., 639; *Shepard v. Telegraph Co.*, 143 N. C., 244; *Stanford v. Grocery Co.*, 143 N. C., 420; *Ross v. Cotton Mills*, 140 N. C., 115; *Board of Education v. Makely*, 139 N. C., 31; *Stewart v. Carpet Co.*, 138 N. C., 60; *Womble v. Grocery Co.*, 135 N. C., 474.

In *Cook v. Guirkin*, 119 N. C., 13, the Court discusses the rule with reference to the production of evidence by the party who has such evidence within his own peculiar knowledge or has the custody of the document upon which he relies to establish a certain averment. It is apparent from this case that there can be no conflict with the rule announced in the instant case, because a presumption always arises in aid of the party adverse to him who has the peculiar knowledge or custody of the evidence on the given question, and, thereby, the burden of the issue is not affected, and the requirement that, he who has the peculiar knowledge or the possession of the instruments necessary for the proof, must go forward, is only another way of stating that a presumption arises against him who has such peculiar knowledge or possession, and, thereby, aids the party having the burden of proof to such an extent as will put his adversary to his election, either to go forward or run the risk of an adverse verdict from the presumption.

In Massachusetts, this rule seems to have been most clearly applied for many years. In *West v. State Street Exchange*, 146 N. E., 37 (Mass.), this Court says: "The weight or preponderance of evidence might shift, with varying aspects of the trial, but the burden of proof rested on the plaintiffs to maintain the issue presented by the pleadings." *Carroll v. Boston Elevated Railway*, 200 Mass., 527. In *Wylie v. Marinofsky*, 201 Mass., p. 584, the Court says: "Indeed, the burden of proof does not shift under the law of this Commonwealth. When the plaintiff has closed his case, the defendant may then attack it. If he merely introduces evidence which breaks down the case of the plaintiff, he assumes no burden of proof." *Willett v. Rich*, 142 Mass., 356; *Gibson v. International Trust Co.*, 177 Mass., 100.

Wilder v. Cowles, 100 Mass., p. 490 says: "The burden upon the plaintiff is coextensive only with the legal proposition upon which his case rests. It applies to every fact which is essential, or necessarily involved in that proposition."

Smith v. Hill, 232 Mass., 188, says: "The party whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate."

Powers v. Russell, 30 Mass., 69; *Hughes v. Williams,* 229 Mass., 467; *Commonwealth v. Thurlow* 24 Pick. (Mass.), 374.

In *Hill v. Smith,* 260 U. S., 592, *Mr. Justice Holmes* says that the distinction between the burden of proof and the necessity of producing evidence to meet that already produced has been familiar in Massachusetts since the time of *Chief Justice Shaw,* who wrote the opinion in *Powers v. Russell, supra. St. John Bros. Co. v. Falkson,* 130 N. E., 51 (Mass.); *Rudy v. Warehouse Co.,* 144 N. E., 286, (Mass.), *Rugg, C. J.,* says: "This Court has maintained with care the general distinction between the burden of proof and the necessity of producing evidence to meet that already produced."

The same rule has been announced in other states. *First National Bank v. Ford,* 216 Pac., 691 (Wyo.); *Guaranty State Bank v. Shirey,* 258 S. W., 1109 (Texas); *Menzenworth v. Metropolitan Insurance Co.,* 249 S. W., 113 (Mo.); *Carver v. Carver,* 97 Ind., 497. *Res ipsa loquitur* does not shift the burden of proof. *Sweeney v. Irving,* 228 U. S., 223.

The defendants also contest the requirement in this charge that the defendants should "satisfy" the jury that the prima facie showing made by plaintiff upon the introduction of the note with its recital of "for value received of him." While this contention is not vital, in the light of the rule as to "burden of proof," herein set forth, it is proper that we now consider it. It is clear that the instruction, considered contextually as is the rule, that the defendant was required to show "to the satisfaction of the jury and not by the greater weight of the evidence," when coupled with the premise "in order to defeat a recovery by the plaintiff," is placing the burden of proof on the defendants in the sense of the ultimate establishment of the truth of his allegation of "no consideration" as an affirmative defense. Their defense is only negative; they deny that there is any consideration for the note and assert that it is only an accommodation paper.

In *Chaffin v. Mfg. Co.,* 135 N. C., 95, 99, the words, "to the satisfaction of the jury," were considered as equivalent to "the preponderance of the evidence." The Court says: "The weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed." The same rule is announced in *Sigmon v. Shell,* 165 N. C., 582, 586. In both of these cases our Court conceives the language "to the satisfaction of the jury" as consistent with and equivalent to the burden of the proof of the issue in its ultimate establishment.

As stated in *White v. Hines, supra:* "Of course it will be understood that the rule herein stated is not intended, in any way, to modify the well-established principles that apply in cases of homicide. What is said in the instant case does not apply to criminal cases. The rule in criminal cases is set forth with much clearness by the present *Chief Justice* in

Speas v. Bank, supra. We perceive, although we do not now decide, that there is no real conflict. When we consider the character of the contest in criminal cases, upon a plea of not guilty, involving only a simple denial of the allegations of the State, and in other instances, when the plea amounts to a dependent defense, and in cases when the plea is in the nature of a confession and avoidance, the apparent conflict materially lessens. *S. v. Benson,* 183 N. C., 795; *S. v. Willis,* 63 N. C., 26; *S. v. Terry,* 173 N. C., p. 761; *S. v. Hancock,* 151 N. C., 699; *S. v. Clark,* 134 N. C., 706; *S. v. Barrett,* 132 N. C., 1005. In *S. v. Benson, supra,* the Court says: "When it is admitted or proven 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; and an unlawful killing with malice is murder in the second degree." *S. v. Fowler,* 151 N. C., 732.

It will be seen that, in cases of homicide, it is *the law* that raises the presumption when the killing with a deadly weapon is admitted or proved. This makes the crime, as a matter of law, murder in the second degree, when the killing and the use of a deadly weapon are established, unless the defendant proves the legal provocation that will extinguish the malice and reduce it to manslaughter, or that will excuse it upon the ground of self-defense, accident or misadventure. *S. v. Carland,* 90 N. C., p. 675; *S. v. Little,* 178 N. C., 722.

In *S. v. Willis, supra, Mr. Justice Battle* declines to follow the rule that, matters in excuse and in mitigation in such criminal cases, should be proved by the preponderance of the evidence, but allowed and approved the statement that they need only to be proven to the satisfaction of the jury. The Court used such language as to indicate that, although such matters practically amount to an affirmative defense, the law, although it raises the presumption of murder in the second degree from the killing with a deadly weapon, will, for the same reason that it requires the State to prove its case beyond a reasonable doubt, "in the humanity of the law," "for the prisoner's sake," (*S. v. Starling,* 51 N. C., 366) only requires the defendant to show matters in excuse or mitigation "simply to the satisfaction of the jury" (*S. v. Benson, supra; S. v. Carland, supra*), although such matters are practically in the nature of a confession and avoidance or an affirmative defense.

The plaintiff's learned and able counsel contend that the other parts of the charge ought to be construed as curing this error, if we conceive it to be error. If we pursue this view, we run across the doctrine announced in *Patterson v. Nichols,* 157 N. C., 407, 413, and in *Grocery Co. v. Taylor,* 162 N. C., 313.

In these cited cases, the same rule was invoked and the Court said that the jury could not be expected to determine which rule to follow.

If we could perceive this error to be harmless we would apply the salutary doctrine, so ably set forth in *Brewer v. Ring,* 177 N. C., 484; *S. v. Smith,* 164 N. C., 476; *Schas v. Assurance Society,* 170 N. C., 420, 424; and in Graham & Waterman on New Trials, 1235, as does plaintiff's counsel.

The burden of proof is a material rule in all trials of the same nature and kind as the instant case.

The learned author of Graham & Waterman on New Trials, *supra,* says: "Without loss or the probability of loss, there can be no new trial." The rule as to the burden of proof is material. Often, on its proper application, the case pivots, property and personal rights are, thereby, in many cases, established.

In *Hosiery Co. v. Express Co.,* 184 N. C., 478, the present *Chief Justice* says: "The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced."

In *S. v. Parks,* 25 N. C., 296, *Gaston, J.,* said: "It is essential to the uniform administration of justice, which is one of the best securities for its faithful administration, that the rules of evidence should be steadily observed." *Chief Justice, John Marshall,* in *Mima Queen v. Hepburn,* 11 U. S., 290, 295, said: "It was very justly observed by a great judge that "all questions upon the rules of evidence are of vast importance to all orders and degrees of men: our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded."

In *McDowell v. R. R., supra, Justice Hoke,* afterwards *Chief Justice,* when speaking to the value and the integrity of trial by jury as the accepted and approved method of determining questions of disputed fact among English-speaking peoples for more than 900 years, says: "And one of the chiefest features of such a trial as contemplated in these instruments (State and National Constitutions) is that evidence shall be received and weighed in accordance with established rules which have been found by time and experience to make for the ascertainment of truth and the maintenance of right, and a clear violation of such rules can never be regarded as of slight importance."

In the light of these holdings of the Supreme Court of the United States, and our own Court, through *Chief Justice John Marshall, Justice Gaston, Chief Justice Hoke* and *Chief Justice Stacy,* we must conclude that the importance and materiality of the rule as to the burden of proof is firmly established.

Let there be a

New trial.

TOBACCO GROWERS CO-OPERATIVE ASSOCIATION, A CORPORATION, v. L. HARVEY & SON COMPANY, A CORPORATION, J. K. DIXON AND D. J. DIXON, TRADING AS DIXON BROTHERS, L. D. POLLOCK, WILLIAM LOFTIN, RALPH HADDOCK, JOSEPH BROWN, LEE JERKINS, SENUS HILL AND LYON PARKER.

(Filed 22 April, 1925.)

1. Injunction—Hearings—Affidavits—Pleadings—Statutes.

A motion to vacate or modify an injunction may be made, under the provisions of C. S., 856 *et seq.*, upon the complaint and affidavits upon which the injunction is sought, or upon counter affidavits filed on the part of the defendants, the verified answer, if filed, having only the effect of an affidavit if introduced upon the hearing of the motion, and it is not required that the answer should have been previously filed.

2. Same—Issues.

While a restraining order will be continued to the hearing when the pleadings raise material issues of fact, or where the relief sought is not merely ancillary, but is itself the principal relief demanded, if the plaintiff has made out a prima facie case, these allegations must be of the facts necessary to raise the appropriate issues, and the conclusions of the pleader from an insufficient statement of facts is ineffectual.

3. Same—Fraud—Collusion—Cooperative Marketing.

A coöperative marketing association sought to enjoin its members from marketing their tobacco elsewhere in violation of their contracts, and alleged fraud and collusion by them and another in giving agricultural liens to defeat the plaintiff of its rights, and it appeared on the hearing that the liens had been given for advancements: *Held*, the plaintiff's rights had not been invaded, whatever the motive may have been in giving the liens, fraudulent or otherwise, and the injunction was properly dissolved.

4. Same—Solvency.

In this case, *held* that an allegation in the complaint that members of the Coöperative Association had fraudulently given agricultural liens on their crops for which they were charged in excess of the ten per cent over the retail cash price as fixed by statute (C. S., 2482), was insufficient upon which to continue the injunction to the final hearing, especially in view of the admitted solvency of the lienors.

5. Same—Liens—Mortgages.

The contract made by a tobacco growers coöperative association and its members does not transfer the title of the crop to be grown, and under the provisions of the statute the member may "place a mortgage" or lien thereon for agricultural advancements; and the agreement is an executory contract between the association and its members enforceable in equity by a suit for specific performance subject to valid liens thus given thereon. C. S., 2480.

6. Same—Trials.

In this case, *held*, the Tobacco Growers Coöperative Association was not entitled to have the injunction it sought continued to the hearing

on the question of whether the full amount of the advancements claimed by the agricultural lienors had actually been made, it appearing that to some extent the liens were valid, and whatever difference there may be can be determined in the present action.

VARSER, J., did not sit.

APPEAL by plaintiff from an order of *Allen, J.*, dissolving a temporary restraining order on 26 September, 1924, the summons and the complaint having been served on the defendants on 22 September. From LENOIR.

The plaintiff alleges that L. O. Pollock, a farmer cultivating tobacco, and Loftin, Haddock, Brown, Jerkins, Hill and Parker, his tenants, are members of the plaintiff association, all having executed the marketing agreement set out in Exhibit "A" and having delivered to the association a part of the tobacco raised by them in 1922 and 1923, and that in violation of their agreement they sold a portion to parties other than the plaintiff and in December, 1923, announced their purpose not to deliver any more of their tobacco to the plaintiff association. For this reason the plaintiff instituted an action against these defendants in the Superior Court of Onslow County on 21 October, 1923, to enjoin them from disposing of their crops to any one except the plaintiff. The judgment was reversed on appeal (187 N. C., 409) and the restraining order was continued to the final hearing. Thereafter (in September, 1924) L. Harvey & Son Co., by virtue of an alleged agricultural lien and chattel mortgage, took control of the tobacco cultivated by Pollock and said tenants and threatened to dispose of it through parties other than the plaintiff association. It is alleged that the Harvey Company took the tobacco at the request of Pollock and with knowledge that the restraining order above referred to had been continued. On 18 February, 1924, Pollock executed and delivered to the Harvey Company an agricultural lien and chattel mortgage on the crops of 1924, to secure an indebtedness to it of $5,000 and on the same day a similar instrument to Dixon Bros. to secure an indebtedness to them in the same amount. Both these papers were acknowledged and filed for registration on 18 November, 1924, the latter at 11 a. m. and the former at 12 m. It is alleged that the Harvey Company and Dixon Bros. knew the contents of the marketing agreement and that Pollock was a member of the association and had announced his intention not to deliver to the plaintiff any other tobacco grown by or for him and that the plaintiff was seeking to enjoin him from disposing of his tobacco except as provided in his agreement. The Harvey Company, it is said, knew that Pollock was solvent, that he had not formerly given a mortgage on his crops; that the lien was not necessary to secure the amount alleged to be due the lienors; that the amounts advanced were small in comparison with the sum secured;

and that the lien was a device resorted to for the purpose of defeating the injunction. The plaintiff says that the prices charged for the advances made were in excess of those fixed by C. S., 2482. On 17 April, 1924, the tenants named above to secure advances executed to the Harvey Company and to Dixon Brothers agricultural liens and chattel mortgages. The former were filed at 3 p. m. and the latter at 4 p. m. on 19 April. It is asserted that the lienors knew that the tenants were members of the plaintiff association; that they had delivered to it a part of their tobacco and had said they would not deliver any more; that the liens were in excess of the advancements; that the prices were in excess of those allowed by the statute; and that the liens were executed in pursuance of a fraudulent scheme to defeat the agreement made with the plaintiff by Pollock and his tenants.

Upon the complaint, which was treated as an affidavit, Judge Allen, on 22 September, 1924, issued a temporary restraining order returnable before Judge Daniels at Goldsboro on 4 October, 1924, and on the same day at the request of the defendants, who had not had previous notice of the plaintiff's motion, his Honor issued a notice to the plaintiff to show cause before him at the courthouse in Kinston on 25 September, why the restraining order should not be vacated or modified.

Pollock and his tenants filed an answer which was treated as an affidavit; and affidavits were filed on behalf of the Harvey Company and Dixon Bros. In these affidavits all the material allegations of the plaintiff are denied, and exhibits are attached showing an itemized statement of the advances made by the lienors.

At the hearing his Honor vacated the temporary restraining order theretofore issued by him and the plaintiff appealed upon the following assignments of error:

1. That his Honor erred in overruling the plaintiff's objection to his jurisdiction and in holding that he had jurisdiction to hear the motion to vacate or modify the restraining order.

2. That the court erred in admitting the affidavits of C. F. Harvey, Jr., Dan Quinerly, J. K. Dixon and Allen Knott.

3. That the court erred in denying the plaintiff's motion for continuance in order to enable it to prepare and present affidavits in support of the complaint and in answer to the affidavits and answer filed by the defendants.

4. That the court erred in denying the motion of the plaintiff that the temporary injunction be continued until the final hearing of the cause.

5. That the court erred in denying the motion of the plaintiff that the temporary restraining order be continued until the original date set for the hearing before Hon. F. A. Daniels.

6. That the court erred in signing the order vacating the restraining order.

7. That the court erred in denying the plaintiff's motion for continuance of the restraining order pending the appeal under the provision of chapter 58 of the Public Laws of 1921.

8. That the court erred in refusing to require a bond of the defendants L. Harvey & Son Company and Dixon Brothers.

Burgess & Joyner and Kenneth C. Royall for plaintiff.

F. E. Wallace, Spruill & Spruill, and Battle & Winslow for defendants.

ADAMS, J. In reference to the second assignment of error (the first having been abandoned) the plaintiff cites *Ransom v. Shuler,* 43 N. C., 304, as authority for the position that a motion to dissolve an injunction before the answer has been filed is premature. There an injunction was granted upon the bill and at the first term the defendant demurred for want of an equity; the demurrer was set down for argument at the next term and then the defendant's counsel moved to dissolve the injunction. The Court said, "There is an obvious inconsistency in such a course, for the motion to dissolve must be founded on the defects and insufficiency of the bill itself, and therefore it involves precisely the same questions of equity which must arise on the demurrer when brought on for argument and decision. It is, therefore, an attempt to obtain by the summary action on a motion a declaration of the court as to the equity between the parties, which is to come up for solemn determination on the demurrer." It is now provided that a motion to vacate or modify an injunction may be made upon the complaint and affidavits on which it was granted or upon affidavits filed on the part of the defendants, with or without answer, and that a verified answer shall have only the effect of an affidavit. C. S., 856 *et seq.* The time when the affidavits should be filed was a matter largely within the discretion of the judge. This is true likewise as to the matters involved in the third, seventh, and eighth exceptions; and for this reason all these exceptions must be overruled. The fourth, fifth, and sixth present the chief controversy between the parties.

The plaintiff first contends that the affidavits raise an issue of fraud which requires the intervention of a jury. The allegations relating to this issue are substantially as follows: (1) The lienors took possession of the tobacco crop at the request of the lienees; (2) all parties knew that the restraining order had been issued; (3) the liens were executed the same day and filed together for registration; (4) the lienors knew that the lienees were members of the plaintiff association and that

they had previously delivered tobacco to it under their marketing agreement; (5) the principal lienee had not theretofore mortgaged his crop to secure advances and it was unnecessary for him to execute a lien or mortgage for this purpose; (6) the amount secured by the liens was in excess of the advancements; (7) the prices charged were in excess of those authorized by C. S., 2482; (8) the lienors took possession of the crop of tobacco but did not take possession of the other crops; (9) the acts complained of were the result of a fradulent scheme to enable the lienees to evade their obligations to the plaintiff association.

We are not inadvertent to decisions holding that where the pleadings raise material issues of fact or where the relief sought is not merely ancillary, but is itself the principal relief demanded, the restraining order will be continued to the final hearing if a prima facie case is made out. *Marshall v. Comrs.,* 89 N. C., 103; *Jones v. Lassiter,* 169 N. C., 750; *Cobb v. R. R.,* 172 N. C., 58; *Byrd v. Hicks,* 184 N. C., 628. But it is by no means clear that the allegations recited above, considered separately or collectively are sufficient to constitute actionable fraud, the last (ninth) assuming the character of a legal conclusion. If the several acts set out were not illegal or fraudulent in themselves they were not made so merely because prompted by an alleged evil motive which the defendants deny. We had occasion to consider this question in *Bell v. Danzer,* 187 N. C., 224, and there decided that the exercise of a right which does not infringe the legal right of another is not actionable even when prompted by malice, and that the motive is immaterial if the act is otherwise lawful. If the lienors actually made advancements to enable the lienees to produce their crops and were entitled to the possession of the tobacco for the purpose of enforcing the liens, a sinister motive would not in itself defeat the legal right. It is important to note that there is no allegation that the lienors' claims are fictitious or that the secured debts were not contracted, although the amount really advanced is in controversy. True, the plaintiff alleges upon information and belief that the lienors charged more than ten per cent over the retail cash price of the advances in breach of C. S., 2482; but the lienors deny this upon oath and affix an itemized statement of the advances.

In *Riggsbee v. Durham,* 98 N. C., 81, 87, it is said: "'But,' as was said by *Bynum, J.,* in *Perry v. Michaux,* 'it is also a well-settled rule, that when by the answer of the defendant, the plaintiff's whole equity is denied, and the statement in the answer is credible and exhibits no attempt to evade the material charges in the complaint, an injunction, on motion, will be dissolved.' *Perkins v. Hollowell,* 40 N. C., 24; *Sharpe v. King,* 38 N. C., 402. This is clearly so, if, upon the complaint, answer and affidavits, it appears that the plaintiff's claim to have

the restraining order continued, is fully met." In our opinion the injunction should not be continued for such alleged fraudulent collusion, especially in view of the admitted solvency of the lienors.

The decisive question, therefore, is this: Is the legal relation of the lienors to the other parties to the suit such as to require the collection of their claims through the plaintiff association according to the method by which it usually distributes the proceeds arising from a sale of the crops under the marketing agreement, or may they foreclose their liens independently of the marketing agreement?

The agreement between the association and its members contains these sections: (2) The association agrees to buy and the grower agrees to sell and deliver to the association all of the tobacco produced by or for him or acquired by him as landlord or lessor, during the years 1921, 1922, 1923, 1924, 1925. (4a) All tobacco shall be delivered at the earliest reasonable time after picking or curing, to the order of the association. (11) The grower shall have the right to stop growing tobacco and to grow anything else at any time at his free discretion; but if he produces any tobacco, as landlord or lessor, during the term hereof, it shall all be included under the terms of this agreement and must be sold only to the association. (12) Nothing in this agreement shall be interpreted as compelling the grower to deliver any specified quantity of tobacco each year; but he shall deliver all the tobacco produced by or for him. (13a) This agreement shall be binding upon the grower as long as he produces tobacco directly or indirectly, or has the legal right to exercise control of any commercial tobacco or any interest therein as a producer or landlord during the term of this contract. (13c) If the grower places a crop mortgage upon any of his crops during the term hereof, the association shall have the right to take delivery of his tobacco and to pay off all or part of the crop mortgage for the account of the grower and to charge the same against him individually. The grower shall notify the association prior to making any crop mortgage and the association will assist the grower in any such transaction as far as it deems proper.

The plaintiff says that the marketing agreement effects a present sale of future crops to be delivered at the earliest reasonable time; that the lienors had knowledge of this agreement and took their liens subject to the plaintiff's equitable title; and that this principle is not affected by the statutes relating to the probate and registration of instruments required or allowed by law to be registered in the office of the register of deeds. C. S., ch. 65.

We do not concede the accuracy of the plaintiff's position. A sale is the transmutation of property from one man to another in consideration of a price or recompense in value; and if it be granted that the crops

in question had a potential existence when the marketing agreements were made (a circumstance which the defendants do not grant), we fail to discover in the agreements any present transfer of title from the defendant members to the association. In the express words of the contract the "association agrees to buy and the grower agrees to sell and deliver" the tobacco; and moreover they agree "that this is a contract for the purchase and sale of personal property." The crop is described as that of the grower, and *he* may "place a mortgage upon any of *his* crops." See Marketing Agreement, secs. 2, 5, 13c, 18a, 18b. The agreement considered in its entirety imports, not a present sale of future crops or a mortgage of after-acquired property, but an executory contract between the association and its members enforceable by a suit for specific performance. Indeed, this remedy not available where the title has actually been transferred, seems to be approved, not only by the courts, but by the terms of the agreement itself. By statute and by agreement the association is given an equitable remedy for the breach of an executory contract. Public Laws 1921, ch. 87, sec. 17c; Agreement, 18b; *Tobacco Association v. Battle,* 187 N. C., 260; *Tobacco Asso. v. Spikes,* 187 N. C., 367; *Tobacco Asso. v. Patterson,* 187 N. C., 253.

Under these circumstances it is not necessary to enter into a discussion of the principle underlying the right of priority between antagonistic claimants for the reason that the specific question presented has heretofore been determined by this Court. In *Tobacco Asso. v. Patterson, supra, Mr. Justice Hoke,* said: "It is true that a member may place a mortgage or crop lien on his crop for the current year for the purpose of enabling him to successfully cultivate and produce the same, the contract between plaintiffs and defendant clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn, and we understand that plaintiff has no desire or purpose to interfere with any such claim to the extent that it constitutes a valid and superior lien to plaintiff's rights and interests under the contract." . . . "The matter here is not further pursued for the reason that the mortgagee is not thus far a party, and until he is, his rightful claims should not and cannot be in any way impaired and jeopardized in this proceeding, nor, as a rule, should a grower's rights to place a mortgage on his crop for the bona fide purpose of raising the same be in any way hindered or lightly interfered with." This decision expressly recognizes and approves the grower's legal right to execute a mortgage or crop lien for the current year in order that he may produce his crop, as it likewise construes the marketing agreement as contemplating the execution of such lien or mortgage. The plaintiff, it is true, undertakes to differentiate the instant case from Patterson's in these respects: (1) in the latter the mortgagee was not a party; (2) there was no allegation

or evidence that the mortgagee had notice of the marketing agreement; (3) the relative rights of the mortgagee and the association were not presented; (4) there was no question of collusion between the grower and the mortgagee.

The distinction is apparent rather than real. The question of collusion has been referred to; and with respect to the other points of difference it may be said that the brief filed by the plaintiff in *Patterson's case* apparently recognized the outstanding mortgage. While the mortgagee was not a party the relative rights of the parties were, nevertheless, discussed. In its brief the plaintiff said, "The creditor Roberson (mortgagee) has a security right only. He has a title but not a beneficial title; merely a security title. He can protect his security and if necessary can, in a proper proceeding, apply the security to the discharge of the debt." This is just what the mortgagees in the instant case are seeking to do.

The plaintiff says, however, that by virtue of the agreement, sec. 13c, it may "pay off all or a part of the crop mortgage"; that is, that the association may take the tobacco and pay the liens "according to its regular method of distribution," and that the lienors cannot otherwise enforce their security. Several cases from other jurisdictions are cited in support of this position, among them *Redford v. Tobacco Asso.*, 266 S. W. (Ky.), 24; *Tobacco Asso. v. Dunn, ibid.* (Tenn.), 308; *Feagain v. Tobacco Asso.*, 261 S. W. (Ky.), 607; *Wheat Asso. v. Floyd*, 227 Pac. (Kan.), 336; *Oregon Asso. v. Lentz*, 212 Pac. (Or.), 811. But these cases, however persuasive on the questions decided, have no bearing upon our interpretation of local statutes dealing with agricultural liens which the Legislature clearly intended to prefer. C. S., 2480 *et seq.* In these statutes it is provided that advances in money or supplies to a person engaged in the cultivation of the soil may be secured by a lien on the crops made during the year upon the land in the cultivation of which the advances have been expended. The phraseology of the statutes and the legislation affecting the subject manifest a policy to encourage such advances by preferring them to all other liens. It is immaterial that no "lien" is given the plaintiff under the terms of its agreement; if the plaintiff's claim under the agreement be given priority over the agricultural lien the legislative intent to protect the lienor must yield to an agreement to which he is not a party, and for the execution of which he is not responsible. It is upon this principle that we sustain the ruling of the lower court.

It is finally urged that the entire amount secured by the lien includes indebtedness other than that incurred for advances; but it is unquestionable that advances were made, and if the amount is disputed it may be determined in the present action. We must therefore hold that the

plaintiff is not entitled to an order enjoining the lienors from enforceing their liens to the extent of the amounts advanced by them for the "current year" to enable their codefendants to cultivate and produce their crops.

The judgment is

Affirmed.

VARSER, J., did not sit.

CARL THAYER, JR., BY HIS NEXT FRIEND, MAMIE O. HALL v. CARL THAYER.

(Filed 22 April, 1925.)

1. Illegitimate Children—Contracts—Consideration—Support—Statutes—Actions—Limitation of Actions.

The consideration of a contract by the father with the mother for the support of his illegitimate child then *in ventre sa mere*, is not an immoral but a valuable consideration, both in justice and in contemplation of our statute (C. S., 267), and after his birth the child, for whose benefit it had been made, may maintain his action thereon against his father: *Held*, the statute of limitations did not run under the facts of this case.

2. Same—Jury—Judgments.

Where the jury have by their verdict sustained the illegitimate child in his action against the father, on a valid contract made with his mother in his behalf, the court may, as a matter of law, require the father to pay a certain sum for the child's maintenance up to the time of the rendition of the judgment, and fix a certain sum to be paid at intervals in the child's behalf to the clerk of the court or guardian, if appointed for him, until further orders, retaining the cause for that purpose.

APPEAL by defendant from *McElroy, J.*, and a jury, at February Term, 1925, of DAVIDSON.

The complaint, in substance, alleges that Carl Thayer, Jr., is a minor, without guardian, and Mamie O. Hall has been duly appointed his next friend by the court. That Carl Thayer, the defendant is the father of Carl Thayer, Jr., born out of wedlock, Mamie O. Hall being his mother. That the defendant, Carl Thayer, "contracted with the mother of the plaintiff (Mamie O. Hall), that he would support plaintiff and educate him, all of which he has failed to do; that the support and education of the plaintiff would reasonably cost $50.00 per month; that the defendant, as plaintiff is informed and believes, is worth more than $40,000 and well able to support and educate the plaintiff. That the plaintiff should have allotted for his support at least the sum of $50 per month, this amount to be used for his support and education."

Defendant in his answer admits that Carl Thayer, Jr., is a minor. Denies he is the father of Carl Thayer, Jr. Denies the agreement to support and educate him. Defendant, for a further defense, says: (1) If any promise had been made it is barred by the three-year statute of limitation and pleads same; (2) pleads C. S., ch. 6 "Bastardy," the method prescribed by law to establish paternity and the three-year statute of limitation (C. S., 274), Carl Thayer having been born in the year 1914.

In an amended answer, defendant alleges that Mamie O. Hall, mother of Carl Thayer, Jr., after she became of age, indicted defendant for seduction under promise of marriage, and a settlement was made to include all civil liability and in full of all damages due her on account of any alleged seduction, bastardy, and any civil claim, and a written receipt to this effect was signed by Mamie O. Hall. That prior to the indictment the defendant had paid Mamie O. Hall $1,000 in full settlement of all civil liability claimed by her against defendant.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Is the plaintiff the illegitimate child of the defendant as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant, Carl Thayer, prior to the birth of the plaintiff contract to and with Mamie Hall, the mother of the plaintiff, to take care of the plaintiff and educate him? Answer: 'Yes.'

"3. If so, has the matter been compromised and settled by and between the said Mamie Hall and the defendant? Answer: 'No.'

"4. Has the bastardy proceedings ever been had establishing the paternity of the plaintiff? Answer: 'No.'

"5. Has more than three years elapsed since plaintiff's birth? Answer: 'Yes.'

"6. Is plaintiff's cause of action on the contract, barred by the statute of limitation? Answer: 'No.'"

The judgment of the court below on the verdict was as follows:

"His Honor holding as a matter of law that the plaintiff has no cause of action on the grounds found in the first issue, since no bastardy proceedings has ever been had under the statute, but that the plaintiff is entitled to support under the issues as found by the jury, and the court further finding as a fact that this suit had been pending for 18 months, and that the defendant has paid in the sum of $100 and that $350 is a reasonable amount to be paid since the action has been pending, and that $25 a month is a reasonable amount to be paid hereafter for the benefit of plaintiff until some further order is made,

It is, therefore, considered, ordered and adjudged that the plaintiff contracted with Mamie Hall, mother of the plaintiff, in December, 1913,

to take care of the plaintiff and educate him as found by the jury, and the court further adjudges and orders that the defendant pay to the court, or to some guardian for the plaintiff, the sum of $350 for the benefit of the plaintiff to the present, and that from the present time on until the further order of the court that he pay to the clerk of the court of Davidson County, or a guardian if he shall have one appointed, the sum of $25 per month. It is further ordered and adjudged that the plaintiff recover its costs of the defendant to be taxed by the clerk.

It is further adjudged that this judgment is a lien on all the lands owned by the defendant in Montgomery and Scotland counties, but since defendant may want to sell his timber it is understood and agreed that it is not a lien on the timber on the 450-acre Coggins tract, and that he shall have a right to dispose of same if he should so desire, and this cause is retained on docket for further order."

There are 24 exceptions and assignments of error by defendant. The material assignments of error and necessary facts will be considered in the opinion.

Walser & Walser, Spruill & Olive and Z. I. Walser for plaintiff.

J. A. Spence, J. M. Daniels, Jr., R. T. Poole and Phillips & Bower for defendant.

CLARKSON, J. This case was before this Court—187 N. C., 573—on the question of venue.

This is an action brought by an illegitimate child, under age, by his next friend, his mother, to enforce an alleged contract made by his mother to compel the reputed father to support and educate him. The jury found that the plaintiff, Carl Thayer, Jr., was an illegitimate child of Carl Thayer, who had contracted with Mamie O. Hall, his mother, prior to his birth, to take care of and educate him. All the issues, as appear in the record, were found against defendant.

The court below construed the complaint as alleging two causes of action: (1) To establish paternity (2) for breach of contract. The court below submitted the first issue as to paternity of plaintiff over objection and protest of defendant. But, the court held in the judgment, as a matter of law, that plaintiff could not maintain his cause of action embraced in the first issue. The plaintiff has not appealed. No appeal having been taken by plaintiff as to the first cause of action, if there was one under the pleadings, this case is *res judicata.* We think that on all the issues found against the defendant, the evidence was competent, and the charge of the court was in accordance with law.

We will only deal with the law in reference to the second cause of action—"For breach of contract."

The defendant contends that "As to the second cause of action the plaintiff alleges a contract made with his mother six months before he was born. Such a contract must be supported by sufficient or meritorious consideration. What consideration is there moving from the plaintiff in this action to the defendant? None whatever. Love and affection for an illegitimate child is not a meritorious consideration for the reputed father." The contention of defendant cannot be sustained, from the evidence of Mamie O. Hall (who was married to one Godwin last July), and to whose testimony the jury gave credence. She testified, in substance, that she had one child, Carl Thayer, Jr., who was 11 years old—born 7 June, 1914. That she had known defendant practically all her life and they lived in the same vicinity and for years they went with each other. In 1913, the defendant had connection with her several times—more than four in the month of September and October. She had nothing to do with any other man, and was about 17 years old at the time. The plaintiff, Carl Thayer, Jr., was born 7 June, afterwards, and the defendant is his father. "I next saw defendant in December, along about the 18th of December, at my father's home. He came and talked with me about the child, and I told him my condition. He said he would take care of this child. Said he would marry me, and take me to Virginia where his work was next year, and I should not be left. He promised to marry me in 1913, when he found out my condition. He said, we will marry 23 December, and that he would take this child and take care of him. My mother heard him say this. That he would support the child and care for him and educate him comfortably. Defendant said, 'You know my property is here, and my father is here and is old and I cannot afford to go away and leave you in this condition, and he said, Mamie, I love you, and cannot leave you, and will take care of you and the child with my property.' This was before the child was born."

The entire evidence shows that after the agreement of defendant was made, the cohabitation ceased. Under the facts found by the jury, the single question presented here was the agreement supported by sufficient or meritorious consideration. At the time the promise was made, Mamie O. Hall (now Godwin) was with child. Defendant was the reputed father and promised to marry her, the marriage to take place 23 December. The child was born afterwards on 7 June. If this promise had been fulfilled, Carl Thayer, Jr., would have been a legitimate child. By both the civil and canon law the subsequent marriage of the parents legitimized their offspring born before marriage. 1 Black Com., 454; *Fowler v. Fowler,* 131 N. C., p. 169. He would have had inheritable blood. By Laws 1917, ch. 219, sec. 1, C. S., 279, subsequent marriage now makes the illegitimate child legitimate, with all the rights as if born in lawful

wedlock. At the time the promise was made, the law gave the mother certain rights, C. S., 267, and if under said section the paternity of the child was established "then he shall stand charged with the maintenance thereof, as the court may order, and shall give bond, with sufficient surety, payable to the State, to perform said order, and to indemnify the county, where such child is born, from charges for his maintenance, and may be committed to prison until he finds surety for the same, and shall be liable for the costs of the issue or proceeding."

This is a civil action—*Richardson v. Egerton,* 186 N. C., 291. Defendant promised to do for the child what the mother could make him do under the law—maintain him. The promise made was to do this and further to educate the child. Under our school law, children of certain ages are required compulsorily to attend school. C. S., 5758. *S. v. Johnson,* 188 N. C., 591. There was nothing in the promise that was contrary to law or founded on an immoral consideration. It was a natural obligation. Consideration of marriage is a valuable consideration (although not alleged but in evidence, without objection), and a consideration based on the right of the mother, under C. S., 267, to force by law maintenance. Defendant never fulfilled his promise of marriage, nor did he maintain and educate the child. The mother had to go through the agony of child-bearing, suffer the wrong. The marriage promise he failed to live up to would have helped cleanse the sin, but his failure has kept her sin ever before her. "For I acknowledge my transgressions and my sin is ever before me." Ps. 51, v. 3. Carl Thayer, Jr., now asks that this contract on his behalf to maintain and educate him be carried out by the court. Defendant pleads *nudum pactum*—a promise without consideration, unenforceable. Under the facts and circumstances of this case, we cannot so hold. The promise was based on a sufficient and meritorious consideration. We think not only the weight of authority is with the plaintiff, but justice. No mortal can tell the mental and bodily suffering the young 17 year-old girl went through in the birth of this child, the disgrace, the alienation of friends and kindred. Defendant should fulfill his obligation to educate and maintain the child—the wages of his wrong. Retribution has come after long years, but it has come—nemesis.

> "Retribution follows wrong
> Tho the execution tarry long."

The child is under age, and the statute of limitation not applicable.

In *Doty, Admr. v. Doty, Guardian,* 118 Ky., p. 204, where a similar contract, as in the instant case, was upheld, the attorneys of appellee in their brief so well stated the equity of this case, as set forth in the

English case, that we repeat: "In England nearly two hundred years ago one of the 'nobility' misled an innocent young woman and had a son by her. He lived with her for a little while, but afterwards married another woman. But before doing so he executed a bond in which he promised to give the boy at his death $10,000 and died. Suit was brought upon his bond by the mother for the boy in the high Court of Chancery, and a motion was made to dismiss it upon the ground, 'that it being a matter of turpitude, equity would not meddle and should not lend assistance.' The Lord Chancellor substantially said: 'Turpitude consists in the doing of the wrong and not in making reparation.' So we say, this is a case of doing justice—making amends for wrong done to the innocent. Justice is clean and appeals to the highest of all courts. To do justice—to make reparation for wrong done—requires the exercise of the highest function of this Court, and that for which it was established. In that case the chancellor gave the mother judgment for the amount due the child, and the findings was approved by the House of Lords."

Nearly one hundred years ago, *Taylor, C. J.,* in *Kimbrough v. Davis,* 16 N. C., p. 75, said: "The natural obligation of a parent to maintain his illegitimate offspring, cannot be doubted. (Puffend, 6, 4, ch. 11, sec. 6.) . . . 'Past seduction (says Chancellor Kent) has been held a valid consideration to support a covenant for pecuniary reparation; and the innnocent offspring of a criminal indulgence, has a claim to protection and support, which Courts of Equity cannot and do not disregard.' " *Brown v. Kinsey,* 81 N. C., p. 245 and cases cited.

The *Kimbrough case* was cited and approved in *Sanders v. Sanders,* 167 N. C., p. 318: "There can be no controversy that the father is under a legal as well as a moral duty to support his infant children (*Walker v. Crowder,* 37 N. C., 487), and, if he has the ability to do so, whether they have property or not. *Hagler v. McCombs,* 66 N. C., 345. There is a natural obligation to support even illegitimate children which the law not only recognizes, but enforces. *Burton v. Belvin,* 142 N. C., 153; *Kimbrough v. Davis, supra.*"

"At common law the father is under no legal obligation to maintain his illegitimate children, for as has been seen, in the eye of the common law, an illegitimate child has no father, but is regarded as *nulius filius.* But the father is liable on *an express promise to pay for support and maintenance to be furnished to his illegitimate children* (italics ours), and on an implied contract to pay therefor where he has adopted the child as his own, and acquiesced in any particular disposition of it." Tiffany's Persons and Domestic Relations (2 ed.) p. 249. For the position, Mr. Tiffany cites *Burton v. Belvin,* 142 N. C., *supra.* In the note he says: "An agreement by a man to pay for the maintenance of

children which may result from future illicit cohabitation is void, because of its immoral tendency. Clark, Cont., 439; *Crook v. Hill,* 3 Ch. Div., 773. But such an agreement as to children already born, or as to a child in *ventre sa mere,* is valid; the illicit intercourse in such case being past. Clark, Cont., 439; *Crook v. Hill,* 3 Ch. Div. 773. The moral obligation of a father to support his illegitimate children is a sufficient consideration for his bond to do so. *Trayer v. Setzer,* 72 Neb., 845, 101 N. W., 989."

There are cases to the contrary, such as *Nine v. Starr,* 8 Oregon Rep., p. 49, holding there is no legal obligation, but there was no statute imposing a legal obligation, as in this State, requiring the father under the Bastardy Act to maintain the child, nor was there any promise to marry the mother. In fact, in *Sponable v. Owens,* 92 Mo., Appeal Rep., p. 174, there was a promise to marry (a valuable consideration) coupled with a promise to support the illegitimate child—similar to this case. It is there held, p. 178: "The agreement to marry is not alone a consideration supporting an action for failure to marry, but it is a consideration upon which other lawful agreements may be based. It is not unlawful for a father to support, or agree to support, or agree to provide for the support of his illegitimate child; and no reason can exist why he should not be allowed to legally bind himself in a contract with the mother of the child. It is but necessary that there be a legal consideration, and we are of the opinion that an agreement between the two to marry is sufficient."

The suit is properly brought. We said in *Parlier v. Miller,* 186 N. C., p. 503: "We deduce from the authorities that it is well settled that where a contract between two parties is made for the benefit of a third, the latter may sue thereon and recover, although not strictly a privy to the contract." *Bank v. Assurance Co.,* 188 N. C., p. 753.

Defendant further contends: "This cause of action is brought for breach of contract and plaintiff's proper remedy, if any he has, is for damages to be passed on by a jury and not the relief asked for in the complaint, nor the relief granted by his Honor."

We think by analogy to the action of the Court in *Sanders v. Sanders, supra,* p. 317, that the judgment of the court below was proper. The facts were established by the jury. On the entire record, we can discover in law,

No error.

IN RE WILL OF MISS LENORA FULLER, MRS. BETTIE A. BARNWELL AND MRS. SARAH M. BURTON.

(Filed 22 April, 1925.)

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

It is necessary that exceptions appearing in the record on appeal be mentioned in appellant's brief, with reason or argument to support them, to entitle them to be considered by the court, for otherwise they are taken as abandoned. Rule of Court, 185 N. C., 798.

2. Wills—Execution—Witnesses—Statutes—Signing by Testator.

The requirements of C. S., 4131, as to the signing of the witnesses to a will in the testator's presence and at his request, must be met in order to a valid will, and testimony of the witnesses to a joint will of three persons that each of them requested each witness to sign, who accordingly did so in the presence of each testator, and so situated in plain view that each of the testators could plainly see them sign, is sufficient, and it is unnecessary that all of the testators should have signed at the same time, but it is sufficient if they did so on different occasions, under the circumstances required by the statute.

3. Same—Evidence—Questions for Jury—Cross-Examination—Burden of Proof.

Where the direct testimony of the witnesses to a will is sufficient for its validity under the provisions of our statute, C. S., 4131, and on cross-examination its force is weakened so as to leave a doubt of its sufficiency, the issue is for the determination of the jury, with the burden of proof on the caveators.

APPEAL by caveators from *Finley, J.*, and a jury, at December Term, 1924, of CASWELL.

The issue submitted to the jury and their answer thereto is as follows:

"Is the paper offered by the propounders and every part thereof the last will and testament of Bettie A. Barnwell, Sarah M. Burton and Lenora Fuller? Answer 'Yes.'"

Upon the verdict, the court below rendered the following judgment: "Now, therefore, it is ordered and adjudged and decreed by the court that the paperwriting offered by the propounders and every part thereof is the last will and testament of the said Sarah M. Burton, Bettie A. Barnwell and Lenora Fuller; and it is further ordered, adjudged and decreed by the court that the caveators pay the costs of this action to be taxed by the clerk."

The caveators excepted and assigned error to the foregoing judgment, made numerous other exceptions and assignments of error and appealed to the Supreme Court. The other necessary facts and the material assignments of error will be considered in the opinion.

IN RE FULLER.

P. W. Glidewell, T. J. Gold for propounders.

John Hall Manning, Carroll & Carroll and W. B. Horton for caveators.

CLARKSON, J. Miss Lenora Fuller, Mrs. Bettie A. Barnwell and Mrs. Sarah M. Burton, of Caswell County, N. C., being tenants in common with the heirs at law of John Thomas, deceased, made and executed what purported to be their last will and testament, a joint will giving and devising to their nieces and nephew their interest in certain lands in Caswell County. Mrs. J. B. Thomas was named executrix of the will.

Of the above named parties, Lenora Fuller died in 1920, Bettie A. Barnwell in 1923, and Sarah M. Burton in May, 1924. On 16 June, 1924, Mrs. J. B. Riggs (formerly Mrs. J. B. Thomas) presented to the clerk of the Superior Court of Caswell County for probate in common form a joint will of the three above named parties, and the same was admitted to probate in common form by said clerk. Thereafter, and in August, 1924, certain parties who would have taken certain interests in the property left by the three makers of said will, filed a caveat and in said caveat set up as grounds for declaring said will void charges of undue influence, lack of mental capacity, and that the will was not executed according to law.

The concluding part of the will and attestation clause is as follows:

"In witness whereof we, Bettie A. Barnwell, Sarah Burton, Lenora Fuller, hereunto set our hands and seals this 16th day of November, 1911.

BETTIE A. BARNWELL.
SARAH M. BURTON.
LENORA FULLER.

"Signed, sealed and published and declared by the said Bettie A. Barnwell, Sarah Burton and Lenora Fuller to be their last will and testament, in the presence of us, who at their request and in their presence, of each other do subscribe our names as witnesses thereto.

J. L. WARREN.
W. H. WARREN."

Although the caveators have numerous exceptions and assignments of error in the record, in their brief they say: "While the caveators rely upon all their exceptions from 1 to 14, inclusive, waiving none of them, they prefer to discuss them together as an appeal only from the judgment of the court, as being contrary to law and against the evidence in

the case, and especially as to the legal execution of the script propounded as a valid will under our statute, C. S., 4131, which is mandatory as to how a valid will must be excuted."

"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., 798 (part of rule); *In re Westfeldt,* 188 N. C., 705; *S. v. Godette,* 188 N. C., 498.

Caveators confine their assignment of error to the single proposition: "Caveators contend that this will is absolutely void, for that it has not been executed according to the statutory requirements as laid down in C. S., 4131, Rev., 3113, Cyc., Vol. 40, p. 1097C."

The material part of C. S., 4131, to be considered in the determination of this case is as follows:

"No last will or testament shall be good or sufficient in law to convey or give any estate, real or personal, unless such last will shall have been written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the estate, except as hereinafter provided," etc.

(1) The will must be in writing.

(2) The will must be signed by the testator or by some other person in his presence and by his direction.

(3) Subscribed in his presence by two disinterested witnesses at least.

It is admitted that the will was in writing, actually signed by the three alleged testatrixes, and the witnesses disinterested.

The contest is over the fact, did the two witnesses subscribe the will as witnesses thereto in the presence of the three alleged testatrixes? If the witnesses did, the will is valid under the statute; if they did not the will is void.

It is not necessary that the testatrix should have signed the paper as her will, in the presence of witnesses, provided she afterwards acknowledged it before them. *Burney v. Allen,* 125 N. C., 314; *In re Bowling,* 150 N. C., 507; *In re Herring's Will,* 152 N. C., 258; *In re Cherry's Will,* 164 N. C., 363.

Walker, J., has thoroughly gone into the whole matter, *In re Will of Margaret Deyton,* 177 N. C., 503. We quote in part: "It is not required that subscribing witnesses should sign in the presence of each other: *Watson v. Hinson,* 162 N. C., 72; *Collins v. Collins,* 125 N. C., 104; *Eelbeck v. Granberry,* 3 N. C., 232; Rev., sec. 3113, nor is it necessary that the will should have been attested in the same room, provided the witnesses signed it, where the testator could see them do so; that is, could see them sign the very paper that she had signed, so

as to prevent the substitution of the genuine paper for another and spurious one. It was held in *Graham v. Graham,* 32 N. C., 219: 'A will is well attested by subscribing witnesses when, though not in the same room with the testator, they are in such a situation that the testator either sees or has it in his power to see that they are subscribing, as witnesses, the same paper he had signed as his will. Where the supposed testator could only see the backs of the witnesses, but not the paper they were subscribing: *Held,* that the paper-writing was not well attested as a will.' See, also, *Cornelius v. Cornelius,* 52 N. C., 593; *Bynum v. Bynum,* 33 N. C., 632. 'Generally the witnesses are not required to subscribe the will at the express request of the testator. He need not formally request the witness to attest his will as the request may be implied from his acts and from the circumstances attending the execution of the will. Thus a request will be implied from the testator's asking that the witness be summoned to attest the will, or by his acquiescence in a request by another that the will be signed by the witnesses.' Thompson on Wills, 449; *In re Herring's Will,* 152 N. C., 258; *Burney v. Allen,* 125 N. C., 314; *In re Cherry's Will,* 164 N. C., 363. Testator must have seen the witnesses, or have been able to do so at the time of the attestation in the position he then was. *Jones v. Tuck,* 48 N. C., 202."

In *Shell v. Roseman,* 155 N. C., 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., 227." *Hadley v. Tinnin,* 170 N. C., 86; *Christman v. Hilliard,* 167 N. C., 5.

The law is plain. What are the facts? W. H. Warren, one of the subscribing witnesses, testified in part:

"I live at Hightower, and lived there in 1911; conducted a store there. In 1911 I knew Miss Lenora Fuller, Mrs. Bettie A. Barnwell, and Mrs. Sarah Burton. They lived a mile or a little further from the store. They requested me to witness their will, at the store, my place of business. At the same time they requested my father to witness it. My father and myself were present there when the will was witnessed and signed. (Witness handed a paper, and stated this is the will of Mrs. Barnwell, Mrs. Burton, and Miss Lenora Fuller.) They signed that will in my presence. They requested me to witness the will. Brought it there and asked me to witness it; said this was their will. I did not read the will, but they asked me to witness it. They at the same time asked my father to witness it, and both witnessed it at the same time and place. My father and I were present with each other and in the presence of

the others when we witnessed it. I observed them at the time they signed the will and asked me to sign it. . . . The name, Mrs. J. B. Thomas, as executrix in the will is in my handwriting. I wrote it in there at these old ladies' request, at the time it was signed; it is in my handwriting in both places."

On cross-examination W. H. Warren testified: . . . "I cannot remember who was in the store the day they came there. I can remember these people."

"Q. All three at the same time? A. I can't say that; but I know one thing: they all signed it and my father and myself present. I cannot swear that all three came together. I cannot swear that all three signed it at the same time. I can swear that all three signed it at the same place. I don't remember which one came to my place first. I think two came together and one afterwards. That is my opinion. My father and I signed our names when they first came; we witnessed it on 16 November. I would not know the date except for the paper. I cannot pretend to tell the court and the jury which ones of the ladies came there together the first time. I saw all three sign it. I know their handwriting. I have seen them write before. I saw their writing a good many times. They brought letters to mail at the post office and did writing in the store, and did a good deal of business with me. They did not write a fine hand, but you could read it. The paper was lying on the counter when they signed it. The counter in my father's store. I don't remember which signed it first; I don't remember which signed it second; nor which one signed it third. My father and I signed it then and there. They brought the paper there and told us that it was their will and wanted us to witness it, and we did, and by request they asked me to put Mrs. J. B. Thomas' name in it. All three asked us to do it; asked us to witness the will.

"I don't remember that all three signed it at one time. I don't remember all signing it at one time, but I do remember they asked us to sign it. We seen them sign it. I don't remember about their sitting in a chair. I went to the desk and got a pen and ink. When they signed it, they gave it to us and asked us to put it in the safe, and later they came and got it. We put our names on it, the 16th of November, I think that was the day. I don't know that they were looking at my pen when I put my name there. I do not know that they even saw the paper when I put my name to it; I do not know that they saw the will at the time I put my name on it. I do know it was in their presence, but I do not know whether they were looking straight at us or not; they asked us to witness it. My father put it in the safe. I don't know how long we kept it there. They

came after it, but I don't know how long it was before they came after it, and don't know which one came after it. I remember they asked us to take care of it and we did, but I don't remember when they came for it and got it. No, sir I don't know which one came and got it. I don't know the year that the first old lady died. I can tell exactly at home."

Redirect examination: "At the time my father and I witnessed the will the old ladies were right there in the store. Nothing there to keep them from seeing it. No obstruction between us. I saw them sign first. I signed after.

"Q. The certificate here is: 'Signed, sealed and published and declared by the said Bettie Barnwell, Sarah Burton and Lenora Fuller to be their last will and testament in the presence of us and at their request and in the presence of each other, do subscribe our names as witnesses thereto,' is that what happened on that occasion?

"A. Bound to have been or I would not even have signed it if it had not been."

Recross-examination: "Q. You said awhile ago, you did not read it over?

"A. No sir. All I know is all three said it was their will. All three asked me to sign it. I did not know what was in there. I did not know what was on the paper."

J. L. Warren, the other subscribing witness, testified:

"I am the father of William Warren. Live at Hightower. Knew Miss Lenora Fuller, Mrs. Burton and Mrs. Barnwell. I have been knowing them practically all my life. I was engaged in business with my son in a store in 1911. These old ladies requested me to witness their will. (Paper handed to witness, and asked is that the paper?) A. Yes, sir, that is my signature. That is my signature, and the old ladies', all three of them.

"Q. So each and every one signed this will in your presence? A. Yes, sir; I do not think all three signed at the same time. Each one signed in my presence, and I witnessed it in their presence, I do not know that all three were there at the same time.

"Q. You do not say they were not, you just say you do not recollect it? A. I don't know, they said, 'I want you and Will to sign my will.' Each signed it in my presence and I witnessed it at their request.

"Q. The certificate says: 'Signed, sealed, published and declared by the said Bettie A. Barnwell, Sarah Burton and Lenora Fuller to be their last will and testament, in the presence of us, and at their request and in the presence of each other do subscribe our names as witnesses thereto'—Is that what happened there? A. Why, the best of my knowl-

edge they did. That is my opinion. I would not have witnessed the will had I not thought so."

The substance of his weakened testimony is set forth in what he said on recross-examination: "No sir, I did not witness it but one time. Yes, sir, when the last one came my name was on there. I don't reckon she saw me put my name on there it was already on there. All three might have been there, but I don't think so. It has been a good long while ago."

On cross-examination, both subscribing witnesses to the will weakened as to whether all three were in the store at the same time, when they signed the will as witnesses. We do not set out all the evidence, but sufficient to show the conflict that the jury had to consider in arriving at a verdict.

Caveators did not object to the introduction of the will in evidence, but did object to the validity of it.

The witnesses to the will who signed the same had to testify to what occurred some 13 years before. Naturally their recollection as to certain details, as brought out on cross-examination, but material to the validity of the will, were hazy and weakened by time. We think the evidence sufficient to be submitted to the jury. The court below, on this aspect of the case, properly placed the burden of the entire issue on the propounders to satisfy the jury by the greater weight of the evidence. The court charged the jury as follows:

"Now, in this connection the court charges you that it is not necessary that the testator should sign the will in the presence of the witnesses, acknowledgment is sufficient. It is not necessary that the testator request the witnesses to sign, request by attorney is sufficient, or the request may appear from the circumstances. The witnesses must sign in the presence of the testators, and as a rule the testator must actually see or be in a position to see not only the witnesses, but the will itself at the time of the signing, and where he could see the backs of witnesses, not the paper, it is not a good attestation. It may be shown from the location of the objects, furniture in the room, etc., that the testator could have seen the witness who signed the will. The witnesses need not sign in the presence of each other."

From a careful study of the charge of the court below, we think the issue of fact and the law arising thereon was carefully submitted to the jury, and the contention fairly given. We can find in law,

No error.

STATE v. BOB JARRETT.

(Filed 22 April, 1925.)

1. Intoxicating Liquor—Indictment—Counts—Statutes.

An indictment charging violations of the Turlington Act that defendant did unlawfully and wilfully, etc., deliver, furnish, purchase and possess intoxicating liquor, and did have and keep in his possession for the purpose of sale intoxicating liquor, though not separately numbered, charges two counts, one for unlawful delivery and the other the possession for the purpose of unlawful sale, the trying thereof under the same indictment as separate counts being within the sound discretion of the trial court. C. S., 4622.

2. Same—Evidence—Verdict.

Where the charges in the bill of indictment are to be regarded as separate counts, one charging an unlawful delivery, etc., of intoxicating liquors, and the other the possession for the purpose of unlawful sales, evidence that the defendant had sold intoxicating liquor is sufficient for conviction upon a general verdict of guilty.

3. Same — Motion to Quash — Selection by Solicitor — Discretion of Court—Verdict.

Where the bill of indictment charges several criminal offenses of the same grade and punishable alike, the court in its sound discretion may quash or compel the solicitor to elect, and a motion to quash comes too late after verdict.

4. Same—Bill of Particulars.

Where an indictment charges several offenses separable into different counts, and the case accordingly comes on for trial, the defendant may upon motion request the trial judge, acting in his sound discretion, to require the solicitor to furnish a bill of particulars (C. S., 4613), and the indictment may not be quashed if in the bill the charge is sufficiently stated. C. S., 4623.

5. Same—Judgments—Appeal and Error—Harmless Error.

Held, in this case there were but two criminal offenses charged in the bill of indictment, and the judgment of the court upon a third, not included, was not prejudicial, as it imposed no punishment and may be disregarded.

APPEAL by defendant from *Finley, J.*, and a jury, at October Term, 1924, of FORSYTH.

The defendant was tried on appeal from the municipal court of Winston-Salem, at the October Term, 1924, of Forsyth County Superior Court. The warrant in the municipal court on which he was tried in the Superior Court charged, in part, in the words of section 2, of the Turlington Act, chapter 1, Public Laws 1923, as follows:

"Did unlawfully and wilfully transport, import, export, deliver, furnish, purchase and possess intoxicating liquor in violation of law, and did have and keep in his possession for the purpose of sale intoxicating liquor."

The last clause charges an offense against section 10, of the Turlington Act.

The evidence of the State was as follows:

"Rush Howell, testified, that he bought a half pint whiskey from the defendant and paid $1.00 for same, and the whiskey was delivered to him by the defendant."

"John Alspaugh, testified, that he bought half pint of whiskey from the defendant and paid him $1.00 for same, and defendant delivered the whiskey to him."

The court below charged the jury, in part, as follows:

"The State relies upon two clauses in the warrant, one for delivering liquor to the prosecuting witness and the other is for having liquor in his possession for the purpose of sale. He is not charged with the sale in the warrant, but having on hand for the purpose of sale. He is charged with that."

The jury returned a verdict of guilty. The following judgment was rendered by the court below:

"The judgment of the court is, that on the first count in the bill of indictment that the defendant be confined to the common jail for a term of 12 months and assigned to work on the public roads of Forsyth County, not to wear felon stripes, and on the second count in the bill of indictment the judgment of the court is that the defendant be confined in the common jail for a term of 12 months and assigned to work on the public roads of Forsyth County, not to wear felon stripes. This sentence to begin at the expiration of the sentence on the first count contained in the bill of indictment. The judgment of the court is that on the third count in the bill of indictment that the defendant be confined in the common jail for a term of 12 months and assigned to work on the public roads of Forsyth County, and not to wear felon stripes. Capias as to the sentence on the third count in the bill of indictment to issue upon motion of the solicitor."

Defendant made several exceptions, assigned error and appealed to the Supreme Court. These will be considered in the opinion.

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

J. S. Fitts, M. L. Mott, Jr., and Holton & Holton for defendant.

CLARKSON, J. It may not be amiss to give the entire section 2, of the Turlington or Conformity Act, Public Laws 1923, ch. 1:

"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. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of The Volstead Act, act of Congress enacted October twenty-eighth, one thousand nine hundred and nineteen, an act supplemental to the National Prohibition Act, 'H. R., 7294,' an act of Congress approved November twenty-third, one thousand nine hundred and twenty-one."

The warrant on which defendant was tried does not contain all that the Turlington Act makes unlawful in section 2, it omitted, to wit: "Manufacture, sell, barter." The warrant does contain a charge under section 10, "and did have and keep in his possession for the purpose of sale intoxicating liquor." The warrant charges "(1) unlawfully and wilfully deliver intoxicating liquor, (2) did have and keep in his possession for the purpose of sale intoxicating liquor."

The defendant contends that the indictment contained but one count, when the judge charged the jury that there were two counts, and the verdict should have been set aside; there was error in the court below not setting aside the verdict and also error in not allowing defendant's motion in arrest of judgment based upon the same facts. We cannot so hold.

C. S., 4622 (Laws 1917, ch. 168) is as follows:

"When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class or crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated: *Provided,* that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the first count, and half fees for each subsequent count upon which conviction is had: *Provided,* this section shall not be construed to reduce the punishment or penalty for such offense or offenses."

If separate indictments had been found against defendant (1) for delivering intoxicating liquor (2) for having and keeping in his possession for the purpose of sale intoxicating liquor, it was in the sound discretion of the court below to consolidate. This matter is ably and clearly discussed by *Varser, J.,* in *S. v. Malpass, ante,* p. 349—see cases cited. The statute in plain language gives the authority. The defendant should have requested the court below to quash or to make the

solicitor elect on which offense defendant should be tried or to *nol. pros.*, it would have been in the discretion of the court below to grant the motion. No such request was made. In *S. v. Hedgecock,* 185 N. C., p. 719, it is said: "Indeed in *S. v. Little,* 171 N. C., 806, *Hoke, J.,* said: 'As a matter of form, in respect to the feature of the charge, that the unlawful delivery of the quantity (of liquor) specified was to "a person or persons to the jurors unknown," the bill of indictment has been held sufficient, *S. v. Dowdy,* 145 N. C., 432; *S. v. Tisdale, ibid.,* 422 (which were prior to the act of 1913, now C. S., 3383), and the principal question presented is whether, on the facts contained in the special verdict, the defendant is guilty of the offense, under the statute, charged against him in the bill'—which was a violation of the law against transporting intoxicating liquors."

In *S. v. Switzer,* 187 N. C., p. 94, it is said: "Where there are several offenses, but of the same grade and punishable alike, the power of the court to quash or compel the solicitor to elect is a matter of sound discretion. *S. v. Burnett,* 142 N. C., 580; *S. v. Lewis,* 185 N. C., 643."

In *S. v. Burnett, supra,* p. 580, this Court said: "When an indictment charges several distinct offenses in different counts, whether felonies or misdemeanors, the bill is not defective, though the court in its discretion may compel the solicitors to elect, if the offenses are *actually* distinct and separate, lest the prisoner be confused in his defense or embarrassed in his challenges; but there is no ground to require the solicitor to elect when the indictment charges the same act 'under different modifications, so as to correspond with the precise proofs that might be adduced.' *S. v. Haney,* 19 N. C., 394; *S. v. Barber,* 113 N. C., 714; *Gold Brick case,* 129 N. C., 656, and cases there cited. Besides, duplicity is ground only for a motion to quash, made in apt time, and is cured by verdict. *S. v. Wilson,* 121 N. C., 655; *S. v. Hart,* 116 N. C., 978; *S. v. Cooper, supra,* (101 N. C., 684); *S. v. Haney, supra,* (19 N. C., 390); *S. v. Simons,* 70 N. C., 336; *S. v. Locklear,* 44 N. C., 205."

The separate offenses charged in the same warrant or indictment are to be considered and treated as separate counts.

In *S. v. Toole,* 106 N. C., 740, it is said: "Where the offenses are distinct, the court can impose a sentence on each count; but where it is a stating of the same offense, in different ways, only one sentence should be imposed."

In *S. v. McAllister,* 187 N. C., 404, referring to *S. v. Switzer,* 187 N. C., 96, it was there held: "There was a general verdict of guilty, which, in law, was a verdict of guilty on each and every count. The general verdict of guilty upon two counts will be sustained if the evidence justifies either. *S. v. Toole,* 106 N. C., 736; *S. v. Strange,* 183 N. C., 775." *S. v. Coleman,* 178 N. C., 760.

In *S. v. Mitchem,* 188 N. C., p. 609, it is said: "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." *S. v. Efird,* 186 N. C., 482, and cases cited.

It appears on the face of the record two counts—evidence sufficient to support both, and a verdict of guilty. The motion in arrest of judgment cannot be sustained.

The two offenses of which defendant was charged, and on which the case was submitted to the jury, were fully supported by the evidence of the two witnesses who purchased intoxicating liquor from defendant, as found by the jury. Although the witnesses testified that they purchased the whiskey and there is no offense charged for selling, yet there is an offense charged for delivering and the offense is completed by delivery, although the delivery was by sale, and the other offense charged is having and keeping in possession for the purpose of sale intoxicating liquor. This is complete, as the fact of selling is the highest evidence that it was in the possession for sale. The two offenses set out in the warrant, and the charge given by the court below to the jury made certain the offenses that defendant had to meet.

C. S., 4613. "In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters." *S. v. Leeper,* 146 N. C., 661; *S. v. Hawley,* 186 N. C., 433.

C. S., 4623. "Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill of proceeding, sufficient matter appears to enable the court to proceed to judgment."

In *S. v. Switzer, supra,* p. 96, we held: "We think, under the language of the statute, the first count is drawn according to the practice and procedure of this Court. Form, technicality and refinement have given way to substance, and it is sufficient if the indictment contains the charge in a plain, intelligent, and explicit manner. *S. v. Leeper,* 146 N. C., 655; *S. v. Hedgecock,* 185 N. C., 714; *S. v. Hawley,* 186 N. C., 433."

The offenses charged were in general, definite and certain. Defendant could have requested the court below, and this was in its discretion, for a bill of particulars, showing detail and particulars of offenses charged.

In *S. v. Satterwhite,* 182 N. C., 893, it is said: "*S. v. Hamby; supra,* (126 N. C., 1067) was approved, *In re Hinson,* 156 N. C., 252, and *In re Black,* 162 N. C., 459, in which the Court said that it had been 'settled by many decisions and with entire uniformity' that where a defendant had been sentenced to imprisonment on conviction of two or more indictments, 'sentence may be given against him on each successive conviction, the sentence of imprisonment in each successive term to commence from the expiration of the term next preceding,' and that such sentences are not void for uncertainty, but the sentence should state that the later term should begin at the expiration of the former term, else they would run concurrently, citing many authorities." *S. v. Malpass, ante,* 354.

There is no evidence to support a third count, and therefore, the judgment as to this is erroneous. If there had been, the judgment of the court below could not prejudice the defendant. The sentence on the third count was concurrent with the others. The sentence of twelve months on the roads of Forsyth County on the first count in the bill of indictment, with the same judgment on the second count, to commence at the termination of the first term of imprisonment, is correct, and in accordance with the well settled practice and procedure of this Court.

The defendant has to serve under the judgment two years. From a careful review of the law in this jurisdiction, we can find

No error.

G. W. THOMAS BY HIS NEXT FRIEND, W. H. THOMAS, v. W. H. AND T. H. LAWRENCE.

(Filed 22 April, 1925.)

1. Employer and Employee — Master and Servant — Negligence — Evidence—Nonsuit.

Evidence that plaintiff was defendant's employee and was injured in the course of his duties by the falling of a brick upon his head by reason of employees of defendant tossing bricks to others on an overhead scaffold near which plaintiff was ordered to work to be laid by brickmasons in the wall of the building being erected, is sufficient upon the issues of defendant's actionable negligence to take the case to the jury, and deny defendant's motion as of nonsuit thereon, or a peremptory instruction in his favor.

2. Same—Accident.

Where the employer is sued for damages for negligent injury to his employee, the former may not successfully defend the action upon the

contention that it was an accident not reasonably to have been anticipated, especially when the defendant's negligence concurs and proximately causes the injury in suit.

3. Same—Assumption of Risks.

In order for the application of the doctrine of assumption of risks, it is necessary for the employee to have known of the danger he is alleged to have assumed, and where there is evidence tending to show that the injury in suit resulted from his obedience to an order from the defendant's vice-principal, who was aware of the dangerous conditions existing at the place the employee was instructed by him to work, and which caused the injury, and the employee was unaware thereof, a motion as of nonsuit on this ground will be denied.

4. Same—Fellow-Servants.

Where an employee was injured by a brick falling upon his head while engaged in the scope of his duties, which was one of those being tossed by other employees or his fellow-servants to a scaffold to be placed in the wall by defendant's brickmasons, and the place wherein the employee was thus engaged did not meet the requirements that the employer, in such instances, furnish his employee a safe place to work, which resulted in the injury, this duty is one the employer may not delegate, and the defense that the injury in suit was caused by the negligent acts of the employee's fellow-servant for which the employer was not answerable, is untenable.

APPEAL by defendants from *Cranmer, J.*, at September Term, 1924, of DURHAM.

This action was brought by plaintiff, an employee, to recover of defendants, his employers, damages for a personal injury alleged to have been caused by the negligence of defendants (1) in failing to provide for plaintiff a safe and suitable place in which to work and (2) in failing to provide a safe and proper method for hoisting bricks to the walls of the building, in the construction of which plaintiff was at work as an employee of defendant.

It is alleged that plaintiff was at work on the floor of a building, in process of construction by defendants, as contractors and builders, near the stage or rostrum in the auditorium of said building, under the direction of a foreman of defendants; that plaintiff, with other employees, was at work upon steel beams or girders which were to be used in the construction of the building; that while plaintiff was thus engaged in the performance of his duties as an employee of defendants, brickmasons, also employees of defendants, were at work on a scaffold 12 to 14 feet above the floor on which plaintiff was at work; that laborers, or helpers of said brickmasons, also employees of defendants, were engaged in carrying bricks and mortar to a balcony or scaffold some 5 or 6 feet beneath the scaffold on which the brickmasons were at work and above the floor on which plaintiff was at work; that the laborers were required

to pitch the bricks, which were hoisted from the floor to the balcony, to other laborers standing on the scaffold on which the brickmasons were at work where they were to be used by the brickmasons in the erection of a wall of the building; that a laborer on the upper scaffold failed to catch a brick pitched to him by a laborer on the lower scaffold or balcony, and that this brick fell a distance of 12 to 14 feet, striking plaintiff on the head while he was at work at the place to which he had been assigned by a foreman of defendants. As a result of the injury thus inflicted, plaintiff was rendered unconscious and has become a total mental and physical wreck.

As a defense to plaintiff's cause of action, defendants deny that plaintiff was injured by their negligence, alleging that such injury as plaintiff sustained was caused by the negligence of a fellow-servant of plaintiff and that said injury was the result of a risk ordinarily incident to work of the kind and character as that in which plaintiff was engaged and that plaintiff having assumed the risk of such injury as he received when he entered the employment of defendants, cannot recover damages of the defendants.

The issues arising upon the pleadings and submitted by the court to the jury, with the answers thereto, are as follows:

"1. Was the plaintiff injured by the negligence of the defendants as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff injured by the negligence of a fellow-servant, as alleged in the answer? Answer: 'No.'

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

"4. What damages, if any, is the plaintiff entitled to recover? Answer: '$5,000.'"

From the judgment in accordance with the verdict, defendants appealed to the Supreme Court, assigning errors based upon exceptions duly noted.

Brogden, Reade & Bryant for plaintiff.
Fuller & Fuller for defendants.

CONNOR, J. The evidence offered by plaintiff was sufficient to sustain the allegations of the complaint, as to the existence of the relationship of employer and employee, between defendants and plaintiff at the time of the injury, and as to the cause and extent of the injury sustained by plaintiff. Plaintiff was struck on the head by a brick, which fell from above him, while he was at work at the place to which he had been assigned, under the direction of the foreman of defendants in charge of the construction of the building. The falling of the brick was the result of the

failure of a laborer on a scaffold 17 feet above the floor on which plaintiff was at work, to catch the brick which had been pitched to him by a laborer, from the balcony about 7 feet beneath the upper scaffold and about 10 feet above the floor. The bricks thus pitched from one laborer to another laborer, were to be used by brickmasons working on the upper scaffold in the erection of a wall of the building. Bricks were being passed up to these brickmasons in the usual way and by the method provided by defendants for accomplishing that purpose. They were hoisted from the floor of the building to the balcony, about 10 feet above the floor, by means of an elevator; they were then taken from the elevator by laborers who placed them on wheelbarrows which were rolled along the balcony to a place beneath the scaffold on which the brickmasons were at work. They were then pitched, one at a time from the balcony to the scaffold, a distance of 7 feet, and placed by the laborer who caught them on the scaffold so that the brickmasons could pick them up as they were needed. The distance through which they were thus pitched was 18 inches or two feet. The foreman, under whose direction plaintiff was at work, knew that the laborers were engaged, by this method, in getting the brick from the floor or ground, to the scaffold and that they were so engaged at the time plaintiff was directed to work at the place where he was injured.

The injury occurred about 4 o'clock p. m. Prior to this time plaintiff had been at work riveting steel beams near the center of the building. Immediately before the plaintiff was injured, he had been requested, by a fellow-employee, who was authorized to make the request by the foreman, to leave the place at which he was at work, to assist other employees in raising a steel beam or girder from the floor in order that a bench might be put under it. The place to which plaintiff was thus called was about 10 feet from the wall on which the brickmasons were at work and where the bricks were being pitched. The employee to whose assistance plaintiff had gone, just prior to his injury, testified that he did not know that the brickmasons were then at work on the wall or that the laborers were at work getting the bricks to the upper scaffold. Plaintiff has never recovered from the effects of the blow on his head sufficiently to make an intelligent statement about the occurrence and did not testify at the trial for this reason.

1. Defendants first contend that plaintiff's injury was due to an accident and that therefore they are not liable for damages resulting from the injury. An accident is defined as "an unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undesigned occurrence; the effect of an unknown cause, or the cause being known, an unprecedented consequence of it; a casualty." Black's Law Dictionary. *Crutchfield v. R. R.*, 76 N. C.,

320. "An employer is not responsible for an accident simply because it happened but only when he has contributed to it by some act or omission of duty"; *Martin v. Mfg. Co.*, 128 N. C., 264; *Simpson v. R. R.*, 154 N. C., 51; *Lloyd v. R. R.*, 168 N. C., 646; *Bradley v. Coal Co.*, 169 N. C., 255.

The injury sustained by plaintiff was caused by a blow upon his head; this blow was caused by a falling brick; the cause of the injury is therefore known; as to this, upon the evidence, there can be no controversy. There is sufficient evidence from which the jury could find the failure of the laborer on the scaffold to catch the brick pitched to him by another laborer on the balcony 7 feet below, the distance from the hands of the one laborer to the hands of the other laborer being from 18 inches to 2 feet, was the cause of the falling of the brick. That a person may fail to catch a brick pitched to him by another person, especially when he is 7 feet above the person who pitches it and that upon such failure the brick will fall and strike an object beneath it, can hardly be said to be an unprecedented consequence; indeed the result may be expected, it is not unusual nor can it be said that it could not have been foreseen. Under the facts and circumstances as established by the evidence in this case, plaintiff's injury cannot be held as due to an accident; the injury was clearly due to negligence or the failure of someone to exercise due and reasonable care for the safety of the plaintiff in the situation in which he was placed at the time the brick was pitched.

There is no evidence from which the jury could find that plaintiff knew, when he went to the place at which he was injured that the laborers were pitching bricks from the balcony, ten feet above the floor on which he was to work, to the scaffold, seven feet above the balcony and thus 17 feet above plaintiff. Nor is there evidence that the laborers knew at the time they were engaged in pitching the bricks that plaintiff had been assigned to work at a place not more than ten feet from the wall on which the brickmasons were at work. There is evidence that the foreman, under whose direction both the plaintiff and the laborers were at work, had full knowledge of the work in which these employees were respectively engaged. With this knowledge, the foreman required, or at least permitted the respective work to continue.

It is conceded, of course, that upon the facts established by the evidence, defendants owed plaintiff the duty "to exercise reasonable care to provide the plaintiff a reasonably safe and suitable place in which to work," and that a failure to perform this duty, resulting directly and proximately in injury to plaintiff, would be actionable neligence. *Ramsbottom v. R. R.*, 138 N. C., 39, and cases cited in 2d Anno. Ed. It cannot be held, where defendants assigned plaintiff to work

at a place not more than 10 feet from a brick wall of a building in process of construction, while laborers were pitching bricks from a balcony against said wall, 10 feet above the floor of the building, to a scaffold 7 feet above the balcony, to other laborers—the distance from the hands of the laborers who were pitching the bricks to the hands of laborers whose duty it was to catch them being from 18 inches to 2 feet—that there was a compliance by defendants with the law as repeatedly declared by this Court, and by courts of other jurisdictions, which administer law founded upon sound principles and constantly developing to meet the growing complexities of human relationships. There was a breach of the duty, which the law imposed upon defendants, and evidence from which the jury could find that this breach of duty was the proximate cause of plaintiff's injury. Assignments of error, based upon exceptions to the refusal of the court to allow the motion of nonsuit, and to give the peremptory instructions as requested by defendants, cannot be sustained.

2. Defendants assign as error the refusal of his Honor to instruct the jury as requested by defendants, in writing and in apt time, to answer the second issue, "Yes." By the exception, upon which this assignment of erorr is based, defendants present their contention that the injury sustained by plaintiff was caused by the negligence of a fellow-servant, and that, therefore, they are not liable. The duty which defendants owed to plaintiff, with respect to the place provided for him to work, is primary and nondelegable. The employee has a right to assume that this duty had been performed; *Klunk v. Granite Co.,* 170 N. C., 70. Upon the evidence, there was a breach of this duty. The place provided for plaintiff to perform his duties as an employee of defendants was unsafe because of the method adopted by defendants for hoisting bricks to the upper scaffold. The defendants not only adopted this method for doing this work, but their foreman knew that the method was being pursued after plaintiff had left the safe place at which he was at work—at the upper end of the auditorium—and gone to the lower end, within 10 feet of the wall when the bricks were being passed up to the scaffold by this unsafe method. The laborers continued to pursue this method after plaintiff had changed places for work. There is no evidence that they knew of the change. Even if it was negligence for the laborers to adopt and pursue the unsafe method of doing the work which they were required to do, such negligence only concurred with the primary negligence of defendants in causing injury to plaintiff and does not relieve defendants of liability for their negligence. *Beck v. Chair Co.,* 188 N. C., 743, and cases there cited. His Honor instructed the jury that where the master has negligently failed to perform one of the primary duties

which he owed to the servant, and this negligence concurs with that of a coemployee in proximately producing the injury, the master's responsibility therefor is the same as if his negligence were the sole and only cause. Upon competent evidence, and under correct instructions as to the law, the jury has answered the second issue "No." The assignment of error is not sustained.

3. Defendants further assign as error the refusal of his Honor to instruct the jury, as requested by defendants, in writing and in apt time, to answer the third issue "Yes." By the exception upon which this assignment of error is based, defendants present their contention that plaintiff is barred of recovery in this action, because he assumed the risk of the danger which resulted in his injury. Plaintiff was at work at a safe place, when in response to a request of a fellow-employee, made pursuant to the direction of the foreman of defendants, he left said place, and went to the place at which he was injured. In so doing, he was performing the duties of his employment. There is no evidence that he knew that laborers, fellow-servants, were then at work on the wall of the building, or that he knew of the unsafe method which they were pursuing in their work, with the knowledge of the foreman. But for this work and the method by which it was pursued, the last place was as safe as that from which he had gone. The fellow-employee, to whose assistance he had gone, did not know that brickmasons or laborers were at work on the wall. He thought they had finished their work. The jury might well find that plaintiff also did not know of the facts which made the place to which he went unsafe. There can be no assumption of a risk, of which the employee is ignorant. The assignment of error is not sustained.

4. Other assignments of error are based upon the refusal of his Honor to give instructions to the jury as requested by defendants. We have examined these assignments of error, with care, and do not find that there was reversible error in refusing to give them.

Brown v. Scofields Co., 174 N. C., 4, is not an authority sustaining the contention of defendants in this case. In that case plaintiff knew that his fellow-servant was working above him, and with this knowledge he continued to work in the place assigned him. The place where plaintiff was at work was not unsafe because of any act, of omission or commission, of defendant. The injury was caused by an act of his fellow-servant, which had no relation to any act of his employer. In this case, the injury was the result of an act of a fellow-servant, it is true; but the act was done in pursuance of a method of doing his work, known to and permitted, if not expressly authorized by

the defendants. Defendants were negligent in adopting or permitting the method of work, by which the bricks were pitched from the balcony to the scaffold, thus passing through the air a distance of 18 inches or 2 feet.

Defenses based upon the doctrines of "Negligence of Fellow-servants," and "Assumption of Risk" do not seem to be in harmony with the spirit of the law as applicable to present-day conditions. The courts recognize them as valid defenses, in actions brought by employees to recover damages for personal injuries sustained while at work within the scope of their employment. However, in deference to the tendencies of modern legislation, and in response to a more humane conception of the relations of master and servant, the courts cannot extend them; the tendency of both legislation and judicial decision is rather to confine and restrict them to cases in which they are clearly and unmistakably applicable. *Cook v. Mfg. Co.*, 183 N. C., 48.

The judgment is affirmed. We find

No error.

RONALD S. SWAIN v. THE INTERSTATE COOPERAGE COMPANY ET AL.

(Filed 22 April, 1925.)

1. Removal of Causes — Federal Courts — Negligence — Joint Torts — Fraudulent Joinder—Parties.

Where in an action brought in the State court against a nonresident and resident defendant, it is alleged that the resident defendant was the manager in charge of the factory of the nonresident defendant for the installation and placing of power-driven machinery, and states that through the negligence of both in the installation and placing the machinery, a pulley block burst and caused the injury in suit by a flying fragment therefrom, a joint tort is alleged against both the defendants, jointly and severally, and a motion to remove to the Federal Court made in the State court on the ground of diversity of citizenship will be denied, when based without more upon allegations in the petition that the actions were severable.

2. Same—Petition to Remove.

In order to sustain a motion for the removal of a cause from the State to the Federal Court for diversity of citizenship on the ground of a fraudulent joinder of a resident defendant, the petition must state facts sufficient for the granting of the motion on this ground, and the pleader's conclusions otherwise are insufficient.

APPEAL by plaintiff from *Brown, J.*, at December Term, 1924, of BEAUFORT.

Civil action instituted and pending on 20 October, 1924, in the Superior Court of Beaufort County. Duly verified complaint was filed by plaintiff and before time for answering same had expired, defendant, the Interstate Cooperage Company, filed with the clerk of said court its petition, duly verified, accompanied by bond as required by statute, praying that said court proceed no further in said action, except to make an order of removal, and to accept the bond filed with the petition, and to cause the record in said action to be removed from the Superior Court of Beaufort County into the District Court of the United States for the Eastern District of North Carolina. The motion for removal was allowed by the clerk. From the order of removal, plaintiff appealed. The petition was then heard and considered by the judge presiding at the next ensuing term of the Superior Court of Beaufort County. The judge affirmed the order of the clerk, and ordered that the action be removed. To this order, plaintiff excepted and appealed therefrom to this Court. Assignment of error is based on this exception.

Tooly & McMullan for plaintiff.
Small, MacLean & Rodman for defendants.

STACY, C. J. This is a civil action pending in the Superior Court of Beaufort County. Plaintiff, a citizen of the State of North Carolina, seeks to recover damages for a personal injury alleged to have been caused by the joint wrong of defendants, The Interstate Cooperage Company, a citizen of the State of New York, and W. A. Buys, a citizen of the State of North Carolina. The amount involved is $50,000, the damages alleged in the complaint.

It is alleged in the complaint that on 8 August, 1923, and for some time prior thereto, the plaintiff was and had been an employee of defendant, The Interstate Cooperage Company; that defendant, W. A. Buys, was, on said date, and had been for some time prior thereto, the manager of the box factory, and other wood-working plants owned and operated by his codefendant, at Belhaven, N. C.; that plaintiff, sometime prior to 8 August, 1923, had been ordered and directed by the Interstate Cooperage Company, and W. A. Buys, "as its spokesman and agent" to leave the commissary of defendant company, where he had been at work, and to go to work in the box factory of said defendant; that his duty in said box factory was to supervise and direct the work of the men employed there; that the machinery in said box factory had been installed by the company under the direction and supervision of W. A. Buys, its manager; that on 8 August, 1923, while plaintiff was engaged in the performance of his duties, in said box factory, a pulley, driving the fan described in the complaint, suddenly broke into numer-

ous fragments of jagged cast iron, one of the said fragments striking plaintiff on the head, inflicting a serious and permanent injury to plaintiff.

Plaintiff alleges that said injury was caused by the negligence of defendants, in that defendants wrongfully failed to furnish plaintiff a reasonably safe place in which to work, and in that defendants had wrongfully and negligently failed to provide a sufficient and suitable fan for the purpose of blowing the shavings, dust, bark and other waste material, accumulated from the boards passing through the planer and other machinery in said box factory, and wrongfully and negligently failed to provide sufficient and suitable conveyors to and from said fan, thus causing the fan to become choked and clogged with waste material; that thereby the fan was subjected to much strain, thus causing the pulley to break into fragments; that the injury sustained by plaintiff was the direct and proximate result of said negligence.

Plaintiff further alleged that the shaft and pulley were not properly installed by defendants, in that defendants wrongfully and negligently connected the shaft, driving said pulley, with the pulley below said mill, by a belt placed in one-quarter turn; that the defendants negligently and wrongfully placed and located the machinery in said box factory, and that this negligence of defendants was the direct and proximate cause of the injury sustained by plaintiff.

Defendants, The Interstate Cooperage Company, upon petition filed in apt time, that is, before the time for answering the complaint had expired, prayed that the action be removed from the Superior Court of Beaufort County into the District Court of the United States for the Eastern District of North Carolina. The facts, upon which this motion was made, as alleged in the petition, are (1) that plaintiff is now and was at date of alleged injury a citizen of the State of North Carolina; (2) that defendant, The Interstate Cooperage Company, is now and was on said date a citizen of the State of New York; (3) that the amount in controversy exceeds three thousand dollars, exclusive of interest and cost; (4) that the cause of action as between plaintiff on the one side, and petitioner and its codefendant, W. A. Buys, on the other, is separable and (5) that defendant, W. A. Buys, a citizen of the State of North Carolina, was wrongfully and fraudulently joined with petitioner, a nonresident, as a defendant for the sole and only purpose of preventing a removal of the action into the District Court of the United States, and of depriving said Court of its rightful jurisdiction of the action.

The District Court of the United States has jurisdiction of the action as stated in the complaint, in favor of plaintiff, a citizen of the State of North Carolina, and against defendant, The Interstate Cooperage Company, a citizen of the State of New York, the amount involved

being in excess of the jurisdictional sum. It has, however, no jurisdiction of the action, as stated in the complaint, in favor of plaintiff and against both defendants, W. A. Buys, one of the defendants, being a citizen of the same state as plaintiff. The action is therefore not removable (1) unless it is separable, as between defendants, or (2) unless the resident defendant has been joined with the nonresident defendant with the fraudulent purpose of thereby depriving the nonresident defendant of a right which it has under the Constitution and laws of the United States, and of depriving the District Court of its rightful jurisdiction of the action.

Plaintiff states his cause of action in his complaint as founded upon the joint wrong of defendants; he sues them as joint tort-feasors. They are liable to him, if liable at all, jointly and severally, for damages caused by their joint wrong. The controversy is not wholly between citizens of different States and, not being separable, is not removable upon that ground. In *Smith v. Quarries Co.,* 164 N. C., 338, this Court has said: "It is the approved position with us that actions of this character may be prosecuted as for a joint wrong, and authoritative decisions hold that when so stated in the complaint and made in good faith, the allegations viewed as a legal proposition must be considered and passed upon as the complaint presents them, and in such case no severable controversy is presented which requires or permits a removal to the Federal Courts." Again in *Hollifield v. Telephone Co.,* 172 N. C., 714, "The plaintiff is entitled to have his cause of action considered as stated in his complaint. If there has been a joint tort committed, he may sue the wrongdoers jointly or separately, at his election, as they are liable to him in either form of action." *Hough v. R. R.,* 144 N. C., 692; *R. R. v. Miller,* 217 U. S., 209, 54 L. Ed., 732; *R. R. v. Thompson,* 200 U. S., 206, 50 L. Ed., 441.

Petitioner further alleges that W. A. Buys, a resident of the State of North Carolina, was wrongfully and fraudulently joined with petitioner as a defendant for the sole and only purpose of preventing a removal of the action into the District Court of the United States and of depriving said Court of its rightful jurisdiction of the action.

The right of removal cannot be defeated by the fraudulent joinder of a resident defendant having no real connection with the controversy. If in such a case a resident defendant is joined, the joinder, although fair upon its face, may be shown to be only a sham or fraudulent device to prevent a removal; but the showing must be made by a statement in the petition for removal of facts rightly leading to that conclusion apart from the pleader's deductions. *Wilson v. Republic Iron & Steel Co.,* 257 U. S., 92, 66 L. Ed., 144; *Rea v. Mirror Co.,* 158 N. C., 28; *Johnson v. Lumber Co., ante,* 81.

The facts alleged in the petition may be sufficient to show a fraudulent joinder, but the allegations of the complaint are broad enough to state a cause of action against both defendants. Not only is it alleged that ordinary care was not used in undertaking to provide the plaintiff with a reasonably safe place to work, but it is also alleged that the defendant Buys, in the discharge of his duties as general manager of the Interstate Cooperage Company, negligently failed to install the machinery in a proper manner, which proximately resulted in injury to the plaintiff. The plaintiff is entitled to have his cause of action considered as stated in his complaint. *Smith v. Quarries Co., supra.*

In *Rea v. Mirror Co.,* 158 N. C., 25, the order of removal on the ground of a fraudulent joinder of a resident general manager was approved, but there it was stated in the petition that the resident "defendant was not present or in the factory when the plaintiff was injured; that the injury received was neither the direct nor proximate result of any negligence of said resident defendant nor of the breach of any duty imposed upon him, nor of the failure to use due care, caution or prudence, and properly discharge his duties, which are and were at and before the alleged injury of plaintiff, in the office of the nonresident defendant." And there was nothing in the complaint to challenge this statement.

In *Smith v. Quarries Co.,* 164 N. C., 338, the refusal of the order of removal was affirmed on the ground that it appeared from the allegations in the complaint that the resident defendants had some authority over plaintiff's intestate and were charged with some responsibility concerning him while at work for the nonresident defendant. Facts were alleged which, though controverted by petitioner, if true, were sufficient to impose liability upon the resident defendant jointly with the nonresident defendant.

In *Hollifield v. Telephone Co.,* 172 N. C., 714, *Walker, J.,* distinguishing that case from *Rea v. Mirror Co.,* said: "But in this case the plaintiff has alleged in his complaint that J. C. Hollifield (the resident defendant) was superintendent of the work in which plaintiff was employed at the time he was injured, had general charge and control of it, and was clothed with authority to employ and discharge plaintiff and the other hands for disobedience to his orders, and generally represented his principal, the telephone company, in this respect, and that, holding this position in the service of the company, he directed the plaintiff, who was inexperienced, to perform work which J. C. Hollifield knew to be dangerous, and without proper warning of the danger to his subordinates or proper instructions to them as to how to do the work

with safety." This Court approved the denial of the motion to remove that case. See, also, *Fore v. Tanning Co.*, 175 N. C., 583; *Stevens v. Lumber Co.*, 186 N. C., 749.

Under authority of the *Smith* and *Hollifield cases,* we think the learned judge erred in ordering the cause removed to the Federal Court.

Error.

I. P. GRAHAM, RECEIVER OF BANK OF PROCTORVILLE, v. PROCTORVILLE WAREHOUSE AND J. R. LAWSON.

(Filed 22 April, 1925.)

1. Banks and Banking—Bills and Notes—Deposits—Debtor and Creditor.

A bank is debtor to its depositor to the amount of the deposit, and when a note of the depositor to the bank becomes due, to the amount of the note the depositor becomes a debtor to the bank, and in this relationship the bank may credit the note in whole or in part, as the case may be, with the amount of the deposit.

2. Same—Deposits for Collection—Payment.

Where a bank has received a valid check of its depositor through a correspondent bank, and sends it with other items for payment against its reserve account in another bank, and the check of its depositor remains unpaid at the time the payee bank thereof goes into a receiver's hands still owing its depositor a certain balance, and holding a past due note of his likewise, the double relationship of debtor and creditor exists in the receiver's action upon the note, and the depositor is entitled to a credit to the extent of his deposit; and, *Held further*, the fact that the payee bank marked the depositor's check paid, returned it to him and had this transaction entered regularly upon its books, cannot vary the fact that the check had not been paid or affect the result.

3. Same—Subrogation.

Where a depositor in a bank has drawn a check thereon to a third person, and by reason of the afterward insolvency and receivership of the payee bank the check remains unpaid in the hands of a bank that has received it in the course of collection, by paying the check so held the depositor is subrogated to the rights of the bank thus holding the check in an action thereon brought against him, by the receiver of the payee bank.

VARSER, J., did not sit.

APPEAL by defendant, J. R. Lawson, from judgment rendered, upon an agreed statement of facts, by *Calvert, J.*, at December Term, 1924, of ROBESON.

Plaintiff is the owner of a note, dated 28 November, 1922, executed by J. R. Lawson, payable to Proctorville Warehouse Company, for $542.62, upon which the sum of $48.43 was paid on 21 December, 1923.

This action was begun on 2 February, 1924, to recover of defendants the amount due on said note. On 2 January, 1923, the Bank of Proctorville was adjudged insolvent and plaintiff was duly appointed receiver. A few days prior to said date, J. R. Lawson had on deposit in said bank the sum of $219.60. He drew his check against said deposit in favor of A. Weinstein of Lumberton, N. C., who at once endorsed and deposited the same to his credit in a bank at Lumberton. Said check was forwarded by the Bank of Lumberton to the American Exchange National Bank of Greensboro, along with other checks, for collection in the usual course, and was thereafter forwarded by the said American Exchange National Bank to Bank of Proctorville for collection. The Bank of Proctorville, upon receiving said check, marked same "Paid" and charged the amount thereof to the account of J. R. Lawson and thereafter returned the same with his monthly bank statement to the said Lawson. On the same day that the check was thus marked "Paid" and charged to the account of the said Lawson, the Bank of Proctorville drew its check upon its reserve account in a bank at Wilmington, N. C., in favor of the said American Exchange National Bank covering the amount of the said Lawson check and other items received for collection. The said check was thereupon forwarded to the American Exchange National Bank at Greensboro, N. C. Before this check could be presented to the bank at Wilmington on which it was drawn for payment, the Bank of Proctorville had closed its business and plaintiff had been appointed receiver. This check, including the amount of the Lawson check, has not been paid, but is now held by the American Exchange National Bank of Greensboro.

The American Exchange National Bank has charged the amount of the Lawson check to the bank at Lumberton and the bank at Lumberton has in turn charged the same to the account of A. Weinstein. J. R. Lawson has paid to Weinstein by another check on another bank the indebtedness for which he drew his check on the Bank of Proctorville. Defendant, Lawson, contends that plaintiff, as receiver of the Bank of Proctorville, is now indebted to him in the sum of $219.60, and pleads same as a counterclaim, *pro tanto,* to the note upon which this action was brought. The plaintiff contends that the Bank of Proctorville having paid Lawson's check to Weinstein, by including the amount thereof in the check forwarded to the American Exchange National Bank, he is not indebted to Lawson in said sum, and that Lawson is not, therefore, entitled to the counterclaim as pleaded by him.

The Court being of the opinion that upon the statement of agreed facts, defendant Lawson was not entitled to the counterclaim, rendered judgment that plaintiff recover of the said defendants the sum of

$542.62 with interest thereon from 28 November, 1922, subject to a credit of $48.32 as of 21 December, 1923. To this judgment defendant Lawson excepted and appealed therefrom to the Supreme Court.

McIntyre, Lawrence & Proctor for plaintiff.
McLean & Stacy for defendant.

CONNOR, J. Prior to the adjudication that it was insolvent and to the appointment of plaintiff as its receiver, the Bank of Proctorville had on deposit to the credit of J. R. Lawson and subject to his check the sum of $219.60. The relation of debtor and creditor existed between the said Lawson and the said bank by reason of said deposit. *Reid v. Bank,* 159 N. C., 99; *Boyden v. Bank,* 65 N. C., 13. The Bank of Proctorville also held the note executed by J. R. Lawson, payable to Proctorville Warehouse Company, and transferred by endorsement to the bank. The bank was a creditor of said Lawson by virtue of said note. Both the indebtedness of Lawson to the bank by virtue of the note and the indebtedness of the bank to Lawson by virtue of the deposit arose out of contract. Each had a cause of action against the other, arising out of contract and existing at the commencement of this action, unless the indebtedness of the bank to Lawson had been paid prior to appointment of plaintiff as receiver; if not, each was entitled to a counterclaim against the cause of action of the other. C. S., 521, sec. 2; 14 R. C. L., 655, and cases cited.

The bank had the right to apply the deposit as a payment, *pro tanto,* on the note after same became due; *Hodgin v. Bank,* 124 N. C., 540; *Moore v. Bank,* 173 N. C., 180; *Moore v. Trust Co.,* 178 N. C., 128; *Trust Co. v. Trust Co.,* 188 N. C., 766; and so, defendant Lawson had the right to have any sum due him by the bank at the date of its insolvency applied as a payment on his note held by the bank; *Davis v. Mfg. Co.,* 114 N. C., 321. In his opinion in this last cited case, *Justice Burwell* says: "We declare that, in our opinion, equity and justice require that the receiver, when he comes to make a settlement with one who is a creditor of the bank, shall deduct from his credit all those sums for which he is debtor, and when he settles with a debtor to the bank he shall allow him credit for all sums for which he is a creditor of the bank."

Plaintiff contends, however, that the amount due by the bank to Lawson, by reason of said deposit, upon the facts agreed, has been paid, and that the relation of debtor and creditor between the bank and Lawson did not exist at the commencement of this action. Lawson contends that upon the agreed facts the amount has not been paid, but was and still is due him by the bank.

When Lawson's check for $219.60, the amount of the deposit, payable to A. Weinstein, was presented for payment by the American Exchange National Bank of Greensboro to the Bank of Proctorville a few days before it became insolvent, and while it was open for the transaction of its usual business, it was the duty of the Bank of Proctorville, by virtue of its contract with Lawson, its depositor, to accept the check and pay the amount for which it was drawn to the payee or endorsee. Prior to acceptance it owed no duty to the payee or endorsee of said check; *Perry v. Bank,* 131 N. C., 118. It accepted the check, however, and undertook to pay the same by sending to the American Exchange National Bank its check, drawn on its correspondent bank at Wilmington, N. C., including in the amount for which it was drawn the amount of the Lawson check. It marked the Lawson check "Paid," charged it to his account, and subsequently returned the same to Lawson, canceled. The check sent to the American Exchange National Bank was only a conditional payment of the Lawson check. No facts appear in the statement of agreed facts from which it can be found that it was agreed by the Bank of Proctorville and the American Exchange National Bank that said check was sent or accepted as an unconditional payment of the Lawson check or as a full and final discharge of the liability of the Bank of Proctorville for the proceeds of the collection of said check. In the absence of an agreement to the contrary, the delivery of a check by the debtor to the creditor and the acceptance by the creditor of the check is not a payment of the indebtedness until the check has been paid; *Bank v. Barrow, ante,* 303.

The check on the Bank of Wilmington has not been paid; it must follow, therefore, that the proceeds of the collection of the Lawson check have not been paid. The Bank of Proctorville, at the date of the appointment of plaintiff as receiver, had, among its assets, which passed to plaintiff, the money which Lawson had deposited with it. Its balance in the Wilmington bank, on which it had drawn its check covering the amount of the Lawson check, had not been diminished by reason of said check, but passed to plaintiff, intact, so far as said check was concerned. Neither Lawson nor the payee or endorsee of his check for the amount of his deposit in the Bank of Proctorville had received any part of same, so that neither the proceeds of the collection nor the check have been paid by the Bank of Proctorville.

It is true that it is agreed that Lawson's check after it came into the possession of the Bank of Proctorville was marked "Paid" by the said bank and that entries were made on the books of the bank showing that said check had been charged to Lawson's account. Debts, however, cannot be paid or obligations discharged by mere entries upon books, which

are inconsistent with facts. Such entries, certainly when made *ex parte,* cannot be held as conclusive; they can be, at best, no more than evidence.

In *Bank v. Bank,* 119 N. C., 307, *Justice Montgomery* says: "Simply entering credits on mutual accounts between the actual collecting banks and their intermediaries will not protect the actual collector of drafts or checks from the demands of the owner under the circumstances of this case."

The Bank of Proctorville, not having paid the amount due to Lawson by reason of his deposit, plaintiff, as receiver, still owes this amount. He does not owe it to the American Exchange National Bank, for this bank has been released of any obligation which it incurred to the Bank of Lumberton, from which it received the Lawson check for collection. He does not owe it to Bank of Lumberton, for it has charged the amount of the Lawson check to Weinstein, from whom it received the check for deposit. Nor does he owe it to Weinstein, the payee; Lawson, doubtless, being advised that his indebtedness to Weinstein has not been paid, because his check given in payment thereof was not paid by the Bank of Proctorville, has fully paid Weinstein and discharged his indebtedness to him. The indebtedness of plaintiff, as receiver of Bank of Proctorville, on account of the deposit, not having been paid, is still due to J. R. Lawson, both in fact and in law. Upon the agreed facts, whatever rights to said indebtedness were acquired by Weinstein or the bank at Lumberton or the American Exchange National Bank by reason of Lawson's check and its acceptance by the Bank of Proctorville have been released and extinguished. If there is any liability still existing against the Bank of Proctorville arising out of its check on the Bank of Wilmington to American Exchange National Bank, upon the agreed facts the same cannot be enforced by said bank so as to include the amount of the Lawson check. Lawson has acquired the right to enforce such liability by subrogation. In any event, at the commencement of this action, plaintiff was indebted to Lawson in the sum of $219.60, either because the amount of his deposit has not been paid, or if it was paid, because he has been subrogated to the rights of the American Exchange National Bank in and to the check, which includes the proceeds of the collection of Lawson's check, payable to Weinstein. Defendant, Lawson, is, therefore, entitled to have such indebtedness applied as a payment, *pro tanto,* upon his note, in accordance with his plea of counterclaim. There was error in rendering judgment denying defendant Lawson his counterclaim.

We have not overlooked the contention of plaintiff that by reason of chapter 20, Public Laws 1921, the Bank of Proctorville had the option to pay the check of J. R. Lawson, its depositor, when same was sent

to it for collection through the post office by draft on the bank at Wilmington. This statute has been declared by the Supreme Court of the United States not to be in violation of the Constitution of the United States, and, therefore, valid; 262 U. S., 649; 67 L. Ed., 1157. The provisions of the statute, however, must be construed in accordance with well settled rules of law; it will not be held that a drawee bank can charge checks drawn on it by its customers to the accounts of such customers, remit in drafts or exchange to the forwarding bank, and thereby be released, notwithstanding that said drafts or exchange are, for valid and lawful reasons, not paid. Where a check drawn on a bank or trust company chartered by this State is presented to the drawee bank, "by or through any Federal Reserve Bank, post office or express company or any respective agent thereof," and such bank or trust company, in the exercise of the option conferred by said statute, sends to the forwarding bank its draft on its reserve deposits in payment of such check, it will not be discharged of liability for the collection of its depositor's check until such draft on its reserve deposit has been paid.

There was error in rendering the judgment and same is

Reversed.

VARSER, J., did not sit.

STATE v. E. L. PALMORE.

(Filed 22 April, 1925.)

1. Appeal and Error—Criminal Law—Solicitor's Acceptance of Appellee's Case—Record.

Where the convicted defendant on a trial of a criminal action serves in apt time his case on appeal on the solicitor, who endorses his acceptance thereon as the case tried, it will conclusively be taken as the case on appeal, and may not be corrected by affidavit of the stenographer that the judge's charge to the jury had been inaccurately transcribed by her from her notes taken at the trial.

2. Criminal Law—Instructions—Reasonable Doubt—Appeal and Error.

The requisite of the law that the State must show the defendant in a criminal action guilty beyond a reasonable doubt in order to convict him is for the defendant's benefit, and a charge that likewise puts the burden on defendant to show his innocence beyond a reasonable doubt is prejudicial error, entitling him, on conviction, to a new trial.

APPEAL by defendant from *Shaw, J.*, and a jury, at September Term, 1924, of GUILFORD.

The defendant was indicted for "wilfully, unlawfully and knowingly did offer for sale and sell to Mrs. D. L. Ladd the stocks, bonds, obliga-

tions of or interest in the Health-Tone Laboratories, Incorporated, of Greensboro, North Carolina, without first having procured license to do so from the Insurance Department of North Carolina."

On the trial the defendant was found guilty by the jury and sentence imposed by the court below. Exceptions and assignments of error were duly made by defendant and appeal taken to the Supreme Court.

When the case was called for argument in this Court, the Attorney-General made a motion "suggesting a diminution of the record," and submitted the following affidavit of the court stenographer:

"That she is the official court stenographer for the Superior Court of Guilford County, North Carolina, and is the court stenographer that took down in shorthand and transcribed the charge of the Honorable Thomas J. Shaw, judge presiding at the trial of the case of State v. E. L. Palmore in the Superior Court of Guilford County at the September Criminal Term, 1924; that she has had her attention called to the last paragraph of said charge as transcribed by her as follows:

" 'It is all a matter for you, gentlemen of the jury. If you find beyond a reasonable doubt that the defendant is guilty in the case in which the bill of indictment recites this transaction with Mrs. Ladd, then you will convict him. If you find beyond a reasonable doubt that he is not guilty, then you will acquit him; and the same rule applies to the second case, gentlemen of the jury, the transaction with Mr. Florence. If you find beyond a reasonable doubt that he is guilty under that bill, you will convict him. If you find beyond a reasonable doubt that he is not guilty, you must acquit him.'

"That she has compared the charge as so transcribed with her original shorthand notes, and that she now finds that the portion of the charge as above set out was incorrectly transcribed; that a true and correct transcription of said charge, in so far as it pertains to said last paragraph, is as follows, and not otherwise:

" 'It is all a matter for you, gentlemen of the jury. If you find beyond a reasonable doubt that the defendant is guilty in the case in which the bill of indictment recites this transaction with Mrs. Ladd, then you will convict him. If you have a reasonable doubt as to his guilt you will acquit him; and the same rule applies to the second case, gentlemen of the jury, the transaction with Mr. Florence. If you find beyond a reasonable doubt that he is guilty under that bill, you will convict him. If you have a reasonable doubt as to his guilt, you must acquit him.

" 'You can retire, gentlemen, and make up your verdict.' "

The appellant's, defendant's, answer to the motion is as follows:

"The appellant herein respectfully submits that the Attorney-General's said motion should be denied for the following reasons:

"Although entitled 'motion suggesting a diminution of the record,' no diminution of the record is suggested. And no certiorari is prayed. The motion prays this Court to amend, modify, or alter a part of the agreed case on appeal in the record so as to make it correspond to what the court stenographer in her affidavit now asserts to be her stenographic notes of the trial. The motion is to amend or change the record here so as to substitute alleged stenographer's notes for case on appeal agreed to by counsel.

"Of course, appellant and his counsel can have no means of knowing what the stenographer's notes are or mean. That is a matter of which she alone can have knowledge.

"We know, however, that the case on appeal containing the judge's charge as set out in the stenographer's typewritten transcription was served on the solicitor within the time allowed, and that within the time allowed him he approved said case on appeal in writing and signed his name to the approval. R. 40.

"The statute, C. S., 643, thereupon made it mandatory upon the clerk to file an agreed case on appeal as a part of the record. He did so, and this agreed case is now a part of the record of this case in this Court.

"This Court holds that stenographer's notes are not compelling authority as to what transpired during the trial, but that the supreme authority is that of counsel themselves in agreeing as to what occurred, whether as to the evidence, as to the charge, or otherwise. And this Court has consistently refused to make the stenographer's notes of higher authority than the agreement of counsel. *Cressler v. Asheville,* 138 N. C., 485; *Rogers v. Asheville,* 182 N. C., 596.

"We, therefore, submit that the Court should not make the stenographer's notes in this case of higher authority than the agreement of counsel.

"Besides, we understand it to be the holding of this Court that it is without power to alter, modify, amend, or in any way change the record as it comes to this Court. *Neal v. Cowles,* 71 N. C., 266; *Covington v. Newberger,* 99 N. C., 523; *Walker v. Scott,* 102 N. C., 487; *S. v. Wheeler,* 185 N. C., 670, 672.

"In *Walker v. Scott, supra,* it was said: 'The case stated or settled on appeal passes into and becomes part of the case in the court below, and it comes to this Court as a part of record. This Court has no authority to make, alter, or modify it in any material respect, or to determine that it was or was not duly filed.'

"In *Covington v. Newberger, supra,* the Court said: 'Counsel for the appellant proposed to show by affidavit what the instructions asked for and refused were; but this Court cannot permit the case stated to be varied or amended in any such way, and we can only consider the question presented in the record.'

"We know of no rule, and can conceive of no reason to support a rule, giving the State when it is a party on appeal any rights in this respect superior to the rights of any other litigant.

"Wherefore, we respectfully submit that the Attorney-General's motion should be denied and that this appeal should be considered and disposed of upon the record."

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

Bynum, Hobgood & Alderman for defendant.

CLARKSON, J. From a careful inspection of the record, examination of the briefs and hearing the arguments, we can discover no error whatever in the record except the charge as appears of record in regard to reasonable doubt and set forth in the motion of the Attorney-General. The case in the court below was tried by a learned and painstaking judge. The Attorney-General in the brief says: "This jury, beyond any doubt, it seems to us, could not have been misled by this patently erroneous statement of his Honor in such way as to affect their finding in the particular case. If the burden is upon the State (and this is probably true) to show that no harm could have come from this error, we think that the considerations suggested herein show that this defendant was not harmed by this error."

In *State v. Starling,* 51 N. C., 367, *Pearson, C. J.,* approves the charge of Shepherd, J., in the court below: "Reasonable doubt, in the humanity of our law, is exercised for a prisoner's sake, that he may be acquitted if his case will allow it. It is never applied for his condemnation." *Speas v. Bank,* 188 N. C., 528.

In the interest of humanity, except in certain cases changed by statute, the accused is entitled to an instruction that the prosecution must prove the charge against him beyond a reasonable doubt. In material or civil matters, ordinarily the rule is different—by preponderance or greater weight of the evidence. Reasonable doubt is defined in *State v. Schoolfield,* 184 N. C., 723. The rule of reasonable doubt has come down to us from ages past and is firmly established in this jurisdiction. It is a substantial right. *Hunt v. Eure, ante,* 482. There was error in the charge as appears from the record.

Should the motion of the Attorney-General be allowed? We cannot so hold. Precedent and orderly practice and procedure is ordinarily the life and light of the law; without it we would have chaos. It may, in some cases, work a hardship, as in this case, to the State, but adherence to the fixed rules is necessary in the administration of law.

The solicitor, under our Constitution, has to prosecute on behalf of the State in all criminal actions in the Superior Court and advise the

officers of justice in his district. He is the most responsible officer of the court. *State v. McAfee, ante,* 320.

The record shows that the defendant prepared and tendered his case in the time allowed by law to the solicitor, and he signed the following: "Service of the foregoing defendant's, appellant's, statement of case on appeal is hereby accepted and the receipt of a copy thereof is hereby acknowledged. . . . The foregoing is hereby approved as the statement of case on appeal."

The record imports verity. The solicitor must pass on "case on appeal" for the State, *State v. Cameron,* 121 N. C., 573, and this Court is bound by the case passed upon, *State v. Wilson,* 121 N. C., 650. The judge cannot authorize the case on appeal to be served upon any other than the solicitor or counsel acting for him. *State v. Stevens,* 152 N. C., 840. When appellant's case is served in time, and no exception or countercase served, it is "the case." *State v. Carlton,* 107 N. C., 956.

Practically this very matter has been recently passed upon in *State v. Humphrey,* 186 N. C., 533. In that case the defendant in apt time served on the solicitor the case on appeal. The solicitor after the statutory period filed a countercase. The judge undertook to settle the case on appeal and directed that the same be filed as the case, etc. The appellant's case on appeal with the record proper was certified to the Supreme Court and duly docketed for hearing. At the call of the cause in this Court the Attorney-General suggested a diminution of the record and moved that the case served by the court be docketed as the only correct and proper case on appeal. Motion disallowed, and cause heard and determined on case as tendered and served by appellant. In the *Humphrey case, supra, Hoke, J.,* in a clear and concise opinion, sets forth the statutes and authorities, and a repetition here is unnecessary.

There must be a

New trial.

JAMES C. DAVIS, DIRECTOR GENERAL, AND SEABOARD AIR LINE RAILWAY COMPANY v. C. B. GILL & CO.

(Filed 22 April, 1925.)

Railroads—Demurrage—Rule—Interstate Commerce Commission—Findings—New Trials.

In an action by a railroad company to recover demurrage charges on an interstate carload shipment, the determinative question was whether the demurrage charges began to accrue at the time of notice or constructive placement or at the time of the actual placement of the cars, the defendant contending that by special agreement with the plaintiff the rule of constructive placement as required by the rule of the Interstate Commerce Commission did not apply, and the plaintiff that this rule was

enforceable to prevent discrimination among shippers and would necessarily control any agreement to the contrary: *Held*, it was necessary for a determination of the case that there should have been a finding as to whether a condition preventing the placement of the cars was attributable to the consignee.

APPEAL by plaintiffs from *Daniels, J.*, at February Term, 1924, of WAKE.

Civil action to recover $804.53, demurrage charges, which, it is alleged, had accrued on nine "order notify" shipments of freight consigned or deliverable to the defendant at Raleigh, N. C.

From a verdict and judgment denying full recovery, plaintiffs appeal.

Murray Allen for plaintiffs.

J. W. Bunn and Banks Arendell for defendant.

STACY, C. J. All liability is not denied, but there is a difference between the parties as to the length of time properly chargeable against the defendant for the accrual of demurrage.

Defendant contends that he is only liable for $110.21, the demurrage which accrued on the nine cars in question from the time they were placed on the sidetrack at his warehouse until released by him. The plaintiffs, on the other hand, contend that they are entitled to recover $804.53, the amount of demurrage which accrued between the time the defendant was notified of the arrival of the cars and the time they were unloaded, deducting therefrom the free time allowed by the demurrage rules. In short, the question for decision is: When did demurrage begin to accrue, at the time of notice and constructive placement, or at the time of actual placement of the cars? The plaintiffs say at the time of notice and constructive placement. The defendant says at the time of actual placement under the arrangement which he had with the plaintiffs. The trial court took the defendant's view of the matter and instructed the jury accordingly. The verdict was for $110.21. Plaintiffs appeal, assigning errors.

It was in evidence that the following rule relating to demurrage had been approved by the Interstate Commerce Commission and was in force at the time the present charges accrued in February and March, 1920:

"Rule 5—Placing Cars for Unloading. Section A.—When delivery of a car consigned or ordered to an industrial interchange track or to other than a public delivery track cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination or, if it cannot be reasonably accommodated there, at the nearest available point, and written notice that the car is held and that this railroad is

unable to deliver will be sent or given to the consignee. This will be considered constructive placement."

For several years prior to 1920 the defendant had an arrangement with the plaintiffs whereby all "order notify" shipments consigned or deliverable to the defendant at Raleigh, N. C., were to be placed on the spur-track in front of the defendant's warehouse without first requiring a surrender of the original bill of lading; and demurrage, if any, on cars held for loading or unloading was to be computed on the basis of the average time of detention, under an "average agreement" entered into between the parties.

By reason of some dissatisfaction occasioned by the defendant's delay in surrendering one or more of the original bills of lading on "order notify" shipments before taking charge of the cars placed on his siding, he was notified by plaintiff's agent at Raleigh that the practice of placing "order notify" shipments on the spur-track in front of his warehouse without first requiring a surrender of the original bill of lading would be discontinued.

After some delay, due to the conflicting contentions of the parties, the defendant took the matter up with plaintiff's freight traffic manager at Norfolk, Va., and effected an arrangement whereby the former custom of placing all such shipments on the sidetrack in front of his warehouse without first requiring a surrender of the original bill of lading would be continued on condition that "outstanding demurrage under the average demurrage agreement will be settled promptly after 1 April." This was assented to by the defendant.

Part of the demurrage on the nine cars in question accrued while the parties were negotiating with respect to the placing of these "order notify" shipments on the sidetrack in front of defendant's warehouse. It is conceded that a portion of the demurrage accrued on said cars after they were finally placed on defendant's sidetrack, and this is not in dispute. Defendant says he agreed to settle the outstanding demurrage on the nine cars in question under the average demurrage agreement, and that said agreement calls for the payment of charges on cars detained on the sidetrack for loading or unloading, and no more. Plaintiffs deny the correctness of this contention, and reply further by saying that it can make no difference whether the particular demurrage is covered by the average agreement or not, as the duty to collect it is imposed by law, and hence it may not be waived or remitted either by contract or by custom, for such would result in discrimination among shippers.

The position of the plaintiffs in regard to a like contention where no cause for the delay was attributable to the carrier or its agents was upheld by us in the case of *Davis v. Storage Co.*, 186 N. C., 676 (peti-

tion for writ of certiorari denied by the Supreme Court of the United States 14 April, 1923, 188 N. C., 836). Under the principles announced in this authority, where the matter is discussed at length and need not be repeated here, it appears necessary to remand the instant case for another hearing, to the end that it may be determined whether the delay in placing the nine cars in question on the spur-track in front of the defendant's warehouse was occasioned by any "condition attributable to the consignee."

New trial.

STATE v. JEFF CROOK.

(Filed 22 April, 1925.)

Criminal Law—Seduction—Statutes—Burden of Proof—Evidence.

In order to convict of seduction under our criminal statute, it is necessary for the State to satisfy the jury beyond a reasonable doubt of the innocence and virtue of the prosecutrix, the promise and the carnal intercourse induced thereby, and a conviction may not be had where there is no supporting evidence that she was innocent and virtuous.

APPEAL by defendant from *Lane, J.*, at the October Term, 1924, of UNION.

The defendant was convicted of seduction, the statute being 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." C. S., 4339.

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

Vann & Milliken for the defendant.

ADAMS, J. Appended to the record is a purported plea in bar based upon the marriage of the defendant and the prosecutrix alleged to have been solemnized in South Carolina since the trial; but the defendant,

withdrawing this plea and relying upon a failure of proof, insists that his motion to dismiss the action at the conclusion of the evidence should have been granted.

To convict the defendant of seduction it was incumbent upon the State to satisfy the jury beyond a reasonable doubt of every element essential to the offense. The three elements are (1) the innocence and virtue of the prosecutrix, (2) the promise of marriage, and (3) the carnal intercourse induced by such promise. To each of these the prosecutrix testified; but the statute provides that the unsupported testimony of the woman shall not be sufficient to convict. This proviso has been construed to mean that the prosecutrix must be supported by independent facts and circumstances as to each element of the offense. *S. v. Ferguson,* 107 N. C., 841; *S. v. Doss,* 188 N. C., 214.

The testimony of the girl's father and stepmother constitutes supporting evidence of the defendant's promise of marriage, but this is not enough. Whether Mrs. Hensley's statement that "he (the defendant) was after her (the prosecutrix) all the time" can reasonably be construed as supporting evidence of carnal intercourse we need not decide *(S. v. Ferguson, supra,* p. 851), for if the question be resolved in favor of the prosecutrix there is yet a distinct lack of evidence supporting the contention that the prosecutrix was an innocent and virtuous woman. As to this element of the crime, evidence of her good character would have been sufficient, but none was introduced. *S. v. Doss, supra; S. v. Moody,* 172 N. C., 967.

Since the evidence was insufficient to sustain a conviction, the defendant's motion should have been granted and the action dismissed. Let this be certified.

Reversed.

G. M. TUCKER v. ASHCRAFT GIN AND MILL COMPANY.

(Filed 22 April, 1925.)

Appeal and Error—Agreement as to Facts—Evidence—Inference—New Trials.

Where the parties to a civil action have agreed after verdict and judgment upon the case so as to present the question of law on appeal, a new trial will be ordered if the facts so agreed upon permit of inferences favorable to both of the contending parties and sufficient to support a verdict in favor of both of them.

APPEAL by plaintiff from *Lane, J.,* at August Term, 1924, of UNION.

The issues were answered as follows:

1. Was J. I. Green acting as agent of G. M. Tucker in making sale to the defendants of the lumber in controversy in this action? Answer: No.

2. If so, did J. I. Green disclose to the defendants at the time of making the contract that he was agent of G. M. Tucker? Answer: No.

3. Did the J. I. Green Lumber Company, after making the contract with the Ashcraft Gin and Mill Company for the sale of the lumber, assign the account for same to plaintiff, G. M. Tucker? Answer: Yes.

4. Was the J. I. Green Lumber Company indebted to defendants in an amount exceeding the account assigned to G. M. Tucker, as alleged in the answer? Answer: Yes.

John C. Sikes and Vann & Milliken for plaintiff.
Parker & Craig for defendants.

ADAMS, J. There was evidence tending to show that the defendant had contracted to purchase two carloads of lumber from the Green Lumber Company, which at that time was indebted to the defendant in an amount exceeding the contract price; that the Green Lumber Company had assigned the "accounts" or "orders" to the plaintiff, who had caused the lumber to be shipped, and that the lumber had been received by the defendant. The plaintiff brought suit to recover the amount alleged to be due and a controversy arose as to whether the debt was due the plaintiff or the Green Lumber Company.

At the close of the evidence each party moved for a directed verdict, and thereupon for the purpose of reducing the controversy to a question of law, facts agreed were submitted to the court. The judge directed a verdict in favor of the defendant, and the plaintiff excepted and appealed.

An inspection of the facts agreed leads us to the conclusion that they are inconsistent, if not contradictory; that more than one reasonable inference may be deduced from them, and that under these circumstances the directed verdict cannot be upheld. If the parties are unable to agree upon a more definite and specific statement of the facts, the issues should be left to the jury with proper instruction as to the law. *In re Will of Margaret Deyton,* 177 N. C., 494; *Phillips v. Giles,* 175 N. C., 409.

For the error assigned a new trial is granted.

New trial.

L. K. HICKS v. SOUTHERN RAILWAY COMPANY.

(Filed 22 April, 1925.)

1. Evidence—Nonsuit—Statutes.

A motion as of nonsuit made under the provisions of C. S. 567, at the close of plaintiff's evidence and renewed at the close of all the evidence, will be denied if it is sufficient to support a verdict in plaintiff's favor taken in the light most favorable to him, whether elicited on direct or cross-examination, and he is entitled to the benefit of every reasonable inference to be drawn therefrom.

2. Railroads—Negligence—Contributory Negligence—Damages.

The contributory negligence of an employee against a railroad company, his employer, will not be held under our statute as a complete bar to his recovery of damages inflicted by the defendant's negligence, but the jury must take it into consideration under proper instructions from the court, in diminishing the amount of damages recoverable.

APPEAL by defendant from *McElroy, J.*, at January Term, 1925, of GUILFORD.

Civil action tried upon the following issues:

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

"2. Did the plaintiff by his own negligence contribute to his said injury, as alleged in the answer? Answer: Yes.

"3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $5,000.00."

From a judgment on the verdict for plaintiff, the defendant appeals, assigning errors.

Bynum, Hobgood & Alderman for plaintiff.
Wilson & Frazier for defendant.

PER CURIAM. Defendant relies entirely upon its demurrer to the evidence, interposed first at the close of plaintiff's evidence, by motion to dismiss the action or for judgment as of nonsuit, and renewed by like motion at the close of all the evidence. C. S., 567.

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 amply supported thereby. It is the settled rule of practice in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be taken and considered in its most favorable light for the

plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Nash v. Royster, ante,* 408.

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 plaintiff being in the employ of a common carrier by railroad, and having brought his action to recover damages for an alleged negligent injury, received while in the discharge of his duties as such employee, is not barred of his right to recover by reason of his own contributory negligence, but such negligence is to be taken in consideration by the jury in diminishing the damages which he otherwise would have been entitled to have awarded. The rule applicable is stated in *Cobia v. R. R.,* 188 N. C., p. 496.

The evidence was conflicting on the main issue of liability; the jury has determined the matter against the defendant; there is no reversible error appearing on the record; the verdict and judgment will be upheld.

No error.

SECURITY FINANCE COMPANY v. CHARLES M. HENDRY, TRADING AS BALTIMORE MERCANTILE COMPANY.

(Filed 29 April, 1925.)

1. Trade Name—Assumed Names — Statutes — Registration—Actions—Police Powers.

While the violation of C. S., 3288, prohibiting carrying on a mercantile business under an assumed name without registration, is made a misdemeanor by C. S., 3291, a further provision is made by the Public Laws of 1919, ch. 2, that such violation shall not prevent a recovery by "said person or persons in any civil action," etc., evidencing the intent of the legislature that the protection of C. S., 3288, as to creditors, should not extend to giving the courts the power to strike out an answer setting up a valid defense upon the admission that defendant had violated sec. 3288, and render judgment in favor of the plaintiff; and *Held further,* the courts will not lend their aid to extend the provisions of C. S., 3288, 3291, highly penal in their nature, and coming within the police powers of the State.

2. Same—Defenses—Fraud.

In an action upon his promissory notes the defendant alleged that the plaintiff held the notes sued on as the agent for the payee, who had procured them through fraud, sufficiently stated: *Held,* the pleadings raised issuable matters for the determination of the jury.

3. Bills and Notes—Attorney and Client—Attorneys' Fees—Statutes.

A provision incorporated in an instrument for the payment of money for counsel fees for collection, is not enforceable. C. S., 2983.

APPEAL by defendant from *Harding, J.*, at January Special Term, 1925, of MECKLENBURG.

The plaintiff, a corporation, sued the defendant, an individual, trading under the style of "Baltimore Mercantile Company," on six promissory notes. These notes are payable to Brenard Manufacturing Company, and plaintiff sues as holder in due course. In each note is the stipulation: "In case of default in payment I agree to pay payee's reasonable attorney fees."

The defendant admits the execution and delivery of these notes to the payee, but denies that plaintiff is a holder in due course. The defendant further says the notes were procured by fraud and deceit of the payee, and that the goods constituting the consideration of the notes were refused by him as soon as he discovered the fraud and deceit, and that plaintiff is, in truth, the agent of the payee and not the owner of the notes.

The defendant also admitted plaintiff's allegation that, "the defendant was engaged in business under the firm or trade name of the 'Baltimore Mercantile Company,' and that the defendant while thus trading failed to record his said trade name in the office of the clerk of the Superior Court of Mecklenburg County, N. C., as he was required so to do by law."

The plaintiff moved the court to strike out the defendant's answer and for judgment by default final on the complaint, upon the defendant's admission that he failed to comply with C. S., 3288.

The court rendered the following judgment:

"This cause coming on to be heard before his Honor, W. F. Harding, judge presiding, and being heard upon motion of the plaintiff for judgment, for that the defendant having failed to comply with the law relative to recording his trade name; and to strike out answer and for judgment by default final. The court finds the following facts: (1) That the defendant, Chas. M. Hendry, is and was at the times mentioned in the complaint, a resident of Mecklenburg County, and was at and before the date of the execution of the notes sued on engaged in business in said county under the trade name of 'Baltimore Mercantile Company.' (2) That the defendant has not and never had, complied with the law in regard to causing his said trade name to be recorded in the office of the clerk of the Superior Court of said county. (3) That it is alleged in the complaint and admitted in the answer that the defendant had so failed to record his trade name 'as required by law.'

(4) That as a result of the failure of the defendant to file his trade name the plaintiff in this action brought suit on said notes against a corporation by the name of the Baltimore Mercantile Company, and was compelled in said action to take a nonsuit and suffered costs and expense, whereas if the defendant had complied with the law recording his trade name this suit and mistake would not have occurred. That upon these facts and admissions the court is of the opinion that the defendant having violated the law by failing to file said trade name to be recorded, and having violated the penal laws of the State by this omission, is not entitled to defend the present action.

"And it further appearing that the summons in this action has been personally served upon the defendant; that a duly verified complaint setting forth the breach of an express contract to pay a definite sum of money upon notes has been filed according to law, and the court being of the opinion that the answer should be struck out and that the plaintiff is entitled to judgment.

"It is therefore upon motion of Thos. W. Alexander, attorney for the plaintiff, that it is hereby ordered, adjudged and decreed that the plaintiff have and recover judgment against the defendant in the sum of—

"$87.00 with interest thereon from 9 March, 1924, until paid at six per cent.

"$87.00 with interest thereon from 9 April, 1924, until paid at six per cent.

"$87.00 with interest thereon from 9 May, 1924, until paid at six per cent.

"$87.00 with interest thereon from 9 June, 1924, until paid at six per cent.

"$87.00 with interest thereon from 9 July, 1924, until paid at six per cent.

"$84.26 with interest thereon from 9 August, 1924, until paid at six per cent.

"And it further appearing that this action is to recover obligations upon which defendant agreed to pay a reasonable attorney's fee for collection, and being an action by a bank for collection of notes purchased by it, and the court being of the opinion that the sum of $50 is a reasonable charge: It is ordered and adjudged that the plaintiff recover of the defendant the additional sum of $50 with interest thereon from 12 January, 1925, being the first day of this term of court, at six per cent per annum until paid; that the defendant pay the costs of the action; that the action being upon notes that the same be marked 'judgment' by the clerk."

The defendant appealed, assigning error in granting plaintiff's motion to strike out the answer and in rendering judgment by default final, and in allowing attorneys' fees.

Thos. W. Alexander for plaintiff.
J. Lawrence Jones for defendant.

VARSER, J. C. S., 3288, prohibits persons from carrying on business in this State "under assumed name, or under any designation, name or style other than the real name of the individual owning, conducting or transacting such business," unless a certificate is filed by such person in the office of the clerk of the Superior Court in the county where such business is carried on, setting forth the name under which such business is conducted or transacted, and the true or real full name of the persons conducting or transacting the same, with the home and postoffice address of such person; and punishment for the violation of this section is prescribed in C. S., 3291. As originally enacted, Public Laws 1913, ch. 77, sec. 4, made the person owning, carrying on or conducting or transacting business without complying with what is now C. S., 3288, guilty of a misdemeanor, and prescribed punishment. Public Laws 1919, ch. 2, added a proviso, however, to C. S., 3291: that the failure to comply with C. S., 3288, "shall not prevent a recovery by said person or persons in any civil action brought in any of the courts of this State." This proviso was added in the light of the decision of this Court in *Courtney v. Parker,* 173 N. C., 479. Prior to this amendment this statute was commented upon in *Fineman v. Faulkner,* 174 N. C., p. 16. In *Courtney v. Parker, supra,* it was the *plaintiff* that had violated the foregoing statute by engaging in the prohibited transaction out of which the suit arose. In *Fineman v. Faulkner, supra,* the plaintiff had not violated any statute, but was suing the administrator of Mamie Faulkner, who was engaged in an illegal business, and the Court says: "In all the cases in which recovery has been denied, it will be found that either the consideration or the transaction was illegal, or the vendor participated in the illegal purposes of the purchaser."

This statute was further considered by the Court in *Jennette v. Coppersmith,* 176 N. C., 82. In that case *Courtney v. Parker, supra,* was distinguished, and the plaintiffs allowed to recover without filing the certificate required by C. S., 3288, because the title of the plaintiffs' firm, Jennett Bros., afforded a reasonable and sufficient guide to correct knowledge of the individuals composing the firm, and, therefore, did not come clearly within the doctrine of "assumed" names; and in

Hines v. Norcott, 176 N. C., p. 130, the Court held that this statute did not apply, because the action did not arise out of the doing of an act forbidden by the statute.

The foregoing were decided by this Court prior to the enactment of chapter 2, Public Laws 1919. This enactment added the proviso now appearing in C. S., 3291, and this proviso had the effect to change the decision in *Courtney v. Parker, supra,* as to violations of C. S., 3288. The legislative intent is clear, not only in the act itself, but the title, "An act to amend chapter 77, of the Public Laws of 1913, regulating the use of assumed names in partnerships, so as to permit recovery in actions brought by a partnership which has failed to register."

In *Price v. Edwards,* 178 N. C., 494, this statute again came under the consideration of the Court under the following circumstances: The administrator of S. J. Edwards, together with J. H. Edwards, in his individual capacity, instituted a proceeding for the final settlement of the estate of S. J. Edwards, deceased. S. J. Edwards, at the time of his death, was conducting a mercantile business in Stanly County in the name of "S. J. Edwards." J. H. Edwards claimed to be a partner in this business and to own a one-third interest in the same. Other distributees of the deceased denied this partnership and pleaded chapter 77, Public Laws 1913 (C. S. 3288-3289-3291), in bar of J. H. Edwards' right to recover as such partner, and in answer to appropriate issues the jury found that J. H. Edwards was a partner to the extent of one-third interest in the business conducted by S. J. Edwards, and that no certificate had been filed with the clerk of the Superior Court, as required by law. The Court said the statute did not apply, since "no question arises as to the rights of third persons." "No good reason can be assigned, or, at least, none has been suggested, why such a statute should defeat the recovery of his share by the living partner, where no third person is involved, but only the partners themselves in relation to transactions wholly *inter se.* The intent and object of the statute was to require notice to be given to the business world of the facts required to be set out in the certificate, to the end that people dealing with a firm may be fully informed as to its membership and know with whom they are trading, and what is the character of the firm and the reliability and responsibility of those composing it."

As stated in *Courtney v. Parker, supra,* and reaffirmed in *Price v. Edwards, supra,* this statute is "a police regulation to protect the general public, as heretofore stated, from fraud and imposition."

The courts will not lend their aid to extend a highly penal statute, although it is within the police power, unless the case comes within the letter of the law, and, also, within its meaning and palpable design. It is just as clearly the policy of the law that it will not lend its aid in

enforcing a claim founded on its own violation. *Price v. Edwards, supra; Marshall v. Dicks,* 175 N. C., 41; *McNeill v. R. R.,* 135 N. C., 733; *Vinegar Co. v. Hawn,* 149 N. C., 357.

In *Jennette v. Coppersmith, supra,* the Court, reviewing *Courtney v. Parker, supra,* after referring to the highly penal character of this statute, says: "It should not be extended or held to include cases that do not come clearly within its provision."

The legislative intent must be the controlling spirit in the construction and application of statutes of this nature. *Niemeyer v. Wright,* 75 Va., 239; *Harris v. Runnels,* 12 How. (U. S.), 79. In the latter case, the Court, in speaking of a statute containing a prohibition and a penalty, says that when prohibition and penalty included in the statute "makes the act which it punishes unlawful, and that this may be implied from a penalty without a prohibition. But it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule."

In the instant case it is clear by express enactment that the Legislature intended by adding the proviso that the punishment should be confined to the fine or imprisonment set out in C. S. 3291, but that contracts made by persons carrying on or conducting or transacting the business in violation of this statute should not be void.

In *Real Estate Co. v. Sasser,* 179 N. C., 498, the Court considers this statute, Public Laws 1913, ch. 77, together with chapter 2, Public Laws 1919, now contained in C. S., 3288-3291, inclusive, and allows the plaintiff to recover, although he was carrying on a real estate business, and he admitted direct violation of this statute. The Court says that this amendment (chapter 2, Public Laws 1919) applied to pending actions and to transactions prior to its enactment in the absence of a saving clause. 36 Cyc., 1164. And, since it is a mere police regulation, it may be abolished at any time and no vested rights are required under it.

In *Miller v. Howell,* 184 N. C., 119, the Court denied the right to the plaintiff to recover on notes given in violation of C. S., 4742-4743-4744-4749. The Court discusses the rule very fully, with many authorities, and applies *Courtney v. Parker, supra; Ober v. Katzenstein,* 160 N. C., 439; *Lloyd v. R. R.,* 151 N. C., 536; *Edwards v. Goldsboro,* 141 N. C., 60; *Puckett v. Alexander,* 102 N. C., 95; *Warden v. Plummer,* 49 N. C., 524; *Sharp v. Farmer,* 20 N. C., 255, as follows: "It is well established that no recovery can be had on a contract forbidden by the positive law of the State, and the principle prevails, as a general rule, whether it is forbidden in express terms or by implication arising from

the fact, that the transaction in question has been made an indictable offense or subjected to the imposition of a penalty."

In *Miller v. Howell, supra,* as well as the cited case from which this rule is deduced, the actor was asserting a right to recover out of a transaction expressly prohibited and penalized by the statute, which contained no provision limiting its effect to the punishment or penalty prescribed.

In *Phosphate Co. v. Johnson,* 188 N. C., 419, *Mr. Justice Connor* clearly reviews the authorities on this question and reaffirms *Courtney v. Parker, supra,* but notes that chapter 2, Public Laws 1919, takes out of chapter 77, Public Laws 1913, the bar to a recovery in a civil action on a contract growing out of transaction prohibited thereby.

The plaintiff in the instant case asserts that this amendment, chapter 2, Public Laws 1919, does not, now, affect plaintiffs or actors, but that it applies, in all its rigor, to defendants, or persons against whom liability is asserted.

Plaintiff further asserts that, whenever it appears that the defendant has violated this statute, the trial court has the power to strike out its answer and to render judgment by default against him because of his admitted no compliance therewith.

The defendant in the instant case filed an answer raising issues properly triable by jury, if the court below was in error in striking out his answer. The power of the court below to strike out the answer is vigorously challenged in defendant's exceptions.

The exercise of the power to strike out pleadings in cases where no statute authorizes the striking out has not frequently arisen in the courts of this State. That the power of the courts to strike out pleadings does exist in certain cases admits now of no doubt. *Crump v. Thomas,* 89 N. C., 241. In that case the amended answer was stricken out because it was in direct violation of the leave given to file an amended answer. The Court was protecting its own order.

In *Lumber Co. v. Cottingham,* 168 N. C., 544, the Court holds that the Superior Courts, as did the former Equity Courts, have, now, full power to refuse to allow a party *in contempt* to oppose relief sought by the plaintiff by contradicting the allegations of the bill or bring forward any defense. It appears that *Chancellor Kent* recognized this rule which formerly obtained in the English Chancery. *Manning v. Manning,* 1 Johns Ch., 527; *Walker v. Walker,* 82 N. Y., 260; *Brinkley v. Brinkley,* 47 N. Y., 41; *Saylor v. Mockbie,* 9 Iowa, 209; *O'Connor v. Ry. Co.,* 75 Ia., 617; *Kaskell v. Sullivan,* 31 Mo., 435.

In 31 Cyc., 632, we find that "pleadings are frequently stricken out for disobedience to orders of court." This power is exercised in practically all the States. See note 3 Cyc., 632.

This power, so clearly established in this State, yet so infrequently exercised, is an attribute of the equity jurisdiction, based on the contemptuous conduct of a party toward the Court and its administration, and does not include the instant case. If defendant's admission invoked the rule in *Courtney v. Parker, supra,* it was necessary for the answer to remain a part of the record in order to support the judgment. The answer was filed within the statutory time allowed, and he was not in contempt; he has a right to be heard and to interpose all defenses, legal or equitable, unless he has forfeited this right by some act in this action, which is tantamount to his refusal to accept or use the right of "due process."

In *O'Neil v. Thomas Day Co.,* 152 Cal., 357, the Court distinguishes, even in punishing for contempt in civil cases, thus: "The plaintiff is always a voluntary actor before a court. A defendant is always under compulsion."

In *American Wireless v. Superior Court,* 153 Cal., 533, the answer was stricken from the files on the ground that defendant, a foreign corporation, had "failed and neglected" to comply with a California statute requiring foreign corporations doing business in that State to file a certified copy of its articles of incorporation with the Secretary of State, and this statute further provided that foreign corporations failing to comply with this requirement could not maintain any suit or action in any of the courts of the State. An order striking out the answer under this statute was reversed, the Court saying that such a statute "will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purpose."

The object of C. S., 3288, is to protect creditors and third persons dealing with parties trading under "assumed names" from fraud and imposition; to enable them to know the real names of those with whom they deal. This object cannot be accomplished by taking away the right to defend an action. This would allow any person not only to sue, but to recover, *ad libitum,* when the legislative intent is now limited to the punishment prescribed in C. S., 3291.

The same rule is announced in *Weeks v. Gold Mining Co.,* 73 Cal., 599; *Benefit Order v. Jones,* 20 Tex. Civil Apps. Rep., p. 73.

The defendant is entitled to the benefits of "due process of law." "The essential elements of due process of law are notice and opportunity to defend." *Phillips v. Telegraph Co.,* 130 N. C., p. 522; *Simon v. Craft,* 182 U. S., 427, 436. A contumacious defendant loses the right to claim the protection of "due process" when he contemptuously refuses this right and willfully refuses to obey rules of the forum.

In *Grocery Co. v. Bails,* 177 N. C., 298, it was held that a violation of a similar statute, C. S., 3292, did not affect a married woman's right to her personal property exemptions.

Weld v. Shop Co., 147 N. C., 589, does not allow Rev. 2118, now C. S., 3292, to apply, even though violated, if creditor knew the truth when he sold the goods.

Therefore, we must conclude that the legislative intent, as well as its meaning and spirit, will not permit the striking out of the defendant's answer, or a judgment against him, because of his admitted violation of C. S., 3288.

In *Trust Co. v. Murphy, ante,* 479, *Mr. Justice Connor,* in discussing the effect of C. S., 3288, says: "This statute manifestly is for the protection of creditors of persons who fail to comply with its provisions, or of others who do business with them. The consequences of a violation of the statute are prescribed by C. S., 3291. They seem to be limited to punishment as a misdemeanor, for it is expressly provided that failure to comply with C. S., 3288 shall not prevent a recovery in a civil action by the person who shall violate the statute." It would be anomalous to allow the violator to recover on the ground that the transaction is valid, when he is plaintiff, but allow others, when he is a defendant, to recover of him on the ground that it is void.

Since the question of the validity of the stipulation in the notes sued on as to payment of "attorney fees" may arise at the next trial, we will now consider it:

We recognize that, in several States, these stipulations are upheld. *Bank v. Yarborough,* 120 S. C., 385, both in law and equity cases; *Williams v. Flowers,* 90 Ala., 136; *Jones v. Crawford,* 107 Ga., 318; *Bowie v. Hall,* 69 Md., 433; 1 L. R. A., 546 (note); *Bank v. Fuqua,* 11 Mont., 285; *Peyser v. Cole,* 11 Oregon, 39; *Bank v. Badham,* 86 S. C., 170; *Morrill v. Hoyt,* 83 Tex., 59; 8 C. J., 148; 3 R. C. L., 895.

Such stipulations are held, in many States, to impair the negotiability of the notes containing them. Others hold otherwise. See note collecting the authorities on both views in 125 Am. St. Rep., 207-212. North Carolina settled this by statute, C. S., 2983, both as to the effect on negotiability and as to validity of the stipulation itself.

This statute (C. S., 2983) provides that "a provision incorporated in the instrument to pay counsel fees for collection is not enforceable." Although the note is executed and payable in another State, such a provision must stand the test of validity here. *Lex fori* governs. *Bank v. Land Co.,* 128 N. C., 193. Such stipulations were discussed in *Tinsley v. Hoskins,* 111 N. C., 340; *Bullock v. Taylor,* 39 Mich., 137. *Tinsley v. Hoskins, supra,* has been affirmed in *Briscoe v. Norris,* 112 N. C., 677; *Williams v. Rich,* 117 N. C., 240; *Turner v. Boger,* 126 N. C., 302; *Bank v. Land Co.,* 128 N. C., 195; *Ragan v. Ragan,* 186 N. C., 461. In *Ragan v. Ragan, supra, Mr. Justice Clarkson*

ably discusses this doctrine and arrays the authorities in this State, and clearly sets forth the views in North Carolina in its various phases. In *Tinsley v. Hoskins, supra,* our Court declared that: "Such a provision is a stipulation for a penalty or forfeiture, tends to the oppression of the debtor and to encourage litigation, is a cover for usury, is without any valid consideration to support it, contrary to public policy and void." *Bank v. Sevier,* 14 Fed., 662; *Meyer v. Hart,* 40 Mich., 517; *Toole v. Stephen,* 4 Leigh, 581; *Boozer v. Anderson,* 42 Ark., 167; *Shelton v. Gill,* 11 Ohio, 417; *Martin v. Trustees,* 13 Ohio, 250; *Dow v. Updike,* 11 Neb., 95.

Unless authorized by statute, the long-standing rule that they are invalid must prevail. Both the statute, C. S., 2983, and the decisions of our Court establish and assert their invalidity.

In order that a trial may be had on the issues raised by the pleadings, let the judgment appealed from be

Reversed.

LAURA McGEHEE v. J. W. McGEHEE, EXECUTOR, ET AL.

(Filed 29 April, 1925.)

Wills—Conflict of Laws—Elections—Sequestration—Moneys in Lieu of Dower.

The personal property of the estate of the deceased domiciled in another state, is disposed of according to the law thereof, and where he had died leaving a will including the disposition of lands in North Carolina with two witnesses, which are sufficient here, but insufficient as to the laws of the state of his domicile, he has died intestate, in the place of his domicile, and a beneficiary may take here as the will provides, and the fact that as heir at law he may thus take a larger share of the estate, does not put her to an election in equity, there being no provision of the will requiring it, or sequester her estate in favor of a disappointed devisee or legatee, the equitable doctrine of the latter depending upon that of the former; and *Held, further,* these principles apply where the testator has bequeathed to his widow a certain sum of money in lieu of her dower rights in land situated here.

APPEAL by plaintiff from *Bryson, J.,* at December Term, 1924, of GUILFORD.

Civil action by Laura S. McGehee to recover the amount of a legacy given to her under her husband's will in lieu of her dower rights in his estate.

The case was heard on facts agreed: Henry W. McGehee died 8 September, 1919, domiciled in South Carolina, leaving him surviving a widow, the plaintiff, and several brothers and sisters, but no children.

At the time of his death, his estate consisted of personal property in South Carolina, North Carolina and Virginia, and real estate in North Carolina, Virginia and Maryland. He left a will with only two witnesses which is valid in North Carolina, Virginia and Maryland, but void in South Carolina where three witnesses are required to make a valid testamentary disposition of property. The South Carolina statute (Civil Code 1912) applicable is as follows:

"Sec. 3564. Devises shall be in writing, attested by three or more witnesses. All wills and testaments of real and personal property shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of said devisor, and of each other, by three or more credible witnesses, or else they shall be utterly void, and of none effect."

The testator owned no real estate in South Carolina at the time of his death. The will on its face purports to dispose of all his property.

Item 2 is as follows: "I give and bequeath to my wife, Laura S. McGehee, all of my furniture and household goods of whatever kind or description and in addition I give and bequeath to her the sum of twenty thousand dollars ($20,000) to be used by her for her maintenance, support and comfort during her natural life, the same to be expended for said purposes in accordance with her personal wishes, and any amount of said sum, together with the interest and profits arising therefrom, which may remain unexpended at her death, I give to my nephew, Henry Richard McGehee, son of Dr. John W. McGehee. These bequests, together with the proceeds from certain policies of insurnace on my life, amounting at this time to the aggregate sum of seven thousand five hundred dollars ($7,500), I give to my said wife, Laura McGehee, in lieu of her dower rights in my estate, and with the hope and confident expectation that the same will be amply sufficient to provide for her support and comfort during her natural life, which is my wish and desire. I have caused the name of my said wife to be inserted as beneficiary in said policies of insurance on my life, and it is my will that she shall have the proceeds thereof in her own right, to be expended or disposed of in accordance with her wishes, without any limitations or restrictions whatever, and should any of said policies lapse, or for any reason not be paid at my death, it is my will that my executor shall pay her the amount of such shortage or deficiency out of any other money coming into his hands belonging to my estate, it being my wish and desire that she shall have the full sum named in this item."

The will also provides for the sum of $20,000 to be placed with Dr. John W. McGehee in trust for his minor son, Henry Richard McGehee.

Letters of administration were issued to the plaintiff and Dr. John W. McGehee in South Carolina and they have administered the personal estate under the intestate laws of that State. The executor named in the will has qualified in the states of North Carolina, Virginia and Maryland, where the will is admittedly valid.

The present controversy is primarily between the widow and Richard Henry McGehee, the beneficiary of a special legacy. The widow has received, under the intestate laws of South Carolina, one-half of the personalty wherever located, amounting to about $36,000, and the other half passed to the brothers and sisters of the deceased. The "furniture and household goods" did not pass under the will, but were sold and the proceeds administered under the intestate laws of the domiciliary state, or rather the widow was required to account for the value of same in the settlement of the estate.

The plaintiff contends that she is entitled to claim her legacy, given "in lieu of her dower rights" and to have it paid from a sale of the real property situated in those states where the will is valid. Richard Henry McGehee, the beneficiary of a special legacy, denies the widow's right to claim under the will to the extent that it may defeat him of his legacy. The court below took the defendant's view of the matter and rendered judgment accordingly. The plaintiff appeals.

King, Sapp & King and Swink, Clement & Hutchins for plaintiff.
J. R. Joyce, Manly, Hendren & Womble for defendants.

STACY, C. J., after stating the facts as above: It is conceded that the will of Henry W. McGehee is void in South Carolina and valid in North Carolina, Virginia and Maryland. The case pivots on whether the plaintiff is entitled to claim under, or required to take against, her husband's will in North Carolina. In other words, do the facts, properly appearing of record, call for the application of the doctrine of equitable election as between the legacy and a distributive share of the personal property? We think not.

"Election," in the sense it is used in courts of equity, says *Judge Story*, "is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both. Every case of election therefore presupposes a plurality of gifts or rights with an intention, express or implied, of the party who has the right to control one or both, that one should be a substitute for the other. The party who is to take has a choice; but he cannot enjoy the benefits of both." 3 Story's Eq. (14 ed.) p. 113; *Sigmon v. Hawn*, 87 N. C., 450. The doctrine of election, as applied to the law of wills,

simply means that one who takes under a will must conform to all of its legal provisions. See *Elmore v. Byrd,* 180 N. C., p. 120, where the subject is fully discussed, but without undertaking to reconcile the divergent authorities. Indeed, such an undertaking would be a herculean, if not a hopeless, task.

To avoid confusion, the one circumstance which must be held clearly in mind is that the plaintiff took nothing in South Carolina against the will and nothing under it. The testator died intestate as to his personal property, and therefore without testamentary intent as to its disposition. The *situs* of such property is at the domicile of the owner, hence its name. *Mobilia sequuntur personam. Trust Co. v. Doughton,* 187 N. C., p. 272. The will is void in South Carolina, the domiciliary State. Title to the personal property was vested in the distributees under the South Carolina law, and not by virtue of the will. The plaintiff had no alternative as to the personal property. She could not take her distributive share of it under the will, when the will failed to dispose of any of the personal property. She could only claim it under the law, or decline to take it. And upon her refusal to accept her distributive share of the personal property, what would become of it? There is no will by which it may be given to others. "What the testator has left undisposed of the law must dispose of for him"—*Gaston, J.,* in *Ford v. Whedbee,* 21 N. C., p. 21.

The defendants do not contend that the plaintiff is required to elect between her legacy and an escheat. They only say that, if she claim her legacy under the will to the prejudice of Henry Richard McGehee, so much of the property received by her from her husband's estate should be sequestered in equity and surrendered to the disappointed devisee or legatee so as to compensate him for the disappointment. *Dunshee v. Dunshee,* 263 Ill., p. 196; Bispham Eq. (9 ed.), 499; Eaton's Equity 182.

It is not strictly the doctrine of election, for which the defendants contend so much, as it is the principle of equitable compensation sometimes engrafted upon this primary doctrine of election. *Ker v. Wauchope,* 1 Bligh, 25. The principle sought to be evoked by the defendants was stated by *Sir Thomas Plummer, M. R.,* in *Gretton v. Howard,* 1 Swanst., 409, as follows: "I conceive it to be the universal doctrine that the court possesses power to separate the estate till satisfaction has been made, not permitting it to devolve in the customary course. Out of that sequestered estate so much is taken as is required to indemnify the disappointed devisee. If insufficient, it is left in his hands. In the case to which I have referred, *Lord Loughberry* uses the expression that the court 'lays hold of what is devised, and makes compensation out of that

to the disappointed party.' . . . It would be too much now to dispute this principle, established more than a century, merely on the ground of difficulty in reducing it to practice, and disposing of the estate taken from the heir at law without any will to guide it; for to this purpose there is no will. The will destined to the devisee not this estate, but another. He takes by the act of the court (an act truly described as a strong operation) not by descent, not by devise, but by decree—a creature of equity."

Conceding the soundness of the doctrine of compensation, it is thought to be inapplicable except in cases calling for an election, for election is the basis upon which it rests.

It may be stated as settled by the weight of authority, both in England and in this country, that where a will is valid as a disposition of personal property, but invalid as a devise of real estate, because of an insufficient number of witnesses, the heir to whom a legacy is given in lieu of his interest in the testator's real estate, will not be put to his election, and he may take the personalty under the will and his share of the realty as heir, unless the bequest of the personalty be upon an express, but not implied, condition that he relinquish his right in the realty as heir, in which event the condition will be enforced and he will be required to elect. *Thellusson v. Woodford,* 13 Ves., 209; *Breckinbridge v. Ingram,* 2 Ves. Jr., 652; *Sheddon v. Goodrich,* 8 Ves. Jr., 482; *Boughton v. Boughton,* 2 Ves. Sr., 12; *Whistle v. Webster,* 2 Ves. Jr., 367. These cases have been recognized and followed in this and other American jurisdictions. *Melchor v. Burger,* 21 N. C., 634; *Kearney v. Macomb,* 16 N. J. Eq., 189; *Jones v. Jones,* 8 Gill., 197; *McElfresh v. Schley,* 1 Gill., 181; *Hand v. Hand,* 60 N. J. Eq., 518.

Speaking to the subject in the case of *Hearle v. Greenbank,* 1 Ves. Sr., 307, *Lord Hardwicke* said: "The infant is not obliged to make her election; for here the will is void. And when the obligation arises from the insufficiency of the execution or invalidity of the will, there is no case, where the legatee is obliged to make an election (*Aliter* if there be *an express condition* not to dispute the will. *Boughton v. Boughton,* 2 Ves. Sen., 12); for here is no will of the land. A man devises a legacy out of land to his heir at law; and the land to another: the will is not well executed according to the statute of frauds for the real estate; the court would not oblige the heir at law, upon accepting the legacy, to give up the land." And, further, as reported in 3 Atkyns, 715: "It is like the case where a man executes a will in the presence of two witnesses only, and devises his real estate from his heir at law, and the personal estate to the heir at law; this is a good will as to personal estate, yet for want of being executed according to the statute of frauds and perjuries, is bad as to the real estate; and I should in that

case be of opinion that the devisee of the real estate could not compel the heir at law to make good the devise of the real estate, before he could entitle him to his personal legacy, because here is no will of real estate for want of proper forms and ceremonies required by the statute."

The principle to be deduced from the foregoing cases is, that the heir or widow of the testator claiming a legacy under the will, and also claiming real estate as heir or dower as widow against the will, the will being inoperative as to real estate by reason of a defective execution, the heir or widow will not be put to an election, but will take both the legacy and the land. In such cases "the heir is allowed to disappoint the testator's attempted disposition by claiming the estate in virtue of his title by descent, and at the same time take his legacy on the ground that the want of a due execution precludes all judicial recognition of the fact of the testator having intended to devise freehold estates; and therefore the will cannot be read as a disposition of such estates for the purpose even of raising a case of election as against the heir." 1 Jarman on Wills (Ed. 1849), 389.

We need not pause to inquire why an express condition should prevail, and one, however clearly implied, should not, except to say that, according to the decided cases, a disposition absolutely void is held to be no disposition at all, and being incapable of operating as such, it is not allowed to be considered as establishing the testator's intent, while an express condition is to be enforced where it enters into and really forms the basis for the gift or devise. This distinction between express and implied conditions may be shadowy and more or less unsatisfactory, nevertheless it has been made and, as said by *Lord Eldon* in *Sheldon v. Goodrich:* "It were better the law should be certain, than that every judge should speculate upon improvement in it." For a valuable discussion of the whole subject of election, see 2 Roper on Legacies, pp. 376-450.

In the instant case, we have a will valid and enforceable against the testator's real estate, but void as a disposition of his personal property—just the reverse of the rule stated above, controlled, however, by the same principle of law; and there is no express condition annexed to the bequest to the plaintiff, calling for such an election on her part as contended for by the defendants. The election which the plaintiff is required to make is whether she will take her legacy under the will, or dissent from the will and claim her dower in the real estate.

Defendants in their brief cite several cases from other jurisdictions which, in tendency at least, seem to support their view of the law, but we think our own decisions are otherwise, as above indicated. *Tucker v. Tucker,* 40 N. C., 82; *Robbins v. Windly,* 56 N. C., 286; *Bost v. Bost,* 56 N. C., 484.

Speaking directly to the question in *Melchor v. Burger,* 21 N. C., 634, *Gaston, J.,* said: "It has, however, been settled in England, at least as early as 1749, that a devise of freehold by one not having legal capacity to devise lands, or not executed according to the solemnities required by law in devises of lands, contained in a will valid as one of personalty, did not impose on the heir disputing its validity an obligation to elect between his rights as heir, and the personal benefits bequeathed by the will. *Hearle v. Greenbank,* 1 Ves. Sen., 306; 3 Atk., 695; *Carey v. Askew,* 8 Ves., 492; 1 Cox, 241; *Goodrich v. Sheddon,* 8 Ves., 481; *Thellusson v. Woodford,* 13 Ves., 209. This modification of the general doctrine is founded upon the principle that the attempted devise affords no legal evidence of an *intention* in the testator to devise; or in the language of *Lord Erskine,* 'a devise of real estate was considered a matter of so much solemnity and importance that the law would accept no proof of the act, except what is required for the validity of the act.' 13 Ves. Jun., 223. The intention not being before the Court, the estate did not appear to have been devised away from the heir, and the will must be read by the Court, as if such devise was not in it. Eminent judges have indeed expressed dissatisfaction with this reasoning, and have thought, that however ineffectual the attempt to devise, the Court might regard the attempt as indicating an intention to devise, which had failed to have legal effect, as clearly as in the case where the devisor attempts through mistake to devise an estate which belongs to another person. However this may be, the rule is there settled as a rule of property; and if no more appears than a devise from the heir, and a bequest of personalty to him, in a will sufficiently executed to pass personal, but not sufficiently executed to pass real estate, it is a good will of the personalty; it is no will as to the lands; there is no implied condition of election; and the heir may keep the lands descended, and also take his legacy."

In the will before us there is no condition annexed to the plaintiff's legacy that she surrender all her rights to the testator's property, both real and personal, before taking same, but the bequest to her is "in lieu of her dower rights in my estate." Strictly speaking, "dower rights" are only such rights as a widow may have in her husband's real estate, and in legal parlance this phrase would not include her claim to a distributive share of the personal property belonging to his estate. *Corporation Commission v. Dunn,* 174 N. C., 679. Dower, under our statute, is the life estate to which every married woman is entitled, upon the death of her husband intestate, or in case she shall dissent from his will, to one-third in value of all the lands, tenements and hereditaments, both legal and equitable, of which her husband was beneficially seized, in

law or in fact, at any time during coverture, and which her issue, had she had any, might have inherited as heir to the husband. *Chemical Co. v. Walston,* 187 N. C., p. 823.

It cannot be known judicially that the result we have reached is at variance with the intention of the testator, for to hold otherwise would be to give effect to that which the South Carolina law says is void. It is not the testator's will, but the requirements of the law of a sister State, at which the defendants complain. Just here, we are unable to help them. Then, too, how do we know the testator did not intend to execute his will exactly as he did? He was a man of education and learning, being an alumnus of Trinity College, this State. We have given effect to the testimentary disposition of his property in so far as it is valid. To do otherwise would be to make a will for him, different from the one he has left; to override the law of wills, and to substitute our own judgment as to what should be done with the testator's property. This is not the function of a court of equity.

If it be thought the case is a hard one, it should be remembered that "hard cases are the quicksands of the law"; and in viewing the apparent hardships of a case, we have been enjoined, by a number of learned judges, not to overlook the law. *Leak v. Armfield,* 187 N. C., p. 628; *Cureton v. Moore,* 55 N. C., 207; *Lea v. Johnson,* 31 N. C., 19.

It follows from what is said above that there was error in the judgment rendered below.

Error.

STATE v. CORNELIUS SINODIS, NICK ZRAKAS, TONY ALFONZO AND MINNIE ALFONZO.

(Filed 29 April, 1925.)

Criminal Law — Prostitution — Statutes — Evidence—Reputation—Nonsuit—Trials.

Under the rule that upon a motion as of nonsuit the evidence is to be construed in the light most favorable to the plaintiff, giving him the benefit of every reasonable intendment therefrom, *it is held* that circumstantial evidence is sufficient for the conviction of violation of our prostitution law, C. S., 4357, 4358, tending to show that the three defendants were partners in the cafe or restaurant business where rooms were also rented, with a bad reputation in this respect, and for cursing and drinking, and where rooms were rented for the purpose of illicit intercourse between men and women, and assignments for this purpose were made by two of the proprietors under such circumstances that the other, also indicted, must have known of the immorality for which the place had the reputation.

STATE *v.* SINODIS.

APPEAL by Cornelius Sinodis, Nick Zrakas and Tony Alfonzo, from *Horton, J.*, and a jury, September Term, 1924, of WAKE.

The defendants, Cornelius Sinodis, Tony Alfonzo, Nick Zrakas and Minnie Alfonzo, were indicted for a violation of the prostitution statutes.

The jury convicted three of the defendants, Cornelius Sinodis, Nick Zrakas and Tony Alfonzo, and rendered a verdict of not guilty as to the defendant Minnie Alfonzo, and the sentence of the court was that the three defendants named be confined in jail for a term of six months each to be assigned to work on the roads of Wake County. The defendants, Cornelius Sinodis, Tony Alfonzo and Nick Zrakas, excepted, assigned errors and appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash, for the State.

John R. Hood for Tony Alfonzo.

J. S. Griffin for Cornelius Sinodis.

H. G. Connor and R. O. Everett for Nick Zrakas.

CLARKSON, J. Cornelius Sinodis, Nick Zrakas and Tony Alfonzo, were, at September Term, 1924, of Wake Superior Court, convicted of aiding and abetting in prostitution at the Raleigh Cafe.

The defendants were indicted under separate bills, but by consent, the cases were tried together.

The bills of indictment against the defendants were drawn under C. S., as follows:

C. S., 4357. "The term 'prostitution' shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire. The term 'assignation' shall be construed to include the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement."

C. S., 4358. "It shall be unlawful:

1. To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation.

2. To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

3. To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.

4. To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking or transporting is prostitution or assignation.

5. To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

6. To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignation.

7. To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever."

At the close of the State's evidence defendants made the motion as of nonsuit. The court reserved its ruling, but later refused the motion. The motion was again made at the close of all the evidence, and again denied by the court.

"On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is 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., 6; *Oil Co. v. Hunt,* 187 N. C., 157; *Hanes v. Utilities Co.,* 188 N. C., 465." *Lindsey v. Lumber Co., ante,* 119.

Evidence of a crime may be circumstantial as well as direct. Prostitution is an offense usually committed in secret, and sometimes circumstantial evidence is the only kind that can be obtained. It is sufficient to show facts and circumstances from which the jury may reasonably infer the guilt of the parties. *State v. Eliason,* 91 N. C., 564. From the facts and circumstances, it is a substantial right that the jury must be satisfied of the guilt of the defendants beyond a reasonable doubt. *State v. Palmore, ante,* 538.

All the convicted defendants rely chiefly on the lack of sufficient evidence to go to the jury to warrant a conviction and that the motion of nonsuit should have been granted. Nick Zrakas also seriously contends that there was error in the charge of the court as to him and he should be granted a new trial. A discussion of the evidence to determine its sufficiency under such motion, therefore, becomes necessary.

The three defendants were engaged in running the Raleigh Cafe, which included an eating house below and rooms for lodgers above, in a building on Martin Street in Raleigh. Each has a one-third interest in the business. Zrakas says: "I keep the books and buy the stuff and look after the cafe and dining room. I work there all the time." He had bought into the business about four months before. The other two had been there some time before.

C. S., 4347 and 4360, deals with the reputation of a place.

C. S., 4347. "On a prosecution in any court for keeping a disorderly house or bawdy-house, or permitting a house to be used as a bawdy-house, or used in such a way as to make it disorderly, or a common nuisance, evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute and boisterous conversation of the inmates and frequenters, while in and around such house, shall be prima facie evidence of the bad character of the inmates and frequenters, and of the disorderly character of the house. The manager or person having the care, superintendency or government of a disorderly house or bawdy-house is the 'keeper' thereof, and one who employs another to manage and conduct a disorderly house or bawdy-house is also 'keeper' thereof."

C. S., 4360. "In the trial of any person charged with a violation of any of the provisions of this article, testimony of a prior conviction, or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge."

The record discloses conditions which must have put an owner of the business on notice as to what was going on. The statute is directed against one who permits a building to be so used "with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose." C. S., 4358, latter part subsec. 2.

Margaret King testified that she went to the cafe on the first of May and stayed until this trouble came up. At another place she said: "I was there for thirty days." She was not at work. She says: "Neal (Sinodis) would say, 'There's a fellow out there who wants a date.' There was nothing to keep him from knowing what I went for. He would come and tell me there were men who wanted to go out riding, and if I saw fit to go, I went. You could hear most any kind of language in there. I have heard cursing and profanity going on in there. They would use it before anyone who would be in there, women and others. I have never heard any other language in there other than cursing and profanity. I went on just like I pleased, and I saw the rest doing the same. I have been in the back part of the cafe and seen people drinking in there."

Jackie Mays testified that she had a room at the cafe. "I had dates with men and others for immoral purposes. Neal would tell me there were young men who wanted to go riding, and if I wanted to go, I went. Most of the time the men would drive up the street and I would walk up the street and get in the car with them. Neal has done that for me several times." She occupied a room in the cafe for immoral purposes.

"I went there with a man. Neal knew he was not my husband. He let us have a room for the night. I did not register. You can get anything you want to; cursing and a lot of vulgarity would be used. I have heard Nick (Zrakas) use it, but never heard Neal. I have known of Neal making dates for other girls, and he made one for me in my room at the hotel." She also testified to vile statement made by Sinodis in the presence of twenty boys and one girl. She said that she did not remember that Nick was there, but Tony was. It is true, she testified, "Nick never made an engagement with me," but it is almost unbelievable that the things of which she testified could have been going on and a part owner of the business, actively engaged in its conduct and there every day, knew nothing about it. Surely, there was reasonable cause for all owners of the business to know that the house was being used for these immoral purposes.

Helen Laws roomed at the cafe a part of March, left, came back, and roomed there again. She also stayed at Alfonzo's house about two weeks. Louise Holderfield and May Lane roomed at Alfonzo's house, and she says that, while at Tony's house, "I made my living like all other sporting girls." The phone in Alfonzo's house was used for the purpose of making her dates. She saw Nick Zrakas about the place. He was working in the cafe. She heard the vulgarity and profanity of all three defendants. Sometimes it was noisy there. Essie Nelson and Bessie Allen were at the place. Louise Holderfield roomed at Alfonzo's house for a couple of months. She made her dates over the telephone. Mrs. Alfonzo would call her to the phone when calls came. Helen Orr and Mary Lane also were there. Nick gave her something to drink.

The reputation of the place was bad. Such is the testimony of Officer Peebles, Mrs. Mamie C. Bradsher, Miss Jeane Perkins, Eckard, R. W. Vinson, J. E. Singleton, T. B. Alderman, J. F. Cain, Ernest Cain, Thompson, and Will Mangum. Mrs. Bradsher heard telephone conversation between Alfonzo and his wife, in which Alfonzo was warning her that a raid was to be made and telling her, "Do not let anything happen to any of our girls. Don't let them have any dates in the house. If you do, they are caught, and if they make any dates, let them be on the outside, and you see to it." Mrs. Bradsher observed indecent conduct in the rooms above the cafe, cab drivers going there and conferring with men who worked at the cafe, and girls come down, get in the cars and drive away. The women who usually went there were street walkers.

Eckard had seen girls come out, get in automobiles with boys and drive off. He heard a cook from the Raleigh Cafe tell some fellows in a Ford that "she" would be down in a minute. Soon afterward a girl came out of the rooming house, got in the car and drove off. A crowd

of boys were continually hanging around, going in and out, cursing. "You could hear any kind of talk going on there, and there was a crowd on Saturday nights as late as three o'clock in the morning. I suppose I have seen at least a dozen different girls there. On one occasion I heard a Greek fellow tell a fellow that 'she' would be down in a minute."

The language used by Neal's wife was so indecent and vile that the witness, Jackie Mays, did not use it. Burns testified that it was not a decent house. Observed a great crowd around there, peeping in at the doors. He had seen fights there.

The evidence was sufficient to take the case to the jury and to justify the conviction of the three defendants. The place was operated by the three together. They rented rooms from time to time for a considerable space of time to women whom they must have known were prostitutes. These women, Margaret King, Louise Holderfield, Jackie Mays, Helen Laws, who testified as witnesses in the case, and the others, Helen Orr, Mary Lane, Bessie Allen and Essie Nelson, must have been known to be women of lewd character, and their purpose in renting rooms here or in the home of Alfonzo must have been apparent. The owners of the building must have known the purpose for which the rooms were sought, and it is unreasonable that Zrakas could have remained there, in active control of its operation, without participating in the offenses and knowing what his fellow-owners were doing. It is clearly shown that Sinodis was making engagements for these women. At the least, all of them were aiding and abetting in the offense.

Nick Zrakas contends that there is prejudicial and reversible error as to him. That the court below in stating the contentions of the State said: "And the State says that it has shown you from the testimony of Jackie Mays that she also used a room in that building for the purpose of prostitution and assignation, even going so far as to permit sexual intercourse with Nick Zrakas."

Jackie Mays, in her testimony, said: "Nick never made an engagement with me. The only one who made an engagement with me was Neal. I went down on one occasion and registered under an assumed name, but Neal knew me and knew the man was not my husband." And again Jackie Mays testified in rebuttal as follows: "I have stayed at the Raleigh Cafe three different times. The first time I stayed there was in February; the next time was in March." And again, when recalled the second time, "I know the Greek, Goss. When I was down there he stayed there in the daytime and worked at night. He stayed in the room with me. I cannot say that the other men knew he was staying in the room with me."

It is conceded Jackie Mays did not testify that she had permitted Nick Zrakas to have sexual intercourse with her, and that the court below was in error in giving such as a contention of the State. Her evidence had reference to a Greek named Goss. While the statute (C. S., 564) requires the judge to state the evidence given in the case in a plain and correct manner and declare and explain the law arising thereon, we cannot hold such a slight inadvertence for reversible error in the present record. The evidence is plenary as to the guilt of all the defendants, and it is apparent, we think, from the whole case, that the jury could not have been misled by this misstatement, which was no more than a "slip of the tongue." Besides, counsel for this defendant could easily have called the matter to the court's attention and the same could have been corrected then and there.

In *State v. Barnhill,* 186 N. C., p. 450, it is said: "If the recitals of the court were incorrect as to the facts of the case, it was the duty of the defendant to call the court's attention to it, so that the correction could be made then and there. If this was not done at the time, the defendant cannot complain and wait and except when the case is made up on appeal. The rule is stated in *S. v. Baldwin,* 184 N. C., 791, as follows: 'We have so often said that the statement of contentions must, if deemed objectionable, be excepted to promptly, or in due and proper time, so that, if erroneously stated, they may be corrected by the court. If this is not done, any objection in that respect will be considered as waived. We refer to a few of the most recent decisions upon this question: *S. v. Kincaid,* 183 N. C., 709; *S. v. Montgomery,* 183 N. C., 747; *S. v. Winder,* 183 N. C., 777; *S. v. Sheffield,* 183 N. C., 783.' See *S. v. Williams,* 185 N. C., 666." *State v. Ashburn,* 187 N. C., 723; *State v. Galloway,* 188 N. C., p. 416; *State v. Beavers,* 188 N. C., 595.

There was abundant evidence to be submitted to the jury—direct and circumstantial—as to the guilt of all three defendants of aiding and abetting in prostitution. All three had an interest in the Raleigh Cafe, below was the eating place—day and night—and above were the rooms which numerous women rented and frequented off and on for months. Some of the defendants made dates for immoral purposes for them. Eleven witnesses testified that the general reputation of the place was bad. One of the witnesses testified: "I know the character of the women that would come in and out; they were usually girls that we would usually call 'street walkers.'"

The evidence against Nick Zrakas was not as strong as against the other two convicted defendants, but, from the evidence, he could not help but know (not being a blind man) the character of the women and the character of the place the partnership was engaged in running, and

he was aiding and abetting in furnishing meals, etc., and as a partner profiting in the nefarious traffic in prostitution.

As to the extent of punishment of Nick Zrakas in reference to the others, this Court cannot enter into. We can only pass on "any matter of law and legal inference."

We cannot hold the inadvertence in the contentions prejudicial or reversible error as to Nick Zrakas. On the entire evidence the motion of nonsuit cannot be allowed as to any of them.

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

No error.

T. J. HARRINGTON ET AL v. THE BOARD OF COMMISSIONERS OF ANSON COUNTY ET AL.

(Filed 29 April, 1925.)

1. Education—County-wide Plan—Statutes—Petition—Endorsement.

Under the adoption of a county-wide plan of education, C. S. 5481, it is not required that petitions in the district therein, when signed by the requisite number of qualified voters, be endorsed by the governing boards of at least a majority of the school districts, as applicable to "special school taxing districts," under the provisions of C. S. 5657, the proceedings being under a different statute, C. S. 5639, relating and confined to "school districts," the new district operating of itself and not by virtue of component units.

2. Same—Taxation.

Where a new school district has been formed on the county-wide plan of organization adopted according to law, C. S. 5481, and the election removes all taxing powers, the validity of the district thus formed is not affected by the fact that some of the districts theretofore existing had power to tax by virtue of previous elections and others had not, the taxing power in the county-wide plan of organization necessarily being the same.

3. Same—Levy and Collection of Taxes.

Where the county-wide plan of organization for educational purposes (C. S. 5481) has been adopted, the annual levy and collection of taxes, as those prescribed for other taxes, C. S. 5642, are expressly authorized by the statute of 1923 to be made for general county purposes, in the months of July, August and September, and the objection that the county commissioners should have acted in this respect in a different month is untenable.

APPEAL by plaintiffs from *Lane, J.*, at November Term, 1924, of ANSON.

The plaintiffs as citizens, taxpayers and residents of Ansonville Special School District, in Ansonville Township, Anson County, instituted this action to have an election, at which a special school tax of forty cents on the $100 valuation of property within said district was voted, together with the consequent tax levy, declared void, and the sheriff of Anson County restrained from collecting the tax.

The defendants, including the board of education and the sheriff, denied plaintiffs' contentions and prayed that the election and levy be declared valid and the injunctive relief denied.

The court rendered the following judgment:

"This cause coming on to be heard, and being heard at the November Term, 1924, of the Superior Court for Anson County, before his Honor, Henry P. Lane, upon the records in the cause and the affidavits filed, and it appearing to the court and the court finding as facts:

"1. That the Board of Education of Anson County, after having notified the various school committeemen of Anson County, and the boards of trustees of schools, met in regular session on 21 July, 1924, giving information of the purposes of said meeting; that the said board met on said date and there was presented to it a diagram or map of Anson County showing the present location of each school district in Anson County, the position of each, the location of roads, streams and other natural barriers, the number of children in each district, the size and condition of the buildings in each school district; that said board of education then prepared a county-wide plan of organization of all the schools in said county of Anson, and indicated how the proposed changes were to be made, and how the districts and parts of the districts were proposed to be consolidated so as to work out a more advantageous school system for the entire county; that the said board listened to all suggestions and advice offered by the committeemen and trustees, after which a county-wide plan of organization was duly and lawfully adopted.

"2. That one of the districts of the county-wide plan adopted as above set forth was Ansonville Consolidated School District, which is described in the complaint in this action, which district was consolidated with boundary lines changed in accordance with the adopted county-wide plan of organization.

"3. That thereafter, on 23 July, 1924, a petition was duly presented to the said Board of Education of Anson County signed by more than one hundred qualified voters residing in said district, more than twenty-five of whom had resided in said district more than twelve months prior to the filing of said petition. A copy of said petition is attached to the complaint, which petition was properly endorsed by the board of education with the request that an election be held in accordance therewith.

And the Board of Commissioners of Anson County ordered an election to be held in said district, which order was made on 23 July, 1924, a copy of which order is attached to the complaint.

"That said election as ordered was held 30 August, 1924, and 289 voters, duly and legally qualified to vote in said election, voted in favor of said special tax; that 97 voters voted against said tax; that there was registered for the election a total of 458 voters, and more than a majority of said registered voters for said election voted in favor of the said special school tax, which said facts were duly and lawfully found by the Board of Commissioners of Anson County; that said election was, in all respects, duly and lawfully held.

"That thereafter, on 1 September, 1924, at the same time other tax levies for Anson County were made, the Board of Commissioners of Anson County levied the tax provided for in said election, which was forty cents on the one-hundred-dollar valuation of property in said district, and that the rate of tax levied in said district is uniform, and no territory in said district is paying a different tax in said district for school purposes, and that the levy aforesaid was in all respects legal and valid.

"4. That the funds necessary to carry out the plan for the county-wide plan of consolidated school districts in so far as the Ansonville Consolidated School District was affected, were approved by the county commissioners and the amount necessary to put in operation such plan was not greater than the amount that might be reasonably expected from the operating and equipment fund for that purpose, and the county board of education has created no debt for the execution for any part of said plan except as is authorized by law.

"5. That the petition asking that an election be called as above set forth was not signed by a majority of the governing board of a majority of the school districts embraced in the territory above described as the Ansonville Consolidated School District, nor by a majority of the school committeemen of the territory embraced in said Ansonville Consolidated School District.

"6. That said Ansonville school district as described was not an enlarged district already created, but was a new district created in the county-wide plan of organization as above set forth.

"Now, therefore, upon motion, it is ordered, adjudged and decreed by the court that the election held 30 August, 1924, was in all respects legal and valid, and that the tax levied by the county commissioners thereunder is legal, valid and binding, and that the order temporarily restraining the collection of said tax, dated 5 November, 1924, be and the same hereby is vacated and dissolved, and that the defendants do recover of the plaintiffs and their bondsmen the costs of this action to be taxed by the clerk."

Upon the facts in this judgment the plaintiffs contend that the conclusion of law therein is erroneous in three respects: (1) Insufficient petition for the election, in that the petition was not endorsed "by the governing boards of at least a majority of the school districts within the special school district proposed to be created." (2) That the election was invalid because some of the territory composing the present district has, as formerly existing districts, special power to tax by virtue of previous elections, and other parts of the territory never had, previous to the election in the instant case, voted any special tax. (3) That the levy of the tax pursuant to the election in the instant case was made by the commissioners of Anson County at their regular meeting in September, instead of June.

Enos T. Edwards and H. P. Taylor for plaintiffs.
Frank L. Dunlap, and Robinson, Caudle & Pruett for defendants.

VARSER, J. The only exception by plaintiffs, appellants, is to the judgment and its conclusions of law.

It distinctly appears that the Board of Education of Anson County complied, in all respects, with C. S., 5481, in adopting a county-wide plan of organization for the purpose of promoting a more advantageous school system for the entire county. Ansonville Consolidated School District was formed pursuant to and in accordance with this county-wide plan of organization. This plan was adopted 21 July, 1924.

A petition for the election in Ansonville Consolidated School District was presented on 23 July, 1924, signed by the requisite number (25) of qualified voters residing in Ansonville Consolidated School District more than twelve months prior to the filing of said petition. The election was held 30 August, 1924. For the special tax 289 votes were cast, and 97 votes against the same, out of a total registration of 458. This election was held in all respects as required by law. The tax levy as contemplated by said election was made by the Board of Commissioners of Anson County on 1 September (first Monday), 1924; and all other requirements of the law were fully met, unless invalidity arises from one of the three sources contended for by plaintiffs.

Plaintiffs' first contention is that a petition for the election was insufficient in that it was not endorsed by "the governing school boards of at least a majority of the school districts within the special school taxing district," known as "Ansonville Special School District," as contemplated in C. S., 5657.

C. S., 5657, relates to "special school taxing districts," and not to "school districts." Special school taxing districts are created by C. S., 5655; they include territory within more than one school district.

Hence, we find the legislative requirement in C. S., 5657 that, "the governing school boards of at least a majority of the school districts within the special school taxing district shall endorse the petition."

In the instant case the election was had pursuant to C. S., 5639, which relates to and is confined to *"school districts."* The petition is sufficient when signed by twenty-five qualified voters, provided the number of qualified voters in said school district equals or exceeds seventy-five, and if less, then only one-third of such number. This petition goes to the county board of education without any indorsement of the governing boards of the "school districts" included therein, because there are no school districts included. A new school district has been formed, and it operates of itself, and not by virtue of any composing units.

In *Sparkman v. Comrs.,* 187 N. C., 241, the procedure followed is that required by C. S., 5657; but in the instant case a new school district was created pursuant to the county-wide plan. The notice of the election in the instant case, contained a statement that, if election carried all taxes formerly voted "is hereby voted off." Hence, the difficulties which were encountered in *Hicks v. Comrs.,* 183 N. C., 394; *Perry v. Comrs.,* 183 N. C., 387; *Paschal v. Johnson,* 183 N. C., 129, and that class of cases, were obviated. In fact, when the case of *Coble v. Comrs.,* 184 N. C., 342, marked out the distinction between "school districts" and "taxing districts," and held that Article II, sec. 29, of the State Constitution, did not apply to the latter, but did apply to the former, then in full accord with this reasoning, the Legislature enacted chapter 136, Public Laws 1923, creating special school taxing districts (C. S., 5655), and providing a method for creating school districts (C. S., 5481). This applied the principles announced in *Coble v. Comrs., supra,* to the whole State.

In *Riddle v. Cumberland,* 180 N. C., 321, the same result as to "voting off" former taxing powers was held valid, on similar facts. The election was held in the *Riddle case* throughout the new school district and not in the hitherto nonlocal-tax territory, but it was then in a new district, and the new school district voted as a unit; so in the instant case.

The instant case avoids *Perry v. Comrs.,* 183 N. C., 387, and *Hicks v. Comrs.,* 183 N. C., 394, in that a new school district is formed, and there is no consolidation of districts. No creditors of any former district comprising this new school district appear to exist.

Hence, the second contention of the plaintiffs must fail, since this is not a consolidation of previous districts, some of which are special school taxing districts and others nonlocal-tax districts, but a new district has been formed in all respects as required by law, and the instant election removes all former taxing powers if, in fact, they existed, after

the adoption of the county-wide plan. Hence, the basis for this contention falls of its own weight. *Riddle v. Cumberland, supra; Sparkman v. Comrs., supra.*

This county-wide plan for the formation of school districts is discussed and upheld in *Blue v. Trustees,* 187 N. C., 431.

The plaintiffs' next contention is that the commissioners of Anson County had no power or authority to levy the taxes voted at the instant election on the first Monday in September, 1924.

Public Laws 1923, ch. 136, sec. 222 (C. S., 5642), provides that such taxes so voted "shall be annually levied and collected in the manner prescribed for the levy and collection of other taxes."

Public Laws 1923, ch. 12, sec. 9, allows the levying of taxes for general county purposes in the months of July, August and September; this puts the instant case within the express provisions of the law.

Therefore, we conclude that the judgment appealed from is correct in law, and therefore it is

Affirmed.

MARY WHITEHURST ET AL v. MINERVA BRADFORD GOTWALT ET AL.

(Filed 29 April, 1925.)

Wills—Intent—Public Policy—Provisions Against Contesting Will.

There is nothing in the disposition of real estate under a will against public policy or fixed principles of law (to prevent the plain intent of the testator) that those contesting it should not take thereunder and their interests shall "revert" to those who may stand firmly by the testator's wishes; and where the will has been caveated by some of the devisees without good reason, and some of its beneficiaries have remained neutral, those who actively participate in sustaining the will will receive the portion that would otherwise have been taken by the caveators, and those who remained neutral only such interests as were devised to them.

APPEAL by petitioners and several of the respondents from *Devin, J.,* from PASQUOTANK.

Petition for partition, heard upon "facts agreed." From an order declaring and adjusting the interests of the respective parties in the lands ordered to be sold for partition, the petitioners and a number of the respondents appeal.

Thompson & Wilson and McMullan & Leroy for appellants.
Ehringhaus & Hall for appellees.

STACY, C. J. The case was heard on the evidence submitted and facts agreed, with the stipulation that the court might find further

facts from the evidence in the case, if necessary to a final determination of the rights of the parties. A jury trial was expressly waived.

On the hearing the interests and rights of the respective parties were properly made to depend: first, upon the validity; and, second, if valid, upon the rightful interpretation of the following clause in the will of D. B. Bradford:

"I do hereby and herein instruct and demand of my executrix, that if any attempt is made on the part of any of the beneficiaries herein named to defeat, nullify, or contest in law or otherwise, the disposition or division of my property as herein made by me, that those so endeavoring to defeat, nullify or contest my wishes as herein expressed, shall not be entitled to the part I have intended for them, and shall only receive the sum of $10 each, and that part or portion of my estate herein set apart for them, shall revert to the other legatees or beneficiaries as may stand firmly by my wishes as herein expressed, and defend the distribution and disposal herein made by me of my property."

The *locus in quo* was devised by the testator to the petitioners and some of the respondents as tenants in common. We deem it unnecessary to set out the precise interest of each, as it would serve no useful purpose, under the view we take of the case.

There was a caveat filed to the will of D. B. Bradford, in which D. B. Fearing, J. B. Fearing, and J. B. Griggs each joined. Upon the issue of *devisavit vel non*, raised thereby, the will was sustained. 183 N. C., 6. His Honor finds as a fact that the caveat was filed without probable cause and that, therefore, all the interests of the caveators in the lands sought to be partitioned were forfeited under the above clause in the testator's will.

It was also found by the court below that the petitioner, Mary Whitehurst, and the respondents, Keith Fearing and Woodson Fearing, neither joined in said caveat proceeding nor assisted the propounders in the defense of the will, but that all remained neutral throughout the contest. Upon this finding it was adjudged that their interests, as devisees, were unaffected by the caveat proceeding.

It was further found as a fact that Minerva I. Gotwalt, Erskine Ehringhaus, Sr., Erskine Ehringhaus, Jr., Camille Ehringhaus Foster, William Ehringhaus, Shelby Ehringhaus Gill, Elizabeth Ehringhaus Johnson and J. B. Culpepper, "legatees or beneficiaries" under the will, stood firmly by the wishes of the testator as therein expressed, and defended the distribution and disposal made therein by him of his property. Upon this finding it was adjudged that the part or portion of the testator's estate set apart by him for the caveators should be divided

equally (per stirpes) among the legatees or beneficiaries who stood firmly by the testator's wishes.

The parties to the present proceeding, therefore, are divided into three classes: (1) "Caveators," whose interests in the lands have been forfeited, under the terms of the will, because of their effort to caveat same in the absence of probable cause for such proceeding; (2) "Neutrals," who take their original interests under the will, unaffected by the caveat proceeding; and (3) "Propounders," who stood firmly by the will, and whose devises are increased by an equal division among them (per stirpes) of the forfeited interests of the caveators.

The caveators and the neutrals appeal, contending (1) that the forfeiture is void; and (2) that, if valid, the forfeited shares of the caveators do not go over to the propounders, but "revert" to the testator's heirs generally.

First, as to the validity of the forfeiture, it is the doctrine of the English courts that a condition subsequent, where the subject of disposition is personal property, is to be regarded as *in terrorem* only, and that a legacy will not be forfeited by a contest of the will, instituted by the legatee, unless by the terms of the will the legacy be given over to another, or be specifically directed to fall into the residue, upon breach of the condition. But this doctrine has never been applied to devises of real estate. 2 Jarman on Wills, sec. 682. The distinction seems to have crept into the English law from the fact that the ecclesiastical courts early adopted the rule of the civil law which, contrary to the common law, regarded such conditions as *in terrorem* only. Later, the courts of equity followed the ecclesiastical courts with respect to bequests or legacies of personal property, and the common law with respect to devises of land. *Bradford v. Bradford,* 18 Ohio, 546; *Estate of Hite,* 155 Cal., 436, reported and annotated in 17 A. & E. Ann. Cas., 993; *Kitchen v. Ballard,* 220 Pac. (Cal.), 301, 30 A. L. R., 1008.

It is not material to determine in the present proceeding whether, in bequests of personal property, these artificial distinctions would be applied in North Carolina, for the devise in question is one of real estate, and by the clear weight of authority, both in England and in this country, a condition of forfeiture, if the devisee shall dispute the will, is valid in law. *Cooke v. Turner,* 15 M. & W. (Eng.), 735; *Perry v. Rogers,* 114 S. W. (Tex.), 897; *Donegan v. Wade,* 70 Ala., 501; *Hoit v. Hoit,* 42 N. J. Eq., 388; *Thompson v. Gaut,* 14 Lea (Tenn.), 314; 28 R. C. L., 315, and cases there cited.

It is further held that where there exists *probalis causa litigandi,* that is, a probable or plausible ground for the litigation, a condition in a will that a legatee shall forfeit his legacy by contesting the will, is not binding, and under such circumstances a contest does not work a for-

feiture. *Morris v. Burroughs,* 1 Atk. (Eng.), 399; *Powell v. Morgan,* 2 Vern. (Eng.), 90; *In re Friend,* 209 Pa. St., 442; *Smithsonian Inst. v. Meech,* 169 U. S., 398. But here it is found as a fact that no probable cause existed for the filing of the caveat.

It is the duty of the courts to effectuate the intention of the testator, and this is the cardinal principle in the interpretation of wills to which all other rules must bend, unless that intention be contrary to public policy or the settled rules of law. *Witty v. Witty,* 184 N. C., p. 381. No considerations of public policy have been called to our attention, which would seem to require that an heir should contest even the doubtful questions of law or of fact upon which the validity of a devise or a bequest may depend. This is a matter ordinarily affecting only the interests of the immediate parties. Speaking to the question in *Cooke v. Turner, supra,* it was said: "There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the State whether the land be enjoyed by the heir or devisee."

There seems to be no precedent in North Carolina bearing directly on the question, but we see no reason to doubt the soundness of the position assumed by *Judge Redfield* in his work on the Law of Wills (p. 679): "The rule of the English law, as to conditions against disputing the will, annexed to some bequests, seems to be in a most absurd state of confusion. It is held, such a condition is void as to personalty, unless the legacy be given over, in the event of failure to perform the conditions; but that such a condition is entirely valid as to real estate, whether there be any gift over or not. And it is agreed that there is no substantial ground for any distinction in this respect between real and personal estate. Hence, we assume that in this country, any such condition, which is reasonable, as one against disputing one's will surely is, as nothing can be more in conformity to good policy than to prevent litigation, will be held binding and valid."

We perceive no error in the judgment of the Superior Court, holding the condition in question to be valid, and that upon its breach, the part or portion intended for the caveators passed to the propounders, or those who stood firmly by the will. The decisions in *Miller's case,* 159 N. C., 123, and *Yorkley v. Stinson,* 97 N. C., 236, are not at variance with this position, but in support of it.

Nor do we perceive any error in the holding that the "neutrals" should take no part of the forfeited estates originally intended for the caveators. The finding of the court fixes them with an attitude of neutrality when the will was being assailed. The testator provided that those who sought to defeat, nullify or contest his will should not be entitled to the part he had intended for them, but that such part or

portion should "revert," go over, or be limited to those who should stand firmly by his wishes. To hold that the word "revert" means a technical reversion would be, not only to disregard the context, but also to defeat the entire limitation over to the propounders. This would be a strained construction and clearly contrary to the intention of the testator.

A careful and painstaking perusal of the whole record leaves us with the impression that the case has been disposed of according to law.

Affirmed.

NORFOLK SOUTHERN RAILROAD COMPANY v. THE ARMFIELD COMPANY.

(Filed 29 April, 1925.)

1. Carriers—Commerce—Order Notify Shipments—Delivery Without Requiring Bill of Lading—Waiver—Title.

The ruling of the Interstate Commerce Commission that the carrier must demand the surrender or possession of the bill of lading of an order notify interstate shipment in accordance with its express terms, before delivering the shipment to the person therein designated, must be observed, and where the delivery is made contrary to this requirement, the consignee acquires no title thereto, and the custom of the dealings between the parties cannot waive this requirement.

2. Same—Actions—Contracts—Trover and Conversion.

Where the terminal carrier's delivering agent on an interstate carload shipment has delivered the shipment to the person to be notified without requiring the surrender of the order notify bill of lading, and the carrier has paid the shipper for the goods thus delivered, whether in an action upon the contract assigned to it, or in wrongful conversion, the carrier may maintain its action against the consignee of the shipment, though the latter may have bought through a third person whom he has paid with knowledge that the shipment was upon an order notify bill of lading subject to the ruling of the Interstate Commerce Commission in the respect stated.

CIVIL ACTION tried by *Calvert, J.*, and a jury at the October Term, 1924, of CUMBERLAND.

His Honor instructed the jury upon the evidence to answer the issues as they appear of record:

1. Was the shipment of oats described in the complaint transported from Nashville, Tennessee, to Fayetteville, North Carolina, on an order notify bill of lading? Answer: Yes.

2. Was the shipment of oats described in the bill of lading delivered by the agent of the Norfolk Southern Railroad Company (the ultimate

carrier to destination) to the defendant Armfield Company at Fayetteville, North Carolina, without requiring the surrender of the bill of lading? Answer: Yes.

3. Is the defendant Armfield Company indebted to plaintiff as alleged in the complaint, and if so, in what sum? Answer: Nothing.

The plaintiff appealed from a judgment in favor of the defendant.

W. B. Rodman and Robinson & Robinson for plaintiff.
Cook & Cook and Nimocks & Nimocks for defendant.

ADAMS, J. This action was brought to recover the value of a carload of oats shipped from West Nashville, Tennessee, to Fayetteville, North Carolina, and delivered by the plaintiff to the defendant, the Armfield Company, without requiring the production of the bill of lading. The defendant gave its order to D. H. Dixon, a wholesale distributor in Goldsboro. Thereafter, on 2 February, 1923, presumably upon Dixon's order, the Tennessee-Oklahoma Grain Company put 300 sacks of oats in a car at West Nashville and received from the Nashville, Chattanooga & St. Louis Railway Company a bill of lading which provided, "The surrender of this original order bill of lading properly endorsed shall be required before the delivery of the property." On the same day (2 February) the Grain Company drew a sight draft on D. H. Dixon in the sum of $1,000.65 (the purchase price of the oats) in favor of the Wayne National Bank of Goldsboro, and attaching the endorsed bill of lading for delivery upon payment of the draft, mailed the papers to the bank. The bank received the papers on 5 February, held them until 12 April, and then returned them to the shipper. The draft was never paid. On 26 January, 1923, D. H. Dixon deposited in the Wayne National Bank his draft on the Armfield Company for $1,091.10, for which the bank gave him credit. The draft was forwarded to the Cumberland Savings and Trust Company, of Fayetteville, and was paid by remittance to the sending bank on 27 February. About two weeks theretofore, on 13 February, 1923, the plaintiff's agent upon the order of Dixon, without demanding the bill of lading, delivered the oats to the Armfield Company, who knew that the shipment had been made on a uniform order bill of lading. Record, p. 63.

The suit was instituted 28 July, 1923. The plaintiff on 14 February, 1924, paid the grain company the amount of its original draft on Dixon and took an assignment of the bill of lading, and at the March Term, 1924, amended its complaint for the purpose of setting up the title thus acquired.

The question is whether the judge erred in directing a verdict upon the evidence. Of course the shipment from West Nashville, Tennessee,

to Fayetteville, North Carolina, constituted interstate commerce. *Addyston Co. v. U. S.*, 175 U. S., 210, 241, 44 Law Ed., 136, 147; *Rosenberger v. Pac. Ex. Co.*, 241 U. S., 48, 60 Law Ed., 880; *Gaddy v. R. R.*, 175 N. C., 515; *Southwell v. R. R., ante,* 417. The defendant had been dealing with Dixon for about two years, and had received similar shipments from the plaintiff without producing the order bill of lading. In June, 1922, the Interstate Commerce Commission notified the plaintiff and other carriers that the clause requiring the surrender of the original order bill of lading must be complied with, and that the practice of delivering shipments without calling for such bills must cease.

There is evidence tending to show that the plaintiff's agents were instructed as to this notice, and that the agent at Fayetteville delivered the shipment in question in breach of the plaintiff's instructions. In addition, the schedule of the plaintiff's tariffs, certified by the Interstate Commerce Commission, provides that unless lost or delayed the carrier's original order bill of lading properly endorsed must be surrendered before the property is delivered; and where the title is retained in this way the carrier as a general rule cannot rightfully deliver the goods until the bill of lading is produced. *Sloan v. R. R.*, 126 N. C., 487; *Bank v. R. R.*, 153 N. C., 346; *Killingsworth v. R. R.*, 171 N. C., 47; *Richardson v. Woodruff*, 178 N. C., 46; *Penniman v. Winder*, 180 N. C., 73; *Watts v. R. R.*, 183 N. C., 12; *Collins v. R. R.*, 187 N. C., 141; *Early v. Flour Mills, ibid.*, 344; *Davis v. Gulley*, 188 N. C., 80; *R. R. v. Bank*, 207 U. S., 270, 52 Law Ed., 201.

The defendant contends that it bought the oats from Dixon and had no dealing with the Tennessee-Oklahoma Grain Company; but the shipment nevertheless was made upon a bill of lading by which the title was retained for the benefit of the grain company, the shipper, and its assigns. The defendant knew this. D. M. Armfield, testifying on its behalf to this effect, said that the bill of lading was not surrendered to the plaintiff when the oats were delivered; in fact the defendant never had the bill of lading, and never tried to get it.

If the jury should find from the evidence that the shipment was made upon an order bill prescribed by the Interstate Commerce Commission, having upon its face a requirement that the bill of lading properly endorsed should be produced when the property was delivered, and the plaintiff's agent delivered the oats to the defendant without demanding the bill of lading, they should then find that no title to the oats passed to the defendant. Under these circumstances what were the plaintiff's legal rights as against the defendant? There is authority for the position that the plaintiff, after taking the transfer of the bill of lading from the shipper, had a cause of action in contract against the defendant, and without the bill of lading under the given circumstances had

a cause of action for conversion. The subject is discussed in *R. R. v. Freedman,* 133 N. E. (Mass.), 101. There it appeared, as in the case before us, that the goods had been shipped under a uniform order bill of lading and wrongfully delivered. The carrier brought suit for the conversion of the goods, and after taking an assignment of the bill of lading brought a second suit in contract. The actions were tried together and resulted in each case in a verdict for the plaintiff. Only one recovery was allowed, but the Supreme Judicial Court of Massachusetts held that the alleged conversion was based on the wrongful interference with the plaintiff's possessory right, while the claim in contract was upon an agreement between the defendant and the plaintiff's assignor.

In other jurisdictions also it has been held under analogous circumstances that without regard to the assignment of the bill of lading the carrier as bailee has a cause of action in trover against the person to whom the goods are delivered, where with knowledge of the conditions such person receives them without presenting the order bill of lading. *Chamberlain v. Torgorm,* 48 Fed., 584; *Tedford Co. v. R. R.,* 172 S. W. (Ark.), 1006; *R. R. v. McDougald,* 199 N. W. (Wis.), 68; *Mosher Co. v. R. R.,* 259 S. W. (Tex.), 253; *In re Bunch Co.,* 180 Fed., 519, 531; *Johnson, etc., Co. v. R. R.,* 34 So. (Miss.), 357; *R. R. v. McKay,* 182 S. W. (Tenn.), 585.

It is contended that a long course of dealing between the parties established a custom and well known usage by which the plaintiff had repeatedly delivered goods shipped on an "order notify" without requiring the production of the bill of lading. Moreover, it is insisted, the plaintiff was not only negligent in permitting such a custom, but is bound by the usage, by the misfeasance of its agent, and by its own conduct, and is therefore estopped to maintain the present action.

In our opinion the principles relied on by the defendant are not applicable here. This was an interstate shipment. We must consider not only the bill of lading as evidence of the contract; we must consider the plaintiff's tariffs and the orders of the Interstate Commerce Commission regulating both the rates for transportation and the terms of delivery. These include requirements which the plaintiff must observe and may not waive. In *R. R. v. Leatherwood,* 250 U. S., 479, 63 Law Ed., 1096, it is said: "The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. That a carrier cannot be prevented by estoppel or otherwise

from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled. A carrier has, for instance, been permitted to collect the legal rate, although it had quoted a lower rate, and the shipper was ignorant of the fact that it was not the legal rate. *Texas & P. R. Co. v. Mugg,* 202 U. S., 242, 50 L. Ed., 1011, 26 Sup. Ct. Rep., 628; *Illinois C. R. Co. v. Henderson Elevator Co.,* 226 U. S., 441, 57 L. Ed., 29, 33 Sup. Ct. Rep., 176; *Louisville & Nashville R. Co. v. Maxwell,* 237 U. S., 94, 59 L. Ed., 853, L. R. A., 1915E, 665, P. U. R., 1915C, 300, 35 Sup. Ct. Rep., 494; *Missouri, K. & T. R. Co. v. Schnoutz,* 245 U. S., 641, 62 L. Ed., 527, 38 Sup. Ct. Rep., 221 (per curiam)."

If the plaintiff had accepted in payment of freight a rate lower than the published tariffs required it could none the less have collected the legal rate, because the duty of collecting the legal rate is imposed by law. Likewise, if in the instant case the plaintiff's agent released the shipment in question (especially in breach of his instructions), without demanding the bill of lading, whereby neither the title nor the right of possession vested in the defendant, the unlawful delivery of the goods, according to the cited authorities, did not work an estoppel against the plaintiff, whether asserting its possessory right as bailee (the title remaining in the consignor) or asserting its title to the property under an assignment of the bill of lading.

The amendment of the complaint seems to have been made without objection, and to have been treated as if incorporated as an original cause of action; at any rate there was no exception to the amendment or to the presentation in this action of the contentions which it raised.

We think his Honor inadvertently instructed the jury to answer the third issue in favor of the defendant if they found the facts as shown by the testimony, and for this reason the plaintiff is entitled to a

New trial.

D. RIFF v. YADKIN RAILROAD COMPANY.

(Filed 29 April, 1925.)

1. Evidence—Depositions—Signature of Witness—Statutes.

The certificate of the proper commissioner or notary public before whom a deposition has been taken, is sufficient for the deposition to be received in evidence upon the trial, without requiring the signature of the deponent, though such is the better practice for the purpose of identification, C. S., 1809.

2. Carriers of Goods—Evidence—Bills of Lading—Connecting Lines—Damages—Commerce—Federal Statutes.

A bill of lading for the transportation of goods over several lines of common carriers for delivery at destination, is evidence of a joint contract of carriage including a liability on the delivering carrier, and this position is not affected by the Carmack Amendment applying to interstate commerce.

3. Same—Lost Contents—Evidence—Burden of Proof.

Where the bill of lading and receipt issued by a railroad company calls for two boxes or packages "in apparent good condition, contents and condition of contents unknown," and an action has been brought against the terminal carrier to recover a part of the contents alleged to have been taken therefrom while in the carrier's possession, the proof of the receipt and bill of lading is only prima facie evidence of the receipt of the packages as therein stated, with the further burden of proof on the plaintiff of showing his loss, which he may do by showing the missing articles had been packed in the cases before delivery to the carrier and were missing when received by the consignee, with further evidence tending to show that the contents of the package had been tampered with while in the carrier's possession.

APPEAL by defendant from *Lane, J.*, at October Term, 1924, of STANLY.

On 31 July, 1920, the Pennsylvania Railroad Company issued a uniform straight bill of lading by which it acknowledged the receipt by it at New York from Yale Knitting Mills of "two cases knit goods in apparent good condition, contents and condition of contents of packages unknown," to be transported by said railroad company and connecting carriers to D. Riff, at Albemarle, N. C. On 16 August, 1920, these two cases of knit goods were delivered to D. Riff, plaintiff, at Albemarle, N. C., by Yadkin Railroad Company, defendant. This action was begun on 12 January, 1921, by plaintiff, to recover of defendant the value of twenty-eight sweaters alleged to have been included in the contents of one of said cases when same was received by the Pennsylvania Railroad Company at New York, and to have been missing when the said case was delivered to plaintiff at Albemarle, N. C., by defendant. Defendant denied that any of the contents of the said case were removed therefrom after the same was received by the Pennsylvania Railroad Company at New York or that any of said contents were missing when the case was delivered to plaintiff at Albemarle, N. C.

The issue submitted to the jury with the answer thereto, was as follows:

"Is the defendant indebted to plaintiff, and if so, in what amount? Answer: $210.00."

From judgment in accordance with this verdict defendant appealed to the Supreme Court, assigning errors based on exceptions duly noted.

W. L. Mann for plaintiff.
R. L. Smith & Sons for defendant.

CONNOR, J. Defendant's first assignment of error is based upon its exception to the overruling by the court of its motion, made before the trial began, to quash the deposition of Gabriel Engel taken before a notary public in New York. This deposition was duly taken in behalf of plaintiff on 18 September, 1923. Both parties were represented at said time and place. By consent, further proceedings were continued until Monday, 21 October, 1923. The deposition was signed by Gabriel Engel before the notary public on 1 October, 1923, neither party being present nor represented on said date. It does not appear that either party attended before the notary public on Monday, 21 October, 1923, or gave notice to the notary public or to the other party of any purpose or desire to proceed further in the matter of the deposition. The attorney for defendant stated upon the argument on appeal that defendant had no desire or purpose to cross-examine the witness further on 21 October, 1923, and had not intended to be present on said date. The deposition containing both the examination and cross-examination of Gabriel Engel was offered as evidence at the trial by the plaintiff and was read to the jury.

There is no requirement in our statute that a deposition shall be signed by the witness. C. S., 1809. This Court has held that a deposition not signed by a witness may be read in evidence. *Boggs v. Mining Co.*, 162 N. C., 393. It is good practice to have the deposition signed by the witness, for the purpose of identification, but the certificate of the commissioner or notary public is sufficient. The exception is not well taken and this assignment of error is not sustained.

At the close of plaintiff's evidence the defendant moved for judgment of nonsuit. Upon denial of this motion defendant excepted. Defendant offered no evidence, and requested the court to instruct the jury that there was no evidence that the goods alleged to have been lost were ever delivered to the railroad company, and that the jury should answer the issue "Nothing." The court declined to give this instruction, and defendant excepted. The third and fourth assignments of error are based upon these exceptions.

In their brief, filed in this Court, attorneys for defendant say that plaintiff relies upon the bill of lading as *prima facie* evidence of the receipt of the goods alleged to have been missing, by the Pennsylvania Railroad Company. This company in the bill of lading acknowledged

receipt by it, for transportation to plaintiff, of two cases of knit goods, "contents and condition of contents of packages unknown." The bill of lading was not *prima facie* evidence of the quantity of the goods in the cases, but it was such evidence of the delivery to it by the Yale Knitting Mills of the articles described therein, to wit, two cases of knit goods. A bill of lading is evidence of the facts recited therein, as against both the initial and the terminal carrier. 10 C. J., 371. This was a through bill of lading for the transportation of the goods from New York to Albemarle, N. C. The liability of the terminal, or delivering carrier, is not affected by the Carmack Amendment, U. S. Comp. Stat., 8604A; *Paper Box Co. v. R. R.*, 177 N. C., 351; *Georgia F. & A. R. Co. v. Blish Milling Co.*, 241 U. S., 190, 60 L. Ed., 949. Defendant, as a common carrier, was liable to plaintiff for the actual contents of the two cases. Plaintiff assumed the burden of proving, by evidence, that the twenty-eight sweaters alleged to have been lost, were in the case when same was delivered to the initial carrier, and were missing when the case was delivered to plaintiff by the defendant. The testimony of the shipping clerk of Yale Knitting Mills, and of witnesses offered by plaintiff as to the condition of the straps on the case, from which it was alleged that the sweaters had been taken, and of the cartons therein when the same was opened by plaintiff at his store in Albemarle, N. C., was competent as evidence, and was properly submitted to the jury. There was competent evidence both as to the number of sweaters missing and as to their value. "The through bill of lading and the receipt for the through freight by defendant are evidence of the joint contract. *Mills v. R. R.*, 119 N. C., 693." *Paper Box Co. v. R. R., supra.*

"Where the question is one merely of shortage in the number of packages in an admitted shipment, the representation of a bill of lading, without any qualifications, is conclusive on the carrier as between the carrier and a consignee or transferee of a bill of lading who has incurred loss or liability in reliance on the correctness of the representation." 4 R. C. L., 27. But see *Williams v. R. R.*, 93 N. C., 42, where it is held that the carrier is not bound unless the goods are actually received for shipment, and that the carrier is not estopped from showing by parol that no goods were in fact received. *Bank v. R. R.*, 175 N. C., 415.

Where there is a general description of packages received for shipment, qualified by the statement in the bill of lading that the contents of the packages are unknown, and the contents are not subject to ordinary inspection, and there is an allegation of shortage in the number of articles in the packages at delivery, the bill of lading, by reason of the qualification is not sufficient alone as evidence to sustain the allega-

tion of shortage; it is, however, competent as evidence. The carrier is liable for the actual contents of the package, and this liability is not affected by the statement in the bill of lading that such contents are unknown.

We have examined the other assignments of error. They are based upon exceptions to evidence and to instructions of the court to the jury. They are not sustained and the judgment is affirmed. We find

No error.

R. J. DAVIS ET AL., SUING ON BEHALF OF THEMSELVES, AND ALL OTHER PARTIES OWNING LOTS IN PIEDMONT PARK, IN THE CITY OF CHARLOTTE, WHO MAY COME IN AND BE MADE PARTIES PLAINTIFF, v. FRANK E. ROBINSON ET AL.

(Filed 6 May, 1925.)

1. Deeds and Conveyances—Restrictions—Development Companies—Evidence.

Conveyances of land by an improvement company from a plat of the original purchase in large acreage, divided into lots showing reserved streets with certain parks laid off, with restrictions in the deeds given for a large number of the lots sold as to the erection of residences only of a certain class or at a certain price in the printed and written conveyance, and without these restrictions by like conveyances as to other lots scattered through the development, is not sufficient to evidence a mutual mistake of the parties in failing to incorporate the restrictions in all of the deeds, enforceable in a court of equity.

2. Same—Equity—Injunction.

Held, under the facts of this case, that a mesne purchaser of a lot of land conveyed by a deed restricting the use of lots to residential purposes cannot maintain his suit in equity for injunctive relief against the erection of a business building, a filling station for automobiles, against a purchaser under a deed containing no restrictions as to the use of the lot he has purchased.

3. Same—Easements—Statute of Frauds—Subsequent Purchaser—Registration.

Where the owner of certain lots in a land development has acquired title by deed with others restricted as to the erection of dwellings, and claims this right against other purchasers whose deeds do not contain this provision, the right so claimed is that of a negative easement, required by the Statute of Frauds to be in writing (C. S., 988), and as against subsequent purchasers for value, their prior registration is required to establish the right. C. S., 3309. The acquisition and incidents of easements discussed by VARSER, J.

APPEAL by plaintiff from *Shaw, J.*, of MECKLENBURG.

Action by R. J. Davis and others, on behalf of themselves, and all other parties owning lots in Piedmont Park, in the City of Charlotte,

who may come in and be made parties plaintiff, against Frank E. Robinson and others, including J. M. Haralson and Keely A. Grice, partners, as "D. H. & G. Service Stations." Judgment for defendants, and plaintiffs appealed. Affirmed.

The plaintiffs alleged that they owned certain parcels of land in a development known as "Piedmont Park," now in the city of Charlotte; that they purchased these parcels under deeds containing restrictions "against the erection of any structure except houses to be used for residential purposes only, costing certain amounts therein mentioned, and necessary outhouses."

Piedmont Park was originally an eighty-six-acre tract of land, purchased by F. C. Abbott in 1900. A corporation, Piedmont Realty Company, was formed, and this land conveyed to it and then developed into lots, streets and avenues; and a map showing lots, blocks, streets, avenues and alleys was made and spread upon the records in the office of the Register of Deeds for Mecklenburg County.

After conveying to purchasers 129½ lots (121½ with and 8 without restrictions), the Piedmont Realty Company conveyed to F. C. Abbott, without restrictions, 136½ lots. Another corporation, Suburban Realty Company, was then organized, and it took the title to the 136½ lots without any restrictions in its titles. The first conveyance of lots by the Piedmont Realty Company was in October, 1900, and its last in April, 1909, when it conveyed to Gustav Oelkers the *locus in quo*, without restrictions, and a residence had been erected thereon by the Piedmont Realty Company.

At the time of the aforesaid conveyance to F. C. Abbott by the Piedmont Realty Company, 117½ lots had been conveyed to sundry purchasers by the Piedmont Realty Company with restrictions, and 6 lots had been so conveyed without restrictions.

The Suburban Realty Company made maps of its said purchase and other added blocks, and spread same on record in the office of the Register of Deeds of Mecklenburg County. The Suburban Realty Company conveyed all the F. C. Abbott 136½ lots and 40 other lots added by it thereto from other contiguous lands, referring to its map and subject to restrictions, practically the same as those contained in the Piedmont Realty Company deeds.

Before *Piedmont Realty Company* conveyed the *locus in quo* to Gustav Oelkers, both of said realty companies had conveyed to sundry purchasers 164½ lots by deeds with restrictions and 142½ lots by deeds without any restrictions whatever.

Certain deeds called secondary conveyances by the parties, because they were quit-claims, corrective deeds, releases and reconveyances, were executed, some with and some without restrictions.

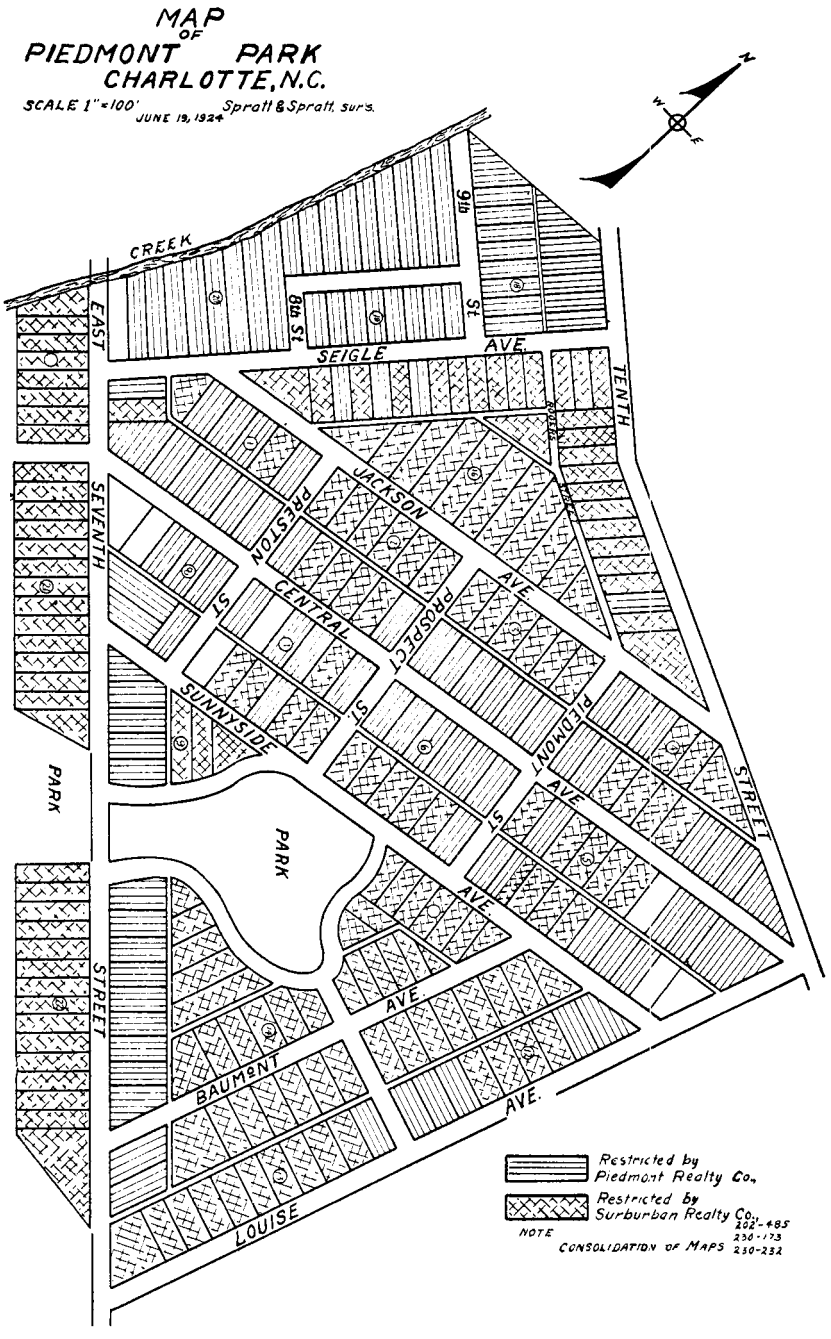
These restrictions, in so far as they are material, provided: That no owner of said real estate shall, at any time hereafter, erect upon said real estate any structure except a dwelling-house which shall cost not less than a specific amount, and no owner shall permit any building erected thereon to be used for other purposes than dwelling and necessary outhouses.

"The party of the first part reserves to itself all parks, streets and avenues, laid out on the map aforesaid, with the right to dispose of same as it may see fit, provided, however, that no alley or street over which the right of way is expressly granted herein shall be closed or materially altered; and the party of the first part reserves to itself all of the rights and easements appurtenant to the said property known as Piedmont Park which are not herein expressly granted."

Some of the plaintiffs hold by mesne conveyances under the Piedmont Realty Company and the others by mesne conveyances under the Suburban Realty Company.

The defendant, F. E. Robinson, holds the *locus in quo* by mesne conveyances under the Piedmont Realty Company through Gustav Oelkers, and in his chain of title no restrictions appear. And defendants, Haralson and Grice, hold by lease under defendant Robinson. The defendants, Haralson and Grice, leased a part of the *locus in quo* for use as a "filling station." They desired to sell gasoline and other merchandise used in operating automobiles. The plaintiffs instituted this action for injunctive relief against this business enterprise and to have declared effective against the *locus in quo* the restrictive negative easements, or covenants applying to their lots, as set out in their deeds. They alleged that the restrictive provisions were omitted from these deeds by inadvertence, or the mutual mistake of the parties to the first conveyance from the Piedmont Realty Company, and that each subsequent grantee took with notice and full knowledge of this omission.

They further alleged that the whole development of Piedmont Park was the result of a "general scheme or plan" to preserve and maintain "Piedmont Park" as a strictly residential community or neighborhood. The defendants denied these allegations and pleaded the express provisions of plaintiffs' deeds and their own deeds, and that they were purchasers for value, without notice or knowledge of any such rights of the plaintiffs as against them. They further alleged that the registered conveyances themselves *negatived* any general purpose to restrict the lots in Piedmont Park, for that many were sold without restrictions, and that the unrestricted lots were so scattered as to evince a lack of any general plan to restrict all the lots in their use.


MAP
OF
PIEDMONT PARK
CHARLOTTE, N.C.
SCALE 1" = 100'
JUNE 19, 1924
Spratt & Spratt, surs.
N
W
E
CREEK
EAST
8th St.
9th
St.
SEIGLE
AVE.
TENTH
STREET
SEVENTH
STREET
PARK
PRESTON
JACKSON
AVE.
CENTRAL
ST
PROSPECT
AVE.
SUNNYSIDE
ST
PIEDMONT
AVE.
ST
PARK
AVE.
AVE.
BAUMONT
AVE.
LOUISE
Restricted by
Piedmont Realty Co.
Restricted by
Surburban Realty Co.
NOTE
CONSOLIDATION OF MAPS 230-232
202-485
230-173

The plaintiffs offered the testimony of F. C. Abbott: That he is a real estate dealer in Charlotte of some 27 years experience, and that he, with others, bought the property now called Piedmont Park for the purpose of development—then organized the Piedmont Realty Company, a corporation, and conveyed this land to it; that he had a scheme or plan for its development as a residential section, except that they were supposed to have a community store on lot No. 1, in block 20, and all the remainder was to be residential. That the Piedmont Realty Company had a deed printed to carry out this plan containing these restrictions; that he was connected with the Piedmont Realty Company until the latter part of 1905. Abbott and Stephens were selling agents for this property. Whenever this question was raised with purchasers that he told them that it was limited to residential uses, except the store corner lot—the restriction is a valuable property right; that he repurchased all the unsold lots of the Piedmont Realty Company, 29 January, 1906. The deed from Piedmont Realty Company to F. C. Abbott conveyed 136½ lots in Piedmont Park, and was not made on the printed forms, and contained no restrictions or reservations; that, for the purpose of turning these over to a new company to proceed with the same development, he organized the Suburban Realty Company and deeded the entire property to them a few days after his deed from the Piedmont Realty Company, which deed contained no restrictions or reservations. He said it was his purpose to convey this property to the Suburban Realty Company and continue to develop or sell the lands according to the original plan he had first adopted by the sale of lots for the Piedmont Realty Company. A new deed was printed for the Suburban Realty Company, containing practically the same restrictions as in the printed form of deed used by the Piedmont Realty Company. That lots Nos. 1 and 2, in block 8, purchased by Gustav Oelkers, constituted a most important approach to this entire property, and that the Piedmont Realty Company built on this property, in 1903 or 1904, under his supervision, a good residence, and had the yard graded, shrubbery set out according to a landscape architect, and had a hedge around the property; this hedge surrounded both lots. Piedmont Realty Company sold its last lot in Piedmont Park some time in 1924. "As far as I knew, I gave to Dr. Austin the same facts I did to other buyers." The Austin deed from Piedmont Realty Company contains this restriction: "It is understood and agreed also that the first building to be erected on lot No. 1 shall be a dwelling-house, costing not less than $1,500.00." The deed from Piedmont Realty Company to F. C. Abbott, October, 1900, not on printed form, but contains the following restrictions: "It is to be further understood and agreed that

the lots fronting on Central Avenue and Seventh Street are to be used for residential purposes only." Witness built his residence on one of these lots.

Another deed was executed to the Louise Mills, with no restrictions in it.

D. L. Probert, for plaintiffs, testified that it was represented to him that this was to be a residential district, with a store on one of the corners to supply the needs in that section; that such representation was an inducement to him to buy a lot and use it for a home. He further testified that the "filling station" is operated every day in the week and later than 10 o'clock at night, including Sunday, and to other objectionable phases as to the "filling station." That the Piedmont Grocery Company is less than 300 feet from Sugar Creek and the building near the store is sometimes used as a meat market.

C. I. Myers, for plaintiffs, testified that notice was given to defendant Robinson before anything was done toward putting a "filling station" on the lot in controversy, and that the coming and going of the cars and glare of the lights disturbed the community and affected the property. The Robinson house still is on the *locus in quo,* but Robinson has moved.

J. D. Biggers testified that he lived just across Seventh Street from the "filling station," and that he was acquainted with the property in controversy before the "filling station" was constructed and the effect of the "filling station" on the use of the other property.

J. T. Moore likewise testified that notice was given before the "filling station" was begun that the property was for residential purposes.

The testimony of the foregoing witnesses was offered subject to the Court's opinion as to its competency. At the close of the plaintiff's evidence, the trial court was of the opinion that the evidence of these witnesses tending to prove that Piedmont Park was established for the purpose of making it a residential section and that the purchasers of the property were notified of the purpose of the owner and promotion; and that testimony tending to show conversation with the defendant Robinson after he purchased the property, in which the defendant said he thought his property was restricted, was not competent, and the court allowed defendant's motion to strike it out. The trial court was further of the opinion that, notwithstanding any plan or purpose that may have been had or formed for the Piedmont Realty Company or the Suburban Realty Company in the development of Piedmont Park, that the plaintiffs' right to maintain this action is dependent upon the restrictions and reservations in the deed under which each of them claims, and that under the restrictions and conditions set out

in the deeds under which plaintiffs claim, the plaintiffs are not entitled to maintain this action. The motion to nonsuit was allowed. Plaintiffs excepted to these rulings and appealed from the judgment of nonsuit.

Cansler & Cansler, D. E. Henderson and John H. Small, Jr., for plaintiffs.

McNinch, Whitlock & Dockery and W. S. Beam for defendants.

VARSER, J. The plaintiffs seek injunctive relief to prevent the use of the lands purchased by the defendant Robinson through mesne conveyances from the Piedmont Realty Company for other than residential purposes. There are no restrictive covenants or stipulations in the defendants' chain of title from the common source, the Piedmont Realty Company. Plaintiffs' deeds contain such restrictive covenants.

The plaintiffs first base their contention upon an alleged mutual mistake or inadvertence, whereby the restrictions appearing in their chain of title were omitted from the defendants' chain of title. The evidence offered by the plaintiffs is totally insufficient to establish an agreement between the Piedmont Realty Company and Gustav Oelkers to limit the use of the *locus in quo* to residential purposes only. In fact, no evidence whatever is offered tending to show what transpired in that transaction. The Piedmont Realty Company sold a large number of lots with restrictions and a large number of lots to F. C. Abbott without restrictions, and Abbott conveyed these lots to the Suburban Realty Company without restrictions. The unrestricted lots are so scattered as to negative this contention. There could have been no inadvertence in omitting these restrictions from the defendants' chain of title, unless there was the intent on the part of both parties to the original purchase, as well as knowledge or a like intent on the part of the mesne grantees to insert these restrictive covenants in the conveyances. The very essence of the doctrine allowing relief from inadvertence, or mutual mistake, is the desire of the law to effectuate the original intent and agreement of the parties. Story's Equity Jurisprudence (13 ed.), sec. 115; Bispham's Principles of Equity (6 ed.), 598, sec. 468. When this common intent is absent, the reason ceases. Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself. Broom's Legal Maxims (8 ed.), 159.

The plaintiffs' next contention is that Piedmont Park is the result of a general plan or scheme of development of an exclusive residential community, and that such scheme was so well known and so basic in its relation to the development that all purchasers took their titles subject

thereto, and that it would now be unconscionable to allow some to use their lots unrestrictedly, while others were restricted to residential purposes.

It appears from the record that a large number of lots were conveyed by the Piedmont Realty Company by primary conveyances without restrictions, and by deeds of trust without restrictions, and that these were registered prior to the sale of the *locus in quo*. Two lots had been released from the restrictions in order that a grocery store might be erected and maintained. No covenants appear in any deeds from the Piedmont Realty Company or the Suburban Realty Company registered prior to the defendants' deeds that, like restrictive covenants, would be inserted in all other deeds made by either of these companies. The Piedmont Realty Company's deeds, which contained the residential restrictions, also contained a provision that "the party of the first part did reserve to itself all of the rights and easements appurtenant to the said property known as Piedmont Park 'which are not herein expressly granted.'" This provision is notice that all rights and easements not expressly granted in each particular deed was held by the Piedmont Realty Company and would not pass to other subsequent purchasers by implication. The grantor reserved to itself the free and unrestricted use, and right, of alienation of its unsold property. It is significant in the instant case that there is no covenant in the plaintiffs' deeds that all other conveyances will contain similar restrictive covenants.

"A general building scheme for an entire tract is not shown, where, although the original proprietor makes conveyances of portions of such tracts subject to restrictions, he also conveys large portions of it free from any restrictions whatever." 18 C. J., 395; *Donahoe v. Turner,* 204 Mass., 274; *Saylor v. Podoliski,* 82 N. J. Eq., 459.

"Where the original proprietor of a tract of land made conveyances of portions of it subject to certain restrictions, but also conveyed portions of it free from any restrictions whatever, the facts do not warrant a finding that a general building scheme founded on such restrictions was adopted for the entire tract." *Donahoe v. Turner, supra.*

In *Milliken v. Denny,* 141 N. C., 224, the Court says: "If purchasers wish to acquire a right of way or other easement over other lands of their grantor, it is very easy to have it so declared in the deed of conveyance. It would be a dangerous invasion of rights of property, after many years and after the removal by death or otherwise of the original parties to the deed and conditions have changed, to impose by implication, upon the slippery memory of witnesses, such burdens on land."

We find it against the weight of authority to construe the covenants in the instant case as plaintiffs contend.

In *Shoonmaker v. Heckscher,* 157 N. Y. Supp., page 77, the Court says: "An owner of real property has an unquestionable right to restrict its uses by covenant or agreement, and such restrictions will be upheld by the courts, provided they are reasonable and not contrary to the public welfare, and effect will be given to the intention of the parties, as shown by the words used, considered in connection with the surrounding circumstances. But if, when so considered, the language used is reasonably capable of two constructions, the one that limits, rather than the one that extends, the restrictions should be adopted, for the reason that the law will always favor the free and unrestricted use of property, and, therefore, all doubts and ambiguities must be resolved in favor of the natural right to the free use and enjoyment of property and against restrictions. *Clark v. Life Ins. Co.,* 64 N. Y., 33; *Clark v. Jammes,* 33 N. Y. Supp., 1020; *Kitching v. Brown,* 180 N. Y., 414; *South Church v. Bldg. Co.,* 148 N. Y. Supp., 519; *Hutchinson v. Ulrich,* 145 Ill., 336; L. R. A., 21, 391; *Duyn v. Chase & Co.* (Iowa), 128 N. W., 300; *James v. Irvine,* 141 Mich., 376; *Walker v. Renner,* N. J. Eq., 493; *Cengor v. Railway,* 120 N. Y., 29; *Richter v. Distelhurst,* 101 N. Y. Supp., 634; *Stone v. Pillsbury,* 45 N. E., 768. In this latter case, the Court, speaking to provisions in conveyances restricting the use of the property conveyed, says: "While a reasonable construction is to be given to them, doubts are to be resolved in favor of the grantee in the deed."

In *Underwood v. Herman* (N. J.), 89 Atl. Rep., 21, the Court says: "It is well settled that, in cases where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful, 'to doubt is to deny.'" . . . Courts of equity do not aid one man to restrict another in the uses to which he may put his land, unless the right to such aid is clear. *Newberry v. Barkalow,* 75 N. J. Eq., 128; *Walker v. Renner,* 60 N. J. Eq., 493; *In re Walsh* (Mass.), 55 N. E., 1043; *James v. Irvine* (Mich.), 104 N. W., 631; *DeGray v. Monmouth Beach Club House,* 50 N. J. Eq., 329; 7 R. C. L., 1115.

Land is becoming more and more an object of daily commerce, and its uses are changing with the varying needs and wants of society. Inventions and new wants reflect themselves in the uses of land, and it is for the best interest of the public that the free and unrestricted use shall be enjoyed, unless such use is restricted in a reasonable manner consistent with the public welfare. The construction of deeds containing such restrictions or prohibitions as to the use of lands by the grantees, in the case of doubt, as a general rule, ought to be strict and in favor of a free use of such property and not to extend such restrictions. This doctrine is clearly established in the foregoing authorities and forcibly expressed in *Hutchinson v. Ulrich, supra.*

Plaintiffs' prayer for injunctive relief presupposes an easement in favor of their lots and a servitude in the defendants' lots.

An easement is an incorporeal hereditament, and is an interest in the servient estate. *Mackey v. Harmon,* 24 N. W., 702; *Clawson v. Wallace* (Utah), 52 Pac., 9.

Black's Law Dictionary, 408, says: "A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner," is an easement. Expressed conversely, the same author says: "It is a privilege which the owner of one adjacent tenement hath of another, existing in respect of their several tenements, by which that owner against whose tenement the privilege exists is obliged to suffer or not to do something on or in regard to his own land for the advantage of him in whose land the privilege exists. A private easement is a privilege, service, or convenience which one neighbor has of another. "Easements are classified as affirmative or negative. Negative easements are those where the owner of a servient estate is prohibited from doing something otherwise lawful upon his estate, because it will affect the dominant estate." Black's Law Dict., 409; 2 Washb. Real Prop., 301; Tiffany on Real Property (2 ed.), 1199; *Nash v. Shute,* 182 N. C., 528.

Easements are, again, either appendant, appurtenant or in gross. "An appurtenant easement is one which is attached to and passes with the dominant tenement as an appurtenance thereof, while an easement in gross is not appurtenant to any estate in land or not belonging to any person by virtue of his ownership of an estate in land, but a mere personal interest in, or right to use the land of another." Black's Law Dict., *supra; Cadwalader v. Bailey,* 17 R. I., 495; *Pinkum v. Eau Claire,* 81 Wis., 301; *Stovall v. Coggins Granite Co.,* 116 Ga., 376; Mordecai's Law Lectures, Vol. I, 469. Easements appendant and appurtenant are always owned in connection with other real estate and as incidents to such ownership; while easements in gross are purely personal and usually end with the death of the grantee. However, an easement in gross designated as a *profit a prendre,* by which the right to take something from the land does not end with the death of the grantee necessarily, but may pass to his heirs or assigns. Mordecai's Law Lectures, *supra; Council v. Sanderlin,* 183 N. C., 253. The differences between easements appendant and appurtenant are not material to the instant case.

The nine ways in which easements may be created are set out in Mordecai's Law Lectures, 464, as follows: "Grant, Estoppel, Way of Necessity, Implication, Dedication, Prescription, Ancient Window Doctrine, Reservation, and Condemnation."

As said by this learned author, and our Court in *Lindley v. Bank,* 115 N. C., 553, the easement of light and air, sometimes called the "Ancient Window Doctrine," does not apply in this State.

The Statute of Frauds, as enacted in C. S., 988, requires "all contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . to be put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized."

In the instant record there appears no writing evidencing the negative appurtenant easement which the plaintiffs seek to establish and enforce against the defendants. Since the plaintiffs have not come within the equitable jurisdiction of the court to correct the conveyances so as to include such easements, there is admittedly no writing which can evidence any agreement or contract creating such an easement. An easement, being a hereditament, is expressly included within this statute. The easement sought, on account of its negative character, seeks to impose a servitude on the defendants' lot. This servitude is a species of incorporeal right derived from the civil law corresponding to the easement "of the common law," except that servitude has relation to the burden on the estate burdened, while easement refers to the benefit or advantage of the estate to which it accrues. If we adopt the terminology of the civil law, this negative easement would be a negative servitude which restrains the owner of the servient estate from making a certain use of his property which would impair the easement belonging to or enjoyed by the dominant tenement. Black's Law Dict. (2 ed.), 1077; *Rowe v. Nally,* 81 Md., 367; *Los Angeles Terminal Land Co. v. Muir,* 136 Cal., 36; *Laumier v. Francis,* 23 Mo., 184. While conveyances of real estate are within this statute, a conveyance of any interest in or concerning the same is, as well, included. *Hall v. Misenheimer,* 137 N. C., 186; *Drake v. Howell,* 133 N. C., 165; *Presnell v. Garrison,* 121 N. C., 366; *Buckner v. Anderson,* 111 N. C., 577; and this language includes, necessarily, an easement both as a hereditament and as an interest in or concerning land or a hereditament. *Herndon v. R. R.,* 161 N. C., 650; *Kivett v. McKeithan,* 90 N. C., 106; *McCracken v. McCracken,* 88 N. C., 272. *Milliken v. Denny, supra,* says: "It is elementary learning laid down in all of the books and adjudged cases on the subject that an easement may be acquired either by grant or dedication or prescription." Prescription is based upon a presumption that a grant was once issued, and there is no claim of dedication to public use in the instant case. In *Hammond v. Schiff,* 100 N. C., 161, *Chief Justice Smith* says: "While an easement is not transferred at law, for want of a seal to the instrument necessary for that purpose,

the contract, as executory, has, in equity, when acted on, a force and efficacy little short, if any, of an easement or right of support to the wall for the security of the adjacent premises."

At law, it was necessary for an easement to be created by a writing under seal, a deed; but a writing now under seal would create the right which could be enforced in equity to compel either the performance or the conveyance of the easement contracted for. Hence, in this jurisdiction, where law and equity are administered by the same court and in the same case, these distinctions are not material to the instant case. *Cagle v. Parker,* 97 N. C., 273, 274, states: "An easement can be created by a conveyance under seal or by long user from which such a conveyance is presumed to have been made." *Herndon v. R. R.,* 161 N. C., 650, 654. An estate in real property: Appeal of R. R. Co., 32 Cal., 506; *Atlantic R. R. Co. v. LeSneur* (Ariz.), 19 Pac., 157. In this latter case the Court says: "We have never seen the principle here stated doubted." "An easement always implies an interest in the land. It is real property and it is created by grant." Washburn on Easements, 5; *Long v. Mayberry* (Tenn.), 36 S. W., 1040. This case holds that a verbal contract for a right of easement is void under the Statute of Frauds. *Nunnelly v. Sou. Iron Co.* (Tenn.), 29 S. W., 361, 365; *Parker v. Meredith* (Tenn.), 59 S. W., 167; *Cadwalader v. Bailey, supra; Trustees v. Lynch,* 70 N. Y., 440; 26 Am. Rep., 615, 619, holds a negative easement by which the owner of land is restrained in its use can only be created by covenants in favor of other lands not owned by the grantor or covenantor. *Hills v. Miller,* 3 Paige, 254; *Tise v. Whitaker-Harvey Co.,* 144 N. C., 508, holds that an unregistered paper-writing agreeing to give the privilege of using an alley or driveway is insufficient, both as a dedication to the public or as a grant of a private way, and that such an effect is shut off by the *prior registration of defendants' deed. Kivett v. McKeithan, supra; Norfleet v. Cromwell,* 64 N. C., 1. This latter case, together with *Blount v. Harvey,* 51 N. C., 186, hold that an easement may be created by a covenant, although such covenant does not contain words of a grant, if the intention is clear, and that this may appear from the context.

A further discussion of easements and the manner of their creation and their effect in "running with the land" appears in *Parrott v. R. R.,* 165 N. C., 295, 300, and cases therein cited.

An equitable interest in lands is within the Statute of Frauds. *Holmes v. Holmes,* 86 N. C., p. 208; *Maxwell v. Wallace,* 45 N. C., 251; *Simms v. Killian,* 34 N. C., 252; *Rice v. Carter,* 33 N. C., 298.

Negative easements are within the Statute of Frauds and cannot be proved by parol. *Ham v. Massasoit Real Est. Co.* (R. I.), 107 Atl., 205.

A building restriction is a negative easement. *Hennen v. Deveny,* 77 S. E., 142; 71 W. Va., 629.

He who purchases land *with notice* that a restrictive negative easement has been created by which the land he purchases is charged with a negative servitude in favor of such other lots restricting its use, and when such restrictions are not against public policy or the general welfare, he will be held to take subject to them. *Wood v. Stehrer* (Md.), 86 Atl., 128. In this case, *Chief Justice Boyd* ably and clearly sets forth the rulings, both English and American.

In the instant case, while the record does not disclose the creation of any easement in favor of the plaintiffs' lands restricting use of the defendants' lands, and since such agreement, if existent, would be within the Statute of Frauds, and, therefore, required to be evidenced by some writing, there is another fatal defect in plaintiffs' case. Under C. S., 3309, all such conveyances of an interest in land to run for more than three years is required to be registered in the county where the land lies, in order to constitute notice to creditors and purchasers for a valuable consideration. *Thompson v. Blair,* 7 N. C., 583; *Johnson v. Prairie,* 91 N. C., 159; *Justice v. Baxter,* 93 N. C., 405; *Smith v. Fuller,* 152 N. C., 7; *Wood v. Tinsley,* 138 N. C., 507; *Brewington v. Hargrove,* 178 N. C., 143.

The wisdom embodied in the Connor Act has clearly demonstrated itself in the certainty and security of titles in this State, which the public has enjoyed since the first day of January, 1886, when this act went into effect.

It is necessary in the progress of society, under modern conditions, that there be *one place* where purchasers may look and find the status of titles to land. Therefore, our courts have held many times since this act went into effect that "no notice, however full and formal, will supply the place of registration." *Austin v. Staten,* 126 N. C., 783; *Fertilizer Co. v. Lane,* 173 N. C., 184; *Wood v. Lewey,* 153 N. C., 401; *Harris v. Lumber Co.,* 147 N. C., 631; *Blalock v. Strain,* 122 N. C., 283; *Buchanan v. Clark,* 164 N. C., 71; *Hinton v. Williams,* 170 N. C., 117; *Blacknall v. Hancock,* 182 N. C., 372.

Upon the instant record we see no reason, either in law or equity, to disturb the judgment of nonsuit entered by the learned and careful judge who tried the case below. Therefore, let the judgment appealed from be

Affirmed.

GEORGE PERKINS v. SPRAY WOOD & COAL COMPANY AND HEDRICK CONSTRUCTION COMPANY.

(Filed 6 May, 1925.)

1. Employer and Employee—Master and Servant—Negligence—Evidence.

The plaintiff was a laborer employed by a construction company in placing dirt upon a public highway being built by his employer, which was excavated by a heavy steam shovel operated by an independent company, and received the injury in suit while acting at the request of the one operating the shovel in placing logs for the safe passage of the shovel on the road whereunder was placed a drain pipe, as the shovel was being taken from one locality to another to resume its work: *Held*, the plaintiff, under the circumstances, is to be regarded as an employee of the defendant company operating the steam shovel, to the extent stated, who owed him the nondelegable duty to furnish him a safe place to work.

2. Same—Emergency—Trespasser—Volunteer.

A third person may render services to another at the request of the latter's employee having charge of its work under an emergency that renders the person performing such service also an employee and not a mere volunteer or trespasser.

3. Same—Safe Place to Work—Nondelegable Duty—Fellow-Servant.

Where an employee is injured by the negligence of the employer in failing to furnish him a safe place to work, the duty being nondelegable, the latter may not avoid liability on the ground that the injury was caused by a fellow-servant of the plaintiff, when an exercise of ordinary care on the employer's part, or on the part of the one having charge of the work, would have prevented it.

4. Damages—Negligence—Evidence.

Upon the issue of damages recoverable by an employee for injuries negligently and proximately caused by his employer, it is *held*, under the facts of this case, that evidence of the amounts charged by the hospital where the surgical operation had been performed on plaintiff, in consequence of the injury, doctors' bills and charges for like treatment or services, was properly admitted on the trial.

APPEAL by defendant, Hedrick Construction Company, from judgment of *Finley, J.*, at November Term, 1924, of ROCKINGHAM.

Action to recover damages for personal injuries sustained by plaintiff while at work beneath a steam shovel owned and operated by defendant, Hedrick Construction Company.

On 11 December, 1923, plaintiff was an employee of defendant, Spray Wood & Coal Company; said company, in performance of its contract with the Board of Commissioners of Rockingham County, was engaged in the construction of a road near Spray, in said county; plaintiff's

duty was to spread and level, with a shovel, dirt hauled in wagons from excavations made in the construction of said road and unloaded or dumped from the wagons on the road, in rolls or ridges.

Defendant, Hedrick Construction Company, had entered into a contract with its codefendant, Spray Wood & Coal Company, by which it undertook to make the excavations required by means of a steam shovel, and to haul the dirt taken from the excavations, by wagons, to places on the road, where it was to be spread or used in making fills. Hedrick Construction Company owned and furnished the steam shovel, wagons and teams, and employed the men required to perform the contract. Plaintiff and another laborer were employed by Spray Wood & Coal Company solely for the purpose of receiving the dirt after it had been excavated and hauled by the Hedrick Construction Company and unloaded or dumped from the wagons. The men engaged in operating the steam shovel and in driving the team and hauling the dirt were employees of the Hedrick Construction Company, while plaintiff and his colaborer were employees of Spray Wood & Coal Company. This latter company did not employ and had no control over the men operating the steam shovel or driving the wagons; the Hedrick Construction Company did not employ and had no control over plaintiff and his colaborer.

During the afternoon of 11 December, 1923, the steam shovel had completed the excavation in the place at which it had been at work. All the dirt from this place had been hauled and disposed of by plaintiff. The operator of the steam shovel was moving it to another place, on or near the road, where the work of excavation was to be resumed. A pipe line which had not been completely covered was across the fill over which the steam shovel was to be moved. The steam shovel was very heavy. The weight of the dipper and lead was two or three tons. Apprehending that the steam shovel, because of its weight and construction, would crush and injure this pipe line, the operator requested plaintiff and his colaborer to get a couple of logs and place them beside the pipe line to protect it as the steam shovel passed over it. Plaintiff was not at the moment engaged in work for his employer, Spray Wood & Coal Company, but was waiting for defendant, Hedrick Construction Company, to resume the work of excavating and hauling dirt. Plaintiff and his colaborer complied with the request of the operator and got the logs. Plaintiff went under the steam shovel to place the log beside the pipe line, and as he did so he saw the fireman on the shovel. The operator was standing beside the levers which were used to control the machine. The dipper was raised eight or ten feet above the ground and held in place by a clutch. While plaintiff was

beneath the shovel, placing the log, the dipper fell, striking him and crushing him to the ground. Plaintiff sustained serious and permanent injuries.

While plaintiff was placing the log under the shovel, in order that it might be moved across the pipe line without injury, a driver of one of the wagons used by the Hedrick Construction Company went upon the platform of the steam shovel and accidentally stepped upon the clutch which held the dipper, thereby causing the dipper to fall and injure plaintiff. After the dipper fell, the operator climbed back into the cab, pushed the fireman away, and, by operating the levers on the platform, pulled the dipper up, thus releasing plaintiff. He was a competent operator and had charge of the steam shovel for defendant; the steam shovel was in good condition.

At the close of the evidence for the plaintiff, the court allowed motion of defendant, Spray Wood & Coal Company, for judgment as of nonsuit. Defendant, Hedrick Construction Company, offered no evidence. The issues submitted to the jury, with answers, are as follows:

1. Was the plaintiff injured by the negligence of defendant, Hedrick Construction Company, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is plaintiff entitled to recover of defendant, Hedrick Construction Company? Answer: $5,000.

From judgment in accordance with verdict, defendant, Hedrick Construction Company, appealed to the Supreme Court, assigning errors based on exceptions duly noted.

D. F. Mayberry and Brooks, Parker & Smith for plaintiff.
W. H. Beckerdite and Swink, Clement & Hutchins for defendant.

CONNOR, J. Appellant, Hedrick Construction Company, upon its appeal in this case, relies upon three contentions, discussed in the brief filed in this Court, each of which is presented by assignments of error, based upon exceptions appearing in the statement of the case on appeal. Appellant did not offer evidence upon the trial. The issues were submitted to the jury solely upon the evidence offered by plaintiff. There is no serious controversy as to the facts, which this evidence tends to establish.

The first contention is that there was no evidence of actionable negligence on the part of the appellant. This Court has said, in *Ramsbottom v. R. R.*, 138 N. C., 39, in the opinion written by *Justice Hoke*, that "to establish actionable negligence, the question of contributory negligence being out of the case, the plaintiff is required to show, by the greater weight of the evidence, first, that there has been a failure to exercise proper care in the performance of some legal duty which

the defendant owed the plaintiffs under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under the circumstances and charged with a like duty; and second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." This definition has been cited with approval in opinions of this Court in numerous cases. See 2d Anno. Ed.

Plaintiff was injured by the falling of the dipper upon him while he was beneath the steam shovel, at work as requested by the operator who was the employee of defendant in charge of the steam shovel; the dipper fell because the clutch which held it up, some eight or ten feet above the ground, was released by a driver of one of the wagons, also an employee of defendant, who, while on the platform of the shovel, accidentally stepped upon it. Was this admitted cause of plaintiff's injury due to a breach of a legal duty which defendant owed to the plaintiff at the time of or immediately before the plaintiff was thus injured? If so, was such breach of duty the proximate cause of the injury—the cause that produced the result in continuous sequence, and without which it would not have occurred? Was it such a cause as a man of ordinary prudence could have foreseen would, under all the facts existing, probably produce such result? There is no plea and no contention that plaintiff, by his own negligence, contributed to his injury.

The degree of care which defendant owed plaintiff must be determined by the circumstances in which plaintiff and defendant were placed with respect to each other. Defendant's duty to plaintiff must be determined by the relation which they bore, each to the other.

Plaintiff, prior to the request of the operator of the steam shovel that he get a log and place it beside the pipe line in order that the steam shovel might pass over without injuring it, was not an employee or servant of defendant. Defendant owed him no duty other than not to wantonly or wilfully injure him. There is no evidence from which the jury could find that the operator had any express authority from defendant to hire or employ any one to aid or assist him in doing the work for which the operator was employed by defendant. The operator, however, in charge of the steam shovel was confronted by a situation in which, in order to perform his duty to his employer safely and without subjecting his employer to loss or liability, it was necessary, or at least greatly to the advantage of his employer, that he have assistance in moving the steam shovel without injury to the pipe line, in order that

he might continue his work. In this situation he called upon plaintiff for assistance, and plaintiff, not being then engaged in the performance of any duty which he owed his employer, the Spray Wood & Coal Company, but interested as such employee in the expeditious moving of the steam shovel to the new "cut," responded. While rendering this assistance, plaintiff was a servant or employee of defendant, at least to the extent that defendant owed him the duty of providing a reasonably safe place in which to work. Under the facts and circumstances, as established by the evidence in this case, the operator of the steam shovel had implied authority from defendant to call upon plaintiff to render the assistance requested. The assistance requested was incidental to the work for which the operator was employed by defendant. Plaintiff, being interested as an employee of the Spray Wood & Coal Company that the work for which his assistance was requested should be done, without delay, was not a meddler, or a trespasser or a mere volunteer when he complied with the request. He was a servant or employee of defendant, and as such was entitled to the rights and the protection due a servant or employee.

In *Vassor v. R. R.*, 142 N. C., 68, this Court, discussing the authority of a railroad conductor in charge of a train, cites with approval section 302 of Elliott on Railroads, in which it is said that the authority of a conductor does not ordinarily extend to making contracts on behalf of the company, but that there may be cases of urgent emergency where he may make a contract for the company. In that case it was held that the conductor had no authority to employ plaintiff, and that therefore the railroad company did not owe to plaintiff any of the duties due by a master. The writer of the opinion emphasizes, it seems, the fact that there was no emergency, or situation rendering it necessary for the conductor to have assistance; nor does it appear that plaintiff had any interest, personal or otherwise, in the work which he testified that he had undertaken at the time he was injured. It is said in the opinion that the authorities are to the effect that the burden was on the plaintiff to establish the authority of the conductor to hire or employ him in behalf of the company. In his concurring opinion *Justice Hoke* dissents from this holding, and says: "I am of the opinion that where a conductor of a freight train employs an ordinary hand to assist in the operation of his train, the presumption should be that his act is rightful until the contrary is made to appear." Where an employee in charge of work for his employer, in the absence of the employer and so situated that he cannot communicate with him, is confronted with an emergency which makes it necessary or greatly to his employer's interest, to make a contract either for material or labor, in order that the work for which he is employed may proceed, it seems that the employer is bound by the

contract, although there is no express authority from the employer to make the contract in his behalf. The fact that the employer is not only absent, but cannot, because of distance or other circumstances, be communicated with, together with the further fact that the material or labor contracted for is incidental to the work which it is the duty of the employee to do, should be considered in determining whether authority to make the contract to meet the emergency is to be implied."

In *Maxson v. J. I. Case Threshing Machine Company,* 81 Neb., 546, 16 L. R. A. (N. S.), 963, it is held that if an agent is given sole charge of cumbersome and complicated machinery and calls to his assistance, in performing the duties of his employment, one who in good faith enters upon such work, the person thus employed is not a volunteer or trespasser, but for the time being assumes the relation to the owner of the machinery, in whose interest it is being used, of servant and master. See *Grissom v. Atlanta & Birmingham Air Line Railway,* 13 L. R. A. (N. S.), 561 and notes.

Plaintiff was, therefore, the servant or employee of defendant while engaged in the performance of the work which he was requested to do by the operator of the steam shovel. Because of this relationship, the measure of duty which defendant owed plaintiff was not limited to merely refraining from wantonly and wilfully injuring him. This is not the standard of duty required by the law of defendant to plaintiff, under the circumstances. Defendant owed plaintiff the duty of providing a reasonably safe place in which to do the work, which he had undertaken. It was necessary for plaintiff to go under and work beneath the steam shovel. The dipper, which was movable, was drawn up, by mechanical power, eight or ten feet. It was held in this position by the clutch. This clutch was so constructed that it could be released by a person accidentally stepping upon it. This fact was necessarily known to defendant and the operator of the steam shovel. It was not due to any latent defect in the clutch, or to any defect in the machinery. It was due to the construction of the steam shovel. If accidentally released, the dipper would necessarily fall and strike any one beneath it. Under the circumstances, it was the duty of defendant to guard the machinery while plaintiff was beneath the shovel, to prevent such an accident. If properly guarded, while plaintiff was beneath it, no one would have been permitted to go upon the platform, and by accident or otherwise, cause the dipper to fall.

In *Taylor v. Power Co.,* 174 N. C., 583, *Justice Walker* says that if defendant allowed an elevator to descend while plaintiff was at work underneath it, and after he had been induced to believe by previous conduct that it would not be moved, and he was thereby injured, the negligence is clear. In *Steele v. Grant,* 166 N. C., 635, it is held that

"the duty of the master to provide reasonably safe tools, machinery, and place to work does not go to the extent of a guarantee of safety to employee, but does require that reasonable care and precaution be taken to secure safety, and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury." There is evidence of actionable negligence on the part of defendant, and same was properly submitted to the jury.

The second contention of defendant is that plaintiff was injured by the negligence of a fellow-servant for whose negligence defendant was not responsible in damages. Defendant's liability to plaintiff is not dependent on the conduct of the driver of the wagon, who went upon the steam shovel, and accidentally stepped on the clutch, thus releasing the dipper. The negligence relied upon is the failure of defendant, while plaintiff was at work for it in a place, inherently dangerous, to keep and maintain the machinery and apparatus which made the place dangerous in such condition as to afford reasonable protection to the servant against injury. The duty to do this was nondelegable. It was for the jury to say whether upon all the evidence there had been a breach of this duty.

The driver of the wagon, who accidentally stepped upon and released the clutch, thus causing the dipper to fall and injure plaintiff, and plaintiff, at time of his injury, were both servants of defendant. Neither had any power or control over the other. Both were serving a common master, and were engaged in the same general business for defendant. It does not appear, however, that the driver of the wagon had any duty, by virtue of his employment by the common master, which required him to go upon the steam shovel. He was not engaged in the performance of any duty to his master when he accidentally stepped upon the clutch. His act in going upon the steam shovel was without authority, express or implied, from defendant. In its brief, defendant says that the driver "sneaked up" on the operating platform. It was the duty of defendant to prevent just such an act, while plaintiff was at work under the shovel.

In *Michaux v. Lassiter,* 188 N. C., 132, a judgment of nonsuit was sustained. In that case, plaintiff's intestate was at work for defendant, on the ground, beneath a mixer or road paver. The pan dropped from its place, and crushed intestate so that he died in a few moments. This Court held that upon the facts in evidence there was no permissible

inference of an actionable breach of duty on the part of defendant. The injury was necessarily attributable and attributable only to an exceptional negligent act of the operator of the machine, who was a fellow-servant of intestate.

In this case, plaintiff was a servant of defendant for a special purpose. He was interested, as an employee of Spray Wood & Coal Company, that defendant should not be delayed or hindered in moving the steam shovel to the new "cut." He was waiting for defendant to resume the work of excavating and hauling dirt, before resuming himself the work for which he was employed by Spray Wood & Coal Company. In this situation, it has been held that he was not, while assisting the operator of the steam shovel, a fellow-servant of the employees of defendant; *O'Donnell v. Maine Central R. R. Co.*, 81 Maine, 552, 25 L. R. A., 658. Defendant's second contention cannot be sustained.

Defendant's third contention is that there was error in permitting plaintiff to testify as to bills due the hospital, doctors and drug store, which were unpaid, and in submitting this evidence to the jury upon the issue of damages.

Plaintiff was injured in December, 1923; he had a wife and three children; he was receiving, at the time of his injury as wages $3.00 per day. As a result of his injury, he has lost the use of one arm. He was in a hospital 64 days, and was at his home 41 days before he could turn over in bed. During all that time he was in a plaster cast. At the trial in May, 1924, he testified that he suffered pain all the time. The doctor split his leg, took out the bone and put another bone in its place. This slips as he walks. The leg stays cold all the time. He testified that his hospital bill was $346, his doctor's bill and drug-store bill $300. He further testified that he had not paid these bills, for the obvious reason that he had not been able to do so. He testified that he had promised to pay these bills. Defendant's objection to this testimony was properly overruled. The exception is not sustained.

His Honor properly submitted this evidence to the jury, for their consideration, upon the second issue.

Upon the facts found by the jury from the evidence in this case, and under the law applicable to these facts, plaintiff has recovered judgment against defendant for $5,000, as damages caused by the failure of defendant to perform a duty which the law in this State, by reason of the facts and circumstances surrounding plaintiff and defendant, at the time of the injury, imposed upon defendant.

Upon appeal we find no error in the trial and the judgment must be affirmed.

No error.

J. M. SAMONDS v. G. D. CLONINGER.

(Filed 6 May, 1925.)

1. Contracts—Options—Seals—Consideration.

An option of purchase of lands given by the owner in writing under seal indisputably imports a consideration sufficient to enforce it upon the payment of the purchase price within the time therein specified, and upon an unconditional acceptance of its terms by the optionee, with his readiness and ability to comply therewith, it becomes a bilateral or binding contract.

2. Same—Acceptance—Tender—Waiver.

Where the optionee in an option on lands offers to comply therewith according to its terms within the period of time granted therein, and is ready, able and willing to do so, a tender of the agreed purchase price is unnecessary where the owner has previously sold the lands, and by his breach has put it out of his power to make the conveyance contemplated in the option.

3. Same—Evidence—Questions for Jury—Nonsuit.

Where the optionee of lands accepts the option within the time limited, evidence that he had then correctly informed the owner that he had a cashier's check for the amount of payment required is sufficient to be submitted to the jury upon his readiness and ability to make this payment, and to deny the defendant's motion as of nonsuit thereon.

4. Contracts—Writing—Options—Parol Evidence—Principal and Agent—Breach—Defenses.

In an action by the optionee for damages against the owner for the breach of his contract of option in failing to convey the land according to its terms, the latter, without seeking reformation of the contract in equity, cannot maintain the position that the instrument did not contain the contract as made, but that it rested in parol, whereby the optionee was an agent to sell and had not advertised, etc., as he had agreed to do, when it appears that the defendant had sold the lands to another within the time prescribed, and had put it beyond his power to comply with the agency contract he has attempted to establish.

APPEAL from MECKLENBURG Superior Court, *Shaw, J.* Judgment in favor of defendant, and plaintiff appeals.

Plaintiff alleges that defendant executed, 20 August, 1923, an option whereby the defendant gave, for sixty days, the plaintiff an option to purchase the *locus in quo* at the price of $10,000 net, payable "$2,500 in cash and balance, $5,000, in B. & L., $2,500 on second mortgage for 2 years." The option provided that the defendant would execute and deliver a deed in fee with full covenants of warranty and seisin, and free from all encumbrances. It was further stipulated that, upon a failure to exercise the option within the time (60 days), the obligation would be null and void.

It appears in evidence that plaintiff is a real estate dealer and that he did not register this option. On 19 September, 1923, the defendant, together with his wife, conveyed the *locus in quo* to W. T. Burroughs and H. L. Taylor and their wives for $10,000. Evidence for plaintiff tends to show that, on 18 October, 1923, J. A. Williamson agreed with plaintiff to purchase the *locus in quo* at the price of $11,000, and gave plaintiff a letter evidencing his offer and containing a check for $2,500 as cash payment thereon. This check was certified by the Merchants and Farmers' National Bank, of Charlotte, N. C. On 19 October, 1923, plaintiff advised defendant by letter that he wished to exercise the option and that he was ready to pay the cash payment and to "sign for the balance purchase price in accordance with the terms of the option, which I hereby accept." The signing and delivery of the option was not denied. Plaintiff testified that this was done on its date or the next day.

Plaintiff further testified that he phoned defendant that he had a purchaser and defendant said the property was sold; that plaintiff went into defendant's store and told him that he had a purchaser for the property in the option and that the purchaser was willing to take it and to give to him his check ($2,500) if he would deliver the deed. Cloninger said the property had been sold. "I (plaintiff) asked him what disposition he was going to make of the option I held on the property, and he said, 'None—you have no option.' "

Plaintiff further testified that he showed defendant a copy of the option and the defendant showed the disposition not to want to talk to plaintiff about the option. Plaintiff testified that he stood ready, able and willing to perform the option on his part.

There was other evidence from which defendant claims plaintiff was unable to comply with the option, and that the efforts to sell to Williamson were after he knew defendant had sold the *locus in quo* and was not a bona fide effort to sell, but only a pretense to get money from defendant.

The defendant offered no evidence.

In the answer, defendant admits the signing of the option, and alleges that the writing did not contain all of the contract between the parties, and that the agreement was based on the condition that the plaintiff would advertise the *locus in quo* and make diligent effort to sell same at once; and that said writing was signed as a mere incident to the "aforesaid contract of agency." And the consideration was the agreement to make diligent effort to sell, and that plaintiff breached the contract by his failure to advertise and to make diligent effort to sell the land. That defendant waited some time for plaintiff to sell the land, and he then sold the property, and when his deed was regis-

tered, the plaintiff began to try to fix up a pretended sale, and by fraudulent representation induce a buyer to make an offer.

At the close of plaintiff's evidence, on defendant's motion, the court entered judgment as upon nonsuit, and plaintiff excepted and appealed.

Taliaferro & Clarkson for plaintiff.
Parker, Stewart, McRae & Bobbitt for defendant.

VARSER, J. This case presents only the question whether, upon all the evidence, viewed in its most favorable aspect for the plaintiff, there was any evidence sufficient to support a verdict for the plaintiff upon the issues necessary to his recovery.

The defendant offered no testimony, and his allegations that present an affirmative defense are not material to this discussion further than as his explanation of transaction.

The option in the instant case is under seal and extends sixty days from the date. It is a continuing offer to sell for the period named—sixty days. We find in the instant record sufficient evidence upon which the jury may find that the plaintiff gave notice to defendant of his acceptance of the terms of the option and of his readiness, willingness and ability to perform it on his part.

The option under seal required no consideration to support it. Of course, the recital of a consideration in the contract is not conclusive as to the consideration further than the contractual nature of this recital extends. This recital is contractual that a consideration exists sufficient to support the contract. *Harrell v. Watson,* 63 N. C., 454; Mordecai's Law Lectures, 931; Minor's Institutes, Vol. 3, Part 1, 139; *Watkins v. Robertson,* 105 Va., 269; *Willard v. Taylor,* 75 U. S., 557, 19 L. Ed., 501; *O'Brien v. Boland,* 166 Mass., 481; *Weaver v. Burr,* 31 W. Va., 736; *McMillan v. Ames,* 33 Minn., 257. In *Thomason v. Bescher,* 176 N. C., 622, *Hoke, J.,* quoting from Pomeroy on Contracts, says: "If the unilateral contract is sealed and the common-law effect of the seal has not been taken away or changed by statute, it appears that the promissory offer contained in the writing cannot be recalled before the time for acceptance has expired." 9 Cyc., 287.

It appears from this latter case that this rule is absolute, and that the defendant will not be heard to dispute the existence of a sufficient consideration to support such a contract when the action is at law for damages, as in the instant case. However, when the suit is in equity for specific performance, as was the case in *Ward v. Albertson,* 165 N. C., 218, 222, the $5.00 mentioned as a consideration was held sufficient, although it had never, in fact, been paid, because the vendor had refused to accept the vendee's check for same when tendered. It was, nevertheless, a sufficient consideration to support the contract when

specific performance was sought. The real consideration to which equity will look, regardless of form, in order to determine whether it will exercise its discretion to decree specific performance is the price promised for the land. When the acceptance and notice thereof have been given to the vendee, with readiness and ability to perform, the contract becomes bilateral and the mutual promises are the real consideration for the bilateral obligations arising therefrom. *Thomason v. Bescher, supra; Alabama Ry. Co. v. Long,* 158 Ala., 301; *Ross v. Parks,* 93 Ala., 153; *Smith v. Bangham,* 156 Cal., 359.

When notice is given to the defendant of plaintiff's intention to purchase the land in controversy, and plaintiff offers to comply with the option, it thereby becomes a binding contract and the rights of the parties are fixed as set out therein. *Bryant Timber Co. v. Wilson,* 151 N. C., 154; *Ward v. Albertson, supra; Watkins v. Robertson, supra; Thomason v. Bescher, supra; Dill v. Reynolds,* 186 N. C., 296; *Elvington v. Shingle Co., ante,* 366.

An elaborate note collecting the authorities from many courts, fully discussing this question, is contained in 2 A. L. R., 631, immediately after the report of *Thomason v. Bescher, supra.*

It may be, upon a trial of this case, that the jury may not find that the plaintiff, within the life of the option, accepted the terms thereof and offered to comply therewith and was ready, able and willing to do so, but, from the evidence submitted, it appears that a jury may so find, and it was, therefore, error to dismiss as upon nonsuit. The execution of the contract is admitted, but the defendant contends in his answer that all of the contract was not contained in the writing and that such other stipulations were made as a part thereof as would require the plaintiff to make diligent effort to sell the land and to advertise it for sale in order to bring about a speedy sale. There is no prayer for reformation, but defendant seeks by this to convert the contract into a mere incident attendant upon the creation of an agency by which the plaintiff is to have the privilege of selling and is to make an effort to sell the lands in controversy for defendant. No evidence to this effect appears, but, since the agreement is to sell the lands for the stipulated price, we now see no hurt to the defendant from the omission of such stipulations or the nonperformance of them on the part of the plaintiff, if the jury shall find that the plaintiff was ready, able and willing to comply with the contract, and so notified the defendant during the 60 days of its life.

However, it appears from the admission of the defendant that the defendant conveyed the lands in controversy on 19 September, 1923, when the option had only run half its prescribed life. This constituted a clear breach of the contract on the part of the defendant, for he then

voluntarily put it beyond his power to perform the contract on his part. Therefore, a tender of the payments, as set out in the option, was not necessary. In *Smith v. Jordan,* 13 Minn., 264, 97 Am. Decisions, 232, the Court says: "The complaint shows that the defendants, by the sale of the logs to Daniel Howes & Co., disqualified themselves from performing the contract. After this, either demand or tender would have been an idle ceremony which the law, under such circumstances, does not require." *Newcomb v. Brackett,* 16 Mass., 161; *Clarke v. Crandall,* 27 Barb., 73. In *Laybourne v. Seymour* (Minn.), 54 N. W., 941, *Dickinson, J.,* says: "The corporation thereby disabled itself from performing the specific obligations expressed in its written undertaking, and, hence, subjected itself at once to the alternative liability to answer in damages as for breach of contract. The law does not require the doing of a useless thing, and the corporation having thus disabled itself to specifically perform its agreement, a demand was not necessary to convert the right to demand the goods into a right to compensation in money." *Delamater v. Miller* (N. Y.), 13 Am. Decisions, 512.

If liability is denied, as in the instant case, by the statement of the defendant that the land had been sold and by a statement that plaintiff had no option, a formal tender of the purchase price is not required in order to sue for specific performance or damages. *Bradford v. Foster,* 87 Tenn., 4; *Sharp v. West,* 150 Fed. Rep., 458; *McLeod v. Hendry,* 126 Ga., 167, *Cobb, P. J.,* says: "It is well settled that no tender is necessary when it would be a mere idle and useless ceremony. When one of the parties to a contract is unable to perform his obligation thereunder, no tender or performance by the other party, who is able and willing to perform, is necessary." In *Irwin v. Askew,* 74 Ga., 582, it is held: "When a contract for the sale of land and putting the purchaser in possession was broken by the vendor, he saying to the purchaser that he could not comply with its terms, the tender of the purchase money was unnecessary."

In the instant case there is sufficient evidence for the jury to find, if they accept plaintiff's contentions that the plaintiff had the $2,500 in a check, certified by the bank on which it was drawn, and that the currency in the form of legal tender was available therefrom or otherwise, and that he was ready, able and willing to make this payment and to give such other securities as would be necessary, including the procurement of either the amount from the building and loan contemplated, or such securities as would meet the stipulation in the option, to wit: "Balance, $5,000, N. B. & L."

When it is reasonably certain that an offer to perform will be refused and that payment or performance will not be accepted, as a general rule, tender is waived. *Gaylord v. McCoy,* 161 N. C., 686. A refusal

to deliver an article sold because the price had gone up makes it unnecessary to tender the price. *Blalock v. Clark,* 133 N. C., 306. A refusal of an offer to pay waives a formal tender. *Gallimore v. Grubb,* 156 N. C., 575.

If defendant has openly refused to perform, plaintiff need not make a tender or demand before suit brought. It is sufficient that he is ready and willing and offers to perform in his pleadings. *Bateman v. Hopkins,* 157 N. C., 470. "The defendant's positively refusing to take the slave, Sam, at all, dispensed with the necessity of a tender of him at Hillsborough." *Mobley v. Fossett,* 20 N. C., 93, citing 2 Stark. on Evidence, 778.

A denial in one's pleading of the agreement sued upon constituted a waiver of tender in *Martin v. Bank,* 131 N. C., 121. In *Smith v. Building & Loan Asso.,* 119 N. C., 257, where a debtor stated that he had the money in the bank ready to pay, but creditor refused to receive it, it was held that the money need not be actually produced.

It is necessary that contracts, when entered into under circumstances as to import mature reflection before execution upon which the parties have a right to depend, should not be treated lightly. Unless there are such facts existent as will relieve the defendant from the performance of the instant contract, and if the jury shall find that the same has been at all times fully kept on the part of the plaintiff, and that, notwithstanding the defendant's conveyance of the *locus in quo* to other parties by deed of record during the 60 days, the plaintiff offered to perform on his part, and that such offer was coupled with his ability and readiness to perform, then the defendant has no just right to complain if he is required to satisfy such loss as plaintiff may have suffered on account of defendant's inability to perform said contract.

The sanctity of contracts and a certainty of their performance, or satisfaction in lieu thereof, form the basis of modern business transactions. Upon these, energy and property may be expended and thrift and prosperity encouraged and promoted. The law does not require that parties who are ready, able and willing to perform a contract which has mutual obligations arising out of the acceptance by the optionee, shall do useless and vain things in making tenders on their part when it is admitted that the maker of the option has voluntarily disabled himself so that performance on his part is no longer possible. He must be ready, able and willing, and must give timely notice thereof. No unfair advantage must be taken of the seller, whether he is able to perform specifically or not.

Therefore, we are constrained to hold that there was error in dismissing this action as upon nonsuit, and it is ordered that a new trial be had, and to that end, let the judgment be

Reversed.

STATE v. WILL WILLIAMS.

(Filed 6 May, 1925.)

1. Homicide—Criminal Law—Murder—Premeditation and Deliberation—Mental Weakness—Drunkenness—Burden of Proof.

On a trial for a homicide, by killing the deceased with a shotgun, where the prisoner's counsel contends and offers evidence of the prisoner's weak mental condition and of intoxication, upon the question of premeditation and deliberation, to reduce the offense from murder in the first degree to murder in the second degree: *Held*, the fact of intoxication alone does not have the effect contended for, under the evidence in the case, and the offense will be that of murder in the first degree, if the condition of the prisoner's mind at the time of the killing was sufficient under the evidence for him to have premeditated and deliberated upon the act, the burden being upon the State to prove this beyond a reasonable doubt.

2. Same—Intent—Instructions—Appeal and Error.

Held, under the facts upon this trial for a homicide, the charge upon first degree murder was sufficiently clear, and the jury could not have been misled as to the correctness of the application of the law as to the previous intent of the prisoner necessary to sustain a verdict of the highest degree of the crime.

3. Criminal Law—Reasonable Doubt—Burden of Proof.

The burden of showing guilt beyond a reasonable doubt required of the State in criminal cases, though not easily defined, imports an uncertainty of mind by the jury after a full, fair and reasonable consideration of the evidence.

APPEAL by defendant from *Lane, J.*, at November Term, 1924, of SCOTLAND.

This is a criminal action in which defendant was convicted of murder in the first degree. From the judgment in accordance with the statute, that defendant suffer death by electrocution, defendant appealed to the Supreme Court. Assignments of error, based upon exceptions to instructions of the court to the jury and to the refusal of the court to give instructions as requested by defendant, appear in the opinion.

The evidence for the State was as follows:

Lewis Gibson testified that on 22 June, 1924, he was coroner of Scotland County, and as such conducted the inquest over the body of Frank Green; the body when first seen by the witness was lying beside his bed in his home with four holes in his breast; he had been shot with a shotgun. He was in his night clothes. He was dead. His death was caused by gunshot wounds.

Sylvia Green testified that Frank Green, the deceased, was her husband; she and her husband were at home on Saturday night, 22 June,

1924; between one and two o'clock a. m. some one came to the house and, rapping on the side of the house, called, "Hello, Uncle Frank," two or three times. Frank got out of bed and replied, "Hello, who is that?" Some one said, "Come out here; ain't nobody to hurt you." Frank got up, went to the door, and said again, "Who is that?" The reply was, "Step out here, I want to see you. I already told you it wasn't anybody to hurt you. I want you to carry me off a piece." Frank then said, "That's Will Williams." Just as he said this, he was shot. Frank came back into the house, fell upon the bed, and died at once.

Witness further testified that she saw Will Williams on Thursday before this Saturday night. He came to the field, where witness and her children were chopping cotton. He acted as if he was drunk. He took a hoe and began to chop up cotton. Witness told him that if he could not chop better than he was doing to get out of the field; that if her husband caught him chopping cotton that way he would run him out of the field. He replied, "God damn old man Frank. I will kill him." He had been drinking and vomited while in the field.

Rosa Green, daughter of this witness and deceased, corroborated her mother as to the occurrences at their home on Saturday night, and also in the cotton field on Thursday. She also testified that defendant asked her, if he killed her father, could he take possession of the house, and that she told him "No."

George Nichols testified that he lived near the home of defendant and Spencer Gay. He heard a gun fire the night Frank Green was killed. Just before that he heard an automobile near his house. It stopped near the bridge, and Spencer Gay got out and cranked it up. Shortly after this, witness heard the gun fire up at Frank Green's house. Pretty soon after, he saw Will Williams pass his window going in the direction of Spencer Gay's house. He then heard an automobile up toward Gay's house.

Frank Chavis testified that he went to Frank Green's house the morning after the shooting. While there he saw some tracks around the house, about a hundred yards from the house, leading toward the home of defendant and Spencer Gay. These tracks came into the road where an automobile had turned around. Witness tracked the automobile toward Spencer Gay's house. Defendant was at Frank Green's house that morning with the officers. An officer had Will Williams' shoes. One of the shoes fitted one of the tracks found near the house. Defendant put on the shoe. The track he then made was like the track found there when witness first went to the house that morning. There was a dent in both tracks. Defendant's shoe had a rubber heel which was worn some.

Spencer Gay was then sworn and offered as a witness by the State. This witness had been indicted and arraigned for the murder of Frank Green. On motion of the solicitor for the State, this indictment and the indictment of defendant had been, without objection, consolidated for the purposes of trial. The joint trial had proceeded until the conclusion of the testimony of the witness Frank Chavis. Spencer Gay, through his counsel, then tendered the State a plea of guilty of murder in the second degree. This plea was accepted, and the judge announced that Spencer Gay was no longer on trial, and that only defendant was now on trial. Spencer Gay testified as follows:

He had known defendant, Will Williams, five or six years. He saw him Thursday before Frank Green was shot. Defendant came to him that night and said, "The women folks, Miss Sylvia and Rosa, want me to kill the old man, Frank." He wanted witness to carry him off somewhere. Witness refused to do so.

On Saturday following, witness was on his way to Gibson. Defendant came to his house. On his return from Gibson, witness met up with defendant. At defendant's request, witness took him to Effie Davis' and then to Laurel Hill. They went by Hattie Purvis' and then to Sexton's, where defendant got a little whiskey. Both witness and defendant had been drinking. Defendant swapped off whiskey for wine. When they were near George Nichols' house, the car choked down. Witness cranked the car and defendant went off. Witness went to sleep in the car. When defendant came back he told witness that he had been to Frank Green's house and shot the old man—said he did not know whether he had killed him, but that he had shot him. Defendant put the gun in the car and they drove off. Witness saw defendant again next morning.

The State rested, and defendant offered the following evidence:

Will Williams, the defendant, testified that on Saturday he went to Gibson with Spencer Gay in his car; that they drove to various places, got whiskey, and finally came to the woods near George Nichols'. Spencer Gay then said to witness: "This is a good time to kill old man Frank. You know them women have been trying to get you to kill him. Listen to me. I done been talking to the women. You go get the gun and come back here. I will stay here until you get back." Witness got the gun and returned to Spencer Gay. He then said to witness: "You go to old man Frank's house, call him out and shoot him. Then come back to me. Knock on his house and say, 'Come out,' and if he asks who is there, say, 'It ain't nobody to hurt you.'" Witness said to Gay, "Won't the bloodhounds track me?" Spencer replied, "No, they can't track you any further than my car." Witness then

testified that he went and did what Spencer told him and came back to the car. Witness and Spencer Gay then went off together in the car.

Witness further testified that Sylvia Green and Rosa Green, wife and daughter of deceased, had asked him to kill Frank Green; they had said he was so mean they wanted him killed. Witness had refused to do so—had nothing against old man Frank. The night he killed him he had drunk about a pint of whiskey and was drunk; does not remember all that happened. It all came to him like a dream the next morning.

On cross-examination, the solicitor asked the witness: "You shot him with the intention that if you killed him, you would take charge of the house, the four-horse crop and the girls?" Witness replied, "Yes, sir."

Defendant offered several witnesses who testified as to their opinion of his mental capacity. They testified that defendant never was very bright; that he had average intelligence and knew right from wrong. Tom Williams, father of defendant, testified that defendant was "franzy-minded," didn't use good common-sense, and had been to school "mighty little."

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

L. B. Prince and E. M. Gill for defendant.

CONNOR, J. In view of the grave consequences to the defendant, of the judgment in this case, we have stated the evidence in full, substantially as the same appears in the statement of the case on appeal. If the facts are as defendant himself testifies, he is guilty of murder in the second degree, at least. His testimony as to the essential facts is fully and abundantly corroborated by the testimony of other witnesses. He admits the intentional killing by him of Frank Green, the deceased, with a shotgun, and there is no evidence of justification or excuse. His counsel concede that upon all the evidence he is guilty of murder in the second degree, and contend only that by reason of weak mental capacity and intoxication, as the result of having drunk whiskey during the night of the homicide, he was unable to "deliberate and premeditate" to such a degree as is essential to guilt of murder in the first degree, as found by the jury. They do not contend that there is evidence tending to show that defendant was not responsible for his act and, therefore, not capable of committing crime for either reason.

There were no exceptions to evidence submitted to the jury and no exceptions to evidence offered and excluded by the court. The charge of the court appears in full in the statement of the case on appeal.

His Honor instructed the jury fully and correctly upon the law applicable to the facts which the jury might find from the evidence. He defined the terms "premeditation" and "deliberation," and instructed the jury that the burden of proving both beyond a reasonable doubt was upon the State. He stated the contentions of both the defendant and the State upon this phase of the case, fully and without objection from the learned counsel for defendant. He instructed the jury as follows:

"Now, in order for a person to be guilty of murder in the first degree, there must be an intent to kill; there must have been sufficient mental capacity to form that intent in the mind, and in order for a person to be guilty of any crime there must have been sufficient mental capacity to know right from wrong.

"Drunkenness under the law is no excuse for crime and does not relieve the person of guilt for crime entirely. But in the case of murder, if a person is so intoxicated and rendered so insensible and so irrational by intoxication of any kind, or is naturally so weak-minded from natural causes that he cannot form an intent and cannot premeditate and deliberate, then it reduces the offense from murder in the first degree to murder in the second degree."

Defendant's counsel except to these instructions and assign same as error. The assignment cannot be sustained. The instructions are supported by opinions of this Court in *S. v. Allen,* 186 N. C., 302; *S. v. Foster,* 172 N. C., 960; *S. v. English,* 164 N. C., 497. His Honor did not instruct the jury that an intent to kill was the only element in the crime of murder in the first degree. In view of the full and correct charge as to premeditation and deliberation, the jury could not, as intelligent men, have been misled to the prejudice of defendant.

The assignment of error based upon the exception to the definition of reasonable doubt given by his Honor in his charge cannot be sustained. His Honor told the jury that "by the term reasonable doubt is meant a doubt which has a valid and satisfactory reason for it; one arising out of the evidence in the case—just what the terms imply." The term "reasonable doubt" is not easily defined. It imports an uncertainty of mind, after a consideration of all the evidence, tending to establish the existence of the fact alleged by him upon whom the law places the burden; this uncertainty of mind must be the result of a full, fair, and reasonable consideration of all the evidence. Black's Law Dictionary.

The fourth and fifth exceptions are to the failure of his Honor to give instructions requested in apt time and in writing. Both these instructions were given in the charge, the principles of law embodied

in them being clearly stated and fully explained by his Honor. The remaining exceptions are formal.

The issue in this case involved the life and death of defendant. The record shows that the trial was conducted by the presiding judge with full appreciation of the grave responsibilities imposed upon him and in strict compliance with the law. Defendant has forfeited his life and must now suffer death; this is in accordance with the law of the State, for defendant has wilfully, unlawfully and feloniously, with malice aforethought, killed and murdered Frank Green, against the peace and dignity of the State; the murder was a deliberate and premeditated killing; the punishment prescribed by law is death.

On appeal to this Court, where only matters of law or legal inference can be considered, we find

No error.

J. S. BYRD v. J. J. NIVENS, JR.

(Filed 6 May, 1925.)

Attachment—Clerks of Court—Appeal — Statutes—Motions—Undertakings—Bond.

Where in the husband's civil action for damages for the alienation of his wife's affection the plaintiff has given the undertaking in attachment, and the defendant has moved before the clerk of the court for an increase of the bond and appealed from the denial of his motion, and the same has been sent to the resident judge of the district accordingly, the appeal is from a question of fact as distinguished from an issue of fact, the statutes on the subject give the plaintiff the right to be heard before the judge, and where the judge, notwithstanding the plaintiff's expressed desire to be heard, proceeds without affording him this opportunity and increases his bond, his action is contrary to the requirements of the statute and ineffectual. C. S., 633, 635, 636.

APPEAL by plaintiff from judgment rendered by *Stack, J.*, at Chambers, in Monroe, N. C., 24 December, 1924.

This is a civil action for damages for alienating the affections of the wife of the plaintiff. A warrant of attachment was issued in said proceedings, and plaintiff filed $200 undertaking. The defendant filed motion to increase bond. Upon hearing the motion before the clerk, it was denied, and from this judgment the defendant appealed.

The order of the clerk is as follows:

"This cause coming on to be heard before the undersigned clerk of this court on the motion filed by the defendant in said cause under date of 9 December, 1924, and which was set for hearing under date of 11 December, 1924, and the same being heard, and after hearing the same

it is ordered and adjudged and the motion is hereby denied. Done this 11th day of December, 1924. Edgar Haywood, C. S. C.

From the foregoing judgment the defendant gave notice in open court of appeal from said judgment to the judge of the court riding this judicial district to be heard at such time and place as the said judge may appoint by agreement. . . .

The defendant also moved the court to dismiss said action on account of irregularities in the affidavit of writ of attachment and the complaint, and said motion is overruled. . . .

The defendant appealed from said ruling to the judge of the court holding the courts of this judicial district. Edgar Haywood, C. S. C."

After hearing the motion and appeal by defendant, there was no further proceedings of any kind in the premises so far as disclosed by the record until 23 December, 1924, when notice was served on plaintiff's attorney of hearing to be at Monroe on the following day at 10 o'clock a. m. before his Honor, A. M. Stack, Judge. The plaintiff's attorney wired Judge Stack on the morning of 24 December, 1924, as follows:

"Judge A. M. Stack, Monroe, N. C.

Byrd against Nivens received notice yesterday from defendant that he would move today to increase bond. Appeal irregular not compliance with statute, papers never returned to clerk since issued. Weather too inclement account heavy sleet, notice insufficient, date inopportune and under circumstances plaintiff does not consent to hear case out of district. R. T. Poole, Attorney for Plaintiff."

The decision of Judge Stack is as follows:

"The above entitled case coming on to be heard before the undersigned judge at Monroe, North Carolina, on the 24th day of December, 1924, upon the defendant's appeal from an order of the clerk of the Superior Court of Montgomery County refusing to require the plaintiff to increase the bond in attachment in this case, and the motion being heard at the time and place stated above over the plaintiff's objection, and after hearing counsel for the defendant, and examining the papers in the cause, the court is of the opinion that the bond should be increased, and, therefore, orders that the plaintiff, within ten days of the service of a copy of this order on him, give a good and sufficient undertaking in the sum of $1,000, pursuant to statute, to indemnify the defendant against damage which he may suffer by reason of said attachment, and upon failure of the plaintiff to give said bond as herein required within ten days of the service of this order upon him, then this action shall stand dismissed. The bond required above is to be in addition to the $200.00 bond already filed. This 24th day of December, 1924."

Plaintiff duly excepted, assigned error and appealed to the Supreme Court:

"1. That the statute provides how cases may be appealed from clerks of the Superior Court to the Superior Court judge, and there was no such compliance in this case.

2. Because there was not sufficient notice to the plaintiff to attend the hearing.

3. Because the judge heard the case out of the 15th Judicial District, over protest of plaintiff.

4. Because the judge made an order dismissing the plaintiff's action, if he failed to file $1,000 bond within ten days from service of copy of the order."

R. T. Poole for plaintiff.
No counsel for defendant.

CLARKSON, J. C. S., 827, is as follows: "The defendant, or person who has acquired a lien upon or interest in his property before or after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, *apply to the court having jurisdiction* to vacate or modify the warrant, *or to increase the security given by the plaintiff,* or for one or more of those forms of relief, together or in the alternative, *as in cases of other provisional remedies.*" (Italics ours.)

The clerk of the Superior Court of Montgomery County, before issuance of attachment in this cause, required plaintiff to give an undertaking in the sum of $200, in accordance with C. S., 803. Defendant made a motion to increase the security given by the plaintiff from $200 to $20,000, under C. S., 827, *supra.* The clerk gave notice to the attorneys representing the parties that the motion would be heard at Troy at one o'clock, 11 December, 1924. Upon the hearing the motion of defendant was denied. The defendant appealed from the ruling of the clerk.

C. S., 633, is as follows:

"Appeals lie to the judge of the Superior Court having jurisdiction, either in term time or vacation, from judgments of the clerk of the Superior Court in all matters of law or legal inference. In case of such transfer or appeal, neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the Superior Court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within ten days after the entry of the order or judgment of the clerk. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who,

being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof."

C. S., 635. "On such appeal, the clerk, within three days thereafter, shall prepare and sign a statement of the case, of his decision and of the appeal, and exhibit such statement to the parties or their attorneys on request. If the statement is satisfactory, the parties or their attorneys must sign it. If either objects to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach the writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district, for his decision."

C. S., 636. "It is the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he has been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for the hearing, and give the attorneys of both parties reasonable notice. He must transmit his decision in writing, endorsed on or attached to the record, to the clerk of the court, who shall immediately acknowledge its receipt, and within three days after notify the attorneys of the parties of the decision and, on request and the payment of his legal fees, give them a copy thereof, and the parties receiving such notice may proceed thereafter according to law."

In *Cushing v. Styron*, 104 N. C., p. 338, *Merrimon, C. J.*, said: "The clerk of the court, acting as and for the court, had authority, out of term time, to grant the warrant of attachment (The Code, sec. 351) (now C. S., 801), and, likewise, to allow all proper amendments in that respect and connection. (The Code, sec. 251, 273) (now substantially C. S., 403-547.) From his decision an appeal lay to the judge, which might be taken within ten days after the entry of the order or judgment complained of, and, within three days after the appeal was taken, it was the duty of the clerk to 'prepare a statement of the case, of his decision and of the appeal,' and sign the same. He should, within that time, have exhibited this statement to the parties or their attorneys; if it were satisfactory, the parties or their attorneys should have signed the same; if either party objected to the statement as partial or erroneous, he should have put his objection in writing, and this objection should have been attached to the statement of the case. Within two days after this was done, the clerk should have sent such statement and the objections, and copies of all necessary papers, by mail, or otherwise, to the judge for his decision. (The Code,

secs. 252, 253, 254) (now substantially C. S., 632, 633 and 635, *supra.*) *Palmer v. Bosher,* 71 N. C., 291."

In *Ledbetter v. Pinner,* 120 N. C., 455, it was held, at p. 457: "From the very nature of the proceedings on appeal from the clerk to the judge, it is clear that such appeals can be heard at chambers *and anywhere in the district.*" (Italics ours.) And at p. 458: "The only controverted fact arising on the pleadings was as to the advisability of a sale for partition or an actual division. This was not an issue of fact, but a question of fact for the decision of the clerk in the first instance, subject to review by the judge on appeal." *Tayloe v. Carrow,* 156 N. C., p. 6.

In the present case, it was not "an issue of fact" to be determined by a jury, "but a question of fact" for the clerk, and, on appeal, subject to review by the judge. Under the facts and circumstances, as appear of record, we do not think C. S., 633, 635 and 636, *supra,* have been substantially complied with by defendant. *Hicks v. Wooten,* 175 N. C., 597. We do not think that "the judge residing in the district, or in his absence the judge holding the courts for the district," can hear the questions and render a decision out of the district. Reasonable notice must be given the attorneys of both parties. Of course, these provisions can be, under certain circumstances, by agreement of parties, changed or waived.

We find nothing in the record showing either that the provisions were waived or any agreement to waive same. On the contrary, plaintiff, from the record, is standing strictly on his legal rights.

The judgment below is

Reversed.

LOULA REID DAVIDSON v. JOHN E. S. DAVIDSON.

(Filed 6 May, 1925.)

Divorce—Alimony Pendente Lite—Statutes—Appeal and Error.

While the amount allowed in the Superior Court as alimony for the wife's support and counsel fees *pendente lite* (C. S., 1666) is not ordinarily reviewable on appeal to the Supreme Court, it may be otherwise in exceptional cases, where the allowance is altogether disproportioned to the husband's earnings or income from property, and the findings in this case appearing to be meager in this respect, the case is remanded for the inquiry to be proceeded with, to ascertain what allowance would be "just and proper, having regard to the circumstances of the parties."

APPEAL by defendant from an order of *Harding, J.,* made 31 January, 1925, at Chambers in MECKLENBURG.

On 10 January, 1925, the plaintiff brought suit against the defendant for divorce from bed and board, filed her complaint, and served a written notice on the defendant that on 16 January, 1925, she would apply for alimony *pendente lite* and for an allowance for counsel fees and expenses. Several affidavits were filed by the parties, and the motion was heard on 23 January. Among the findings of fact are the following:

1. The plaintiff and defendant own jointly a home in the city of Charlotte, the title to which is in both plaintiff and defendant, the defendant having purchased same since the marriage and having the deed made to both the plaintiff and the defendant for the purpose of protecting the defendant and for protecting the plaintiff if any financial reverses should come to the defendant or in case of death of the defendant.

2. Up until the 8th of January, 1925, the plaintiff and defendant had lived together in said home. On that date the plaintiff left the home of the defendant and has not occupied said home since said time, and the defendant is now in sole possession thereof. The value of said home is about $ ..... The defendant has no other property other than income from his practice as a physician, which aggregates annually $2,000, out of which are paid the expenses of the office, rent, salary of nurse or attendant in his office, and other expenses incidental to his own professional business, which amounts to $950 per year.

3. The plaintiff has in her own right seven shares of stock in the Home Real Estate & Guaranty Company, in the city of Charlotte. Said stock is worth not less than the par value of $100 per share, and since the first day of January, 1925, there has been paid to her an annual dividend of 8%. The plaintiff has no other means or income from which to derive a support. When the plaintiff left the home of defendant she had in cash $117 and she has received as income $56, being 8% dividend on seven shares of stock, par value $100, in Home Real Estate & Guaranty Company.

The defendant was ordered to pay into the clerk's office on 15 February, 1925, $150 to cover the plaintiff's counsel fees and expenses, and $100 on the first day of March and on the first day of each succeeding month as alimony *pendente lite*. The defendant excepted and appealed.

Parker, Stewart, McRae & Bobbitt and Walter Clark for appellant.
Thaddeus A. Adams for appellee.

ADAMS, J. This is an application for alimony pending the plaintiff's suit for divorce from bed and board. It is authorized by C. S., 1666, which is to be distinguished from section 1665 providing for ali-

mony after judgment and from section 1667 providing for a reasonable subsistence under certain conditions without impairing the marriage contract.

The defendant contends that the amount allowed as temporary alimony is excessive and makes this the ground of one of his exceptions. It has been held in several of our decisions that while the right to alimony involves a question of law, the amount of alimony and counsel fees is a matter of judicial discretion and usually not reviewable. *Jones v. Jones,* 173 N. C., 279; *Barker v. Barker,* 136 N. C., 316; *Moore v. Moore,* 130 N. C., 333; *Miller v. Miller,* 75 N. C., 70. Excepting attorney's fees and expenses, the amount ordinarily allowed *pendente lite* under section 1666 is not in excess of the amount prescribed by section 1665 upon a final judgment for divorce from bed and board—that is, one-third part of the net annual income from the estate and occupation or labor of the party against whom the judgment is rendered. 19 C. J., 222 (532). But this rule is not inflexible and the amount to be allowed is not arbitrarily fixed by the statute. "The income," said *Mr. Justice Bynum* in *Miller v. Miller, supra,* "may be derived from personal labor, wages, or salary, as well as from lands or personal property"; and in *Muse v. Muse,* 84 N. C., 36, *Mr. Justice Ruffin* remarked, "A husband is not excused from the maintenance of his wife because he lacks an estate. He must labor, if need be, for her support." But "before an allowance of temporary alimony is made, admission or proof of the husband's ability to pay it should be shown. The allowance may be based on the husband's earnings, or his earning capacity, although he is not possessed of money or property." 19 C. J., 216 (518).

The parties hold the house and lot in the city of Charlotte as an estate by the entirety. Granting that the defendant has the right to control, use, and lease the property during coverture (*Dorsey v. Kirkland,* 177 N. C., 520), we find nothing in the record which determines either its actual or its rental value. The judge found the fact to be that the defendant's only remaining property is the income derived from his practice as a physician. It is also undetermined whether his present income is the reasonable measure of his earning capacity. Apparently his only source of revenue is an annual income of $2,000, from which is to be deducted $950 for expenses necessary to the prosecution of his business. His net annual income, then, is $1,050, less than $100 a month; and by the judgment he is required to pay the plaintiff more than his net income. The amount, we apprehend, is proportionately more than the judge intended to allow. It may be all the circumstances disclosed at the hearing do not appear in the record, but upon the facts found and presented by the appeal, it would seem

that the allowance exceeds that which is contemplated by the statute. The situation, of course, may be clarified by a more comprehensive finding of the facts.

While we think the alimony allowed by the judge is more than his findings justify, still upon another hearing additional evidence may be received in reference to the value of defendant's entire estate, and the net annual income that is or should be derived from his estate and labor. The ultimate object is to secure such alimony as may be "just and proper, having regard to the circumstances of the parties." C. S., 1666.

That the complaint does not state a cause of action is another contention which is urged by the defendant. A discussion of the questions pertaining to the sufficiency of the complaint may be found in the following cases: *Everton v. Everton,* 50 N. C., 202; *Erwin v. Erwin,* 57 N. C., 82; *Joyner v. Joyner,* 59 N. C., 322; *McQueen v. McQueen,* 82 N. C., 471; *White v. White,* 84 N. C., 342; *Jackson v. Jackson,* 105 N. C., 433; *O'Connor v. O'Connor,* 109 N. C., 140; *Martin v. Martin,* 130 N. C., 27; *Garsed v. Garsed,* 170 N. C., 672. *Everton v. Everton,* however, is criticized *obiter* in *Jones v. Jones,* 173 N. C., 283. The exception addressed to the alleged insufficiency of the complaint presents a serious question; but as this is a preliminary motion and as the case goes back on another ground, we think the plaintiff should not be denied the right of moving to amend her complaint so as to make its allegations more comprehensive and more specific. *Jackson v. Jackson, supra.*

It is also insisted for the defendant that the court erred in hearing evidence of circumstances occurring within six months after the institution of the action, but there were antecedent facts tending to support the plaintiff's contentions, and we are not warranted in reversing the judgment solely on this ground. The issues have not yet been submitted to the jury.

Reversed and remanded.

JAMES K. ROANE v. W. E. G. ROBINSON, S. M. ROBINSON, C. M. ROBINSON AND JOHN C. RANKIN.

(Filed 6 May, 1925.)

Wills—Estates — Remainders — Fee Simple — Repugnancy — Executory Devise—Statutes.

Where the will devises realty to the testatrix's husband "to be his own, entirely and solely without restriction," but should he die leaving issue by a subsequent marriage, to be divided as set forth in the will: *Held,*

by the first provision the husband takes the fee, not a life estate with power of disposition, and the further and restricted provision being repugnant thereto is void, and he may convey to a purchaser a fee-simple title under the devise. C. S., 4162.

APPEAL by defendants from *Lane, J.*, at March Term, 1925, of MECKLENBURG.

Controversy without action. Following are the material facts:

1. Mrs. Virginia M. Roane died a resident of the State of Virginia on 22 June, 1905, leaving a last will and testament which has been duly probated and recorded in the office of the Probate Court of King William County, Virginia, and the same has also been duly probated and recorded in the office of the clerk of the Superior Court of Mecklenburg County, North Carolina.

2. The will contains these provisions:

(*a*) To my niece, Virginia Graham Waring, of Memphis, Tenn., I leave all my mother's jewelry, save an aquamarine set (bracelet, brooch and necklace), which I give to my nephew, Thomas Roane Waring, Jr., of Memphis, Tenn., as my present to his bride when he marries.

(*b*) To my beloved husband, James Keith Roane, I leave all else I die possessed of, personal and real, to be his own, entirely and solely, to use and spend as he chooses, without any restriction. In the event, however, that he does not marry and have issue, I wish what is left of my realty at his death to be divided as I shall hereafter state, only to be so divided in case he does not leave living issue at his death, but in the event of issue by any subsequent marriage to be divided as devised in fourth article of this will.

(*c*) James Keith Roane dying without issue, I desire two hundred dollars be given to each of my nephews, Thomas, Earl and James Roane Commins, of Rumford, Va. Also the silver marked "R" being either that belonging to their grandfather, James Roane, or else gifts to me from them. The rest of the personalty and realty to go to Thomas Roane Waring, Jr., of Memphis, Tenn.

(*d*) In event of James Keith Roane, my beloved husband, leaving issue by a subsequent marriage, I want all my personalty and realty I die possessed of and not spent by him up to his death to go to his children, save only the silver marked "W," the silver and Bohemian glass set given me by my father, the silver marked "R. P. A.," my mother's portrait and portrait of Uncle Thomas Roane, which articles I desire given to my nephew, Thomas Roane Waring.

3. The testatrix was survived by her husband, but she left no children.

4. At the time of her death she was the owner (besides certain real estate in Virginia) of five lots in the city of Charlotte, which are the subject of this controversy.

5. After her death the plaintiff (surviving husband) married again, is 72 years of age, and has no children born of the second marriage.

6. The plaintiff has contracted in writing to convey to the defendants in fee simple the five lots described above, and the defendants have contracted to purchase said lots at an agreed price.

7. The plaintiff is ready and willing to execute his deed for said lots, and the defendants are ready, able, and willing to comply with their contract, but deny that plaintiff can convey a title in fee.

8. The controversy submitted to the court for its decision is whether said James K. Roane acquired the right and power to convey a fee-simple title to the lands above described under the provisions of the will of Mrs. Virginia M. Roane.

Upon the facts, it was adjudged that the plaintiff is entitled to have specific performance of the contract by the defendants and that upon tender by the plaintiff of a deed in fee with the usual covenants the defendants be required to accept the same and to comply with the contract of purchase. The defendants excepted and appealed.

Pharr & Bell for plaintiff.

C. H. Gover and D. W. Spencer for defendants.

ADAMS, J. The question presented has been before the Court so often that nothing more is necessary than a brief review of some of the decisions in which the controlling principle is treated. Whether a devise of land with a power of disposition over it carries the fee or a lesser estate is obviously dependent upon the terms in which it is expressed. The rule is clearly stated in *Carroll v. Herring:* "Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, and any limitation over or qualifying expression of less import is void for repugnancy. The only exceptions to such a rule is where the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition." 180 N. C., 369.

By statutory provision a devise of real estate shall be construed to be a devise in fee simple unless it appear in express words or by plain intent that the testator's purpose was to convey an estate of less dignity. C. S., 4162. An unrestricted devise of real property therefore passes the fee. If a fee be limited after a fee by way of executory devise the taker of the first fee cannot as a general rule bar the taker of the second fee by the execution of a deed of bargain and sale with warranty. *Myers v. Craig,* 44 N. C., 169, overruling *Spruill v. Leary,* 35 N. C., 225, 408, and distinguishing *Flynn v. Williams,* 23 N. C., 509. But this principle does not apply here, for it will be noticed that Mrs. Roane's "wish" as to the disposition of certain property after the death of her husband relates to such real property as may be left by him undisposed of—in her words, "what is left of my realty at his death to be divided as I shall hereafter state." Moreover, where a fee is limited upon a fee by way of executory devise, if a general right to dispose of the property is given to the taker of the first fee, such right is inconsistent with the second fee and the consequence is that the limitation over of the second fee is inoperative and void. *Newland v. Newland,* 46 N. C., 463; *Hall v. Robinson,* 56 N. C., 348. In *McDaniel v. McDaniel,* 58 N. C., 351, *Chief Justice Pearson* employed this language: "If one devises in fee simple, he cannot make a limitation over by way of executory devise without cutting down the first fee, in order to make room for the second; for, after giving a fee simple absolutely, there is no part of the estate or interest left in him. So, if one devises without an express limitation of the estate, and gives a general power to dispose of the land, he cannot make a limitation over to a third person in case the first taker dies without disposing of the land, or of such part as he may not dispose of, for the general power confers the absolute ownership, and leaves nothing in the devisor. But, if one devises to A and his heirs, the estate of A to be void in the event of his dying without a child living at his death, the devisor still has some interest which he may give to a third person, or by reason of which he may confer on A a power of disposition with such restrictions as he may see proper to impose, and there is no principle of law which prevents him from doing both, as is done in our case." So with a single exception, to which we shall advert, in the words of *Chancellor Kent,* "We may lay it down as an incontrovertible rule that where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee." *Jackson v. Robbins,* 16 John. Rep. 537; Kent's Com. 35, 586; *Batchelor v. Macon,* 69 N. C., 545; *Williams v. Parker,* 84 N. C., 90; *Fellowes v. Durfey,* 163 N. C., 305; *Smith v. Creech,* 186 N. C., 187; *O'Quinn v. Crane, ante,* 97.

As pointed out in *Carroll v. Herring, supra,* the exception to the "incontrovertible rule," which has been referred to, arises where the testator gives to the first taker an estate for life only by certain and express terms and annexes to it the power of disposition. In such case the devisee for life does not take an estate in fee. There is a fair illustration of the principle in *Chewning v. Mason,* 158 N. C., 578. The will contained this clause: "I give and bequeath (after all my just debts shall have been paid) all of my real and personal property, together with all debts owing my estate, to my wife, Martha Chewning, during her natural life, and then to dispose of it as she sees proper." In an opinion in which many authorities are cited the Court held that the wife took only a life estate. The principle upon which the reasoning rests is sustained in other cases which are familiar to the profession, among them *Burwell v. Bank,* 186 N. C., 117; *Miller v. Scott,* 185 N. C., 93; *ibid.,* 184 N. C., 556; *Allen v. Smith,* 183 N. C., 222; *Herring v. Williams,* 158 N. C., 1; *Patrick v. Morehead,* 85 N. C., 62.

In *Chewning v. Mason, supra,* the Court, noting a marked distinction between "property" and "power," said: "The estate devised to Mrs. Chewning is property, the power of disposal a mere authority which she could exercise or not, in her discretion. She had a general power annexed to the life estate, which she derived from the testator under the will. If she had exercised the power by selling the land, the title of the purchasers would have been derived, not from her, who merely executed the power, but from the testator or the donor of the power. 'The appointer is merely an instrument; the appointee is in by the original deed. The appointee takes in the same manner as if his name had been inserted in the power, or as if the power and instrument executing the power had been expressed in that giving the power. He does not take from the donee, as his assignee.' 2 Wash. R. P., 320; 1 Sugden on Powers (Ed. 1856), 243; 2 Sug. Pow. 22; *Doolittle v. Lewis,* 7 Johns ch. 45. 'In the execution of a power there is no contract between the donee of the power and the appointee. The donee is the mere instrument by which the estate is passed from the donor to the appointee, and when the appointment is made, the appointee at once takes the estate from the donor as if it had been conveyed directly to him.' *Norfleet v. Hawkins,* 93 N. C., 392. It does not follow, because she could sell and convey the land under the power, that she thereby became the owner in fee." In accord with this are other cases maintaining the general doctrine that where a life tenant is given unrestricted power to dispose of the estate devised he may exercise the power and by deed properly executed may convey the property in fee. *Parks v. Robinson,* 138 N. C., 269; *Darden v. Matthews,* 173 N. C., 186.

The plaintiff contends that the judgment should be affirmed whether the deed tendered the defendant be treated as the exercise of a power or as the conveyance of a fee devised to the plaintiff.

In our opinion, the plaintiff acquired a title in fee simple to the lots in question under the second item of the will and is entitled to the specific performance of his contract with the defendants. The judgment is, therefore,

Affirmed.

MARY I. JENKINS, ADMINISTRATRIX OF HUGH H. JENKINS, DECEASED, v. THOMAS GRIFFITH, A. J. DRAPER AND J. R. WITHERS, INDIVIDUALLY AND AS MEMBERS OF THE MECKLENBURG HIGHWAY COMMISSION, AND MECKLENBURG HIGHWAY COMMISSION, A CORPORATION.

(Filed 6 May, 1925.)

Government—Roads and Highways—Counties—Road Commissions—Negligence.

An agency of county government incorporated by statute to assume control and working of the county highway, formerly performed by the county commissioners, exercises therein a purely governmental function, from which no liability will attach for personal injuries inflicted on others by the negligence of its employees.

APPEAL by plaintiff from *Shaw, J.*, October Term, 1924, of MECKLENBURG.

The plaintiff declared in tort for the wrongful death of her intestate caused by the alleged negligence of the defendants while her intestate was working as a convict under sentence from the Superior Court in a rock quarry in connection with the building of the public roads of said county. The specifications of negligence are: failure to exercise due care to provide a safe place in which to work; failure to warn and notify deceased of such dangers as were incident to the use of dynamite, and a failure to furnish reasonably safe appliances, and failure to have persons of experience to conduct the blasting of rock. The defendant, Highway Commission, demurred for that the complaint failed to set out a cause of action against it in tort for which it was liable. Demurrer sustained and plaintiff appealed.

J. F. Flowers and Marvin L. Ritch for plaintiff.

J. L. DeLaney for defendant.

PER CURIAM. The corporate defendant was created by chapter 383, Public-Local Laws 1921, and vested with certain duties and powers which hitherto had been exercised by the Board of Commissioners of

Mecklenburg County. This defendant exercises only governmental functions—builds, maintains and controls public roads in Mecklenburg County, which are not a part of the State system, and has charge of the county convicts, as provided by its charter above cited.

Neither phase of the duties of this defendant exceeds the limits of purely governmental functions. Hence, this action cannot be maintained against the defendant, Mecklenburg Highway Commission. *Scales v. Winston-Salem, ante,* 469; *Moody v. State Prison,* 128 N. C., 12; *Murdock Grate Co. v. Commonwealth,* 152 Mass., 28; *Baker v. Spencer State Hospital* (W. Va.), 121 S. E., 497; *Bourne v. Hart,* 93 Cal., 321; *County Commissioners v. Duckett,* 20 Md., 468; 83 Am. Dec., 557, and note; *Clodfelter v. State,* 86 N. C., 51; *White v. Commissioners,* 90 N. C., 437; *Burbank v. Commissioners,* 92 N. C., 257; *Manuel v. Commissioners,* 98 N. C., 9; *Threadgill v. Commissioners,* 99 N. C., 352; *Moffitt v. Asheville,* 103 N. C., 237; *Pritchard v. Commissioners,* 126 N. C., 908; *Bell v. Commissioners,* 127 N. C., 85; *Jones v. Commissioners,* 130 N. C., 451; *Hitch v. Commissioners,* 132 N. C., 573; *Keenan v. Commissioners,* 167 N. C., 356; *Snider v. High Point,* 168 N. C., 608; *Sandlin v. Wilmington,* 185 N. C., 257.

Therefore, the judgment of the trial court, dismissing this action as to the Mecklenburg Highway Commission, is

Affirmed.

A. L. GHORLEY, ADMINISTRATOR, v. ATLANTA & CHARLOTTE AIR LINE RAILWAY COMPANY ET AL.

(Filed 6 May, 1925.)

Carriers—Negligence—Evidence—Nonsuit—Last Clear Chance.

Upon a motion as of nonsuit in this case: *Held,* the evidence was sufficient upon the issue of the contributory negligence of the plaintiff's intestate, to sustain a verdict in plaintiff's favor, there being testimony that the engineer on defendant railroad company's locomotive should have seen the intestate in time to have avoided the injury, under the rule of the last clear chance.

APPEAL by defendants from *Stack, J.,* at December Term, 1924, of GASTON.

Civil action tried upon the following issues:

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

"2. Did the plaintiff's intestate contribute to her death by her own negligence as alleged in the answer? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,000.00."

At the conclusion of plaintiff's evidence, on motion of defendants, judgment of nonsuit was entered as to the Piedmont & Northern Railway Company and the city of Gastonia.

From a judgment on the verdict for plaintiff, the defendants, Atlanta & Charlotte Air Line Railway Company and Southern Railway Company, appeal, assigning errors.

George W. Wilson, Woltz & Woltz, Marvin Ritch and Mangum & Denny for plaintiff.

Manly, Hendren & Womble, Clyde R. Hoey, George B. Mason and O. F. Mason for defendants.

PER CURIAM. The defendants' chief assignment of error, or the one most strongly urged on the argument and in their brief, is the exception addressed to the action of the court in overruling their demurrer to the evidence, interposed first at the close of plaintiff's evidence, by motion to dismiss the action or for judgment as of nonsuit, and renewed by like motion at the close of all the evidence. C. S., 567.

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 amply supported thereby. It is the settled rule of practice in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Nash v. Royster, ante,* 408.

No benefit would be derived from detailing the testimony of the several witnesses, as the principal question before us is whether it is sufficient to carry the case to the jury, and we think it is.

It was earnestly insisted by defendants that, under the evidence, plaintiff's intestate, a child seven years of age, was guilty of contributory negligence in walking on defendants' track in front of a moving train, which caused her death, but we think the trial court was clearly correct in submitting the question to the jury, as he did. There was ample evidence to warrant the jury in finding that the engineer or fireman, in the exercise of reasonable care, could have seen, and should have seen, the little girl in time to have avoided the injury. The train was not in sight when plaintiff's intestate went upon the track, and,

though she was walking with her back to the train, no signal or warning was given to notify her of its approach. The engineer and fireman said they could not see her because of a 3% curve in the track and a moving freight train on a parallel track. There was evidence from the plaintiff to the contrary. The passenger train which struck plaintiff's intestate was running at the time of the injury in excess of the rate of speed allowed by ordinance of the city of Gastonia. The case was properly submitted to the jury. For a valuable and exhaustive treatise on "Contributory Negligence of Children," see *Jacobs v. Koehler Sporting Goods Co.,* 208 N. Y., 416, as reported in L. R. A., 1917-F, and annotation, pp. 10-164.

The evidence was conflicting on the main issue of liability; the jury has determined the matter against the defendants; there is no reversible error appearing on the record; the verdict and judgment will be upheld.

No error.

M. S. HENSLEY ET UX. v. L. HELVENSTON.

(Filed 6 May, 1925.)

Negligence—Automobiles—Identity of Persons—Evidence—Nonsuit.

Upon motion as of nonsuit upon the evidence in an action to recover damages of defendant for negligently driving his automobile upon the highway, wherein the evidence was sufficient as to the negligence alleged, testimony of a witness that he had seen defendant driving the car that caused the injury to plaintiff, with the admission that the license plate upon the car was issued in the name of the defendant, is sufficient to take the case to the jury as to the identity of the defendant as the one causing the injury.

APPEAL by plaintiffs from *Shaw, J.,* at October Term, 1924, of MECKLENBURG.

Civil action to recover damages for alleged negligent injuries sustained by plaintiffs in a collision, on a public highway, between the automobile in which plaintiffs were riding and another automobile, which plaintiffs allege was owned and operated at the time by the defendant, L. Helvenston.

From a judgment as of nonsuit entered on a demurrer to the evidence at the close of plaintiffs' testimony, plaintiffs appeal.

Brenizer & Scholl for plaintiffs.

Hueling Davis, Preston & Ross for defendant.

STACY, C. J. There was ample evidence tending to show negligence on the part of the driver of the car which struck the automobile in which plaintiffs were riding. The motion to nonsuit was allowed on the ground that plaintiffs had failed to connect the defendant with the operation of said car or to show that he was liable for its operation. In this we think there was error.

Counsel for plaintiffs and the trial court seem to have overlooked the following testimony of Dr. Ward: "On the night of the 9th day of September, 1923, I was in Charlotte until about ten minutes of nine, at which time I left Charlotte for Monroe; while returning to Monroe, about two miles before reaching Matthews, I noticed a car stopped on the right-hand side of the road, and I thought that I recognized him (Mr. Hensley) as a friend of mine, and so I stopped and asked him if he needed any help. He said yes, he did, and I pulled up there and got in his car and started it for him and turned it over to him, and while walking back toward my car I looked up toward Charlotte and noticed a car coming at a high rate of speed, swaying from side to side. . . . In the meantime, Mr. Hensley had gone on toward Monroe and Mr. Helvenston passed me. The car coming down the road, swaying from side to side, I would judge, was going at a rate of speed between fifty and sixty miles an hour. After this car passed at the rapid rate of speed which I have described, the accident occurred, which was, I would judge, 25 yards ahead of where I was at the time."

It will be observed the witness says, "Mr. Helvenston passed me." The natural inference from this testimony is that Mr. Helvenston was in the car which was being driven at a high rate of speed and which struck plaintiffs' automobile. It was further in evidence—in fact, admitted—that this rapidly driven car which ran into plaintiff's automobile bore defendant's license number. This circumstance, taken in connection with Dr. Ward's testimony, was sufficient to carry the case to the jury. *Freeman v. Dalton,* 183 N. C., 538.

The presence of Mr. Helvenston on the road that night, if such be a fact, as testified to by Dr. Ward, together with the admitted circumstance that the car which ran into plaintiffs' automobile bore the defendant's license plate or number, is sufficient evidence to warrant the jury in finding, though they would not be required to find from such evidence, that the defendant was responsible for the operation of the car which injured plaintiffs. *Clark v. Sweaney,* 176 N. C., 529; *Linville v. Nissen,* 162 N. C., 96; *Wallace v. Squires,* 186 N. C., 344.

A reversal of the judgment of nonsuit, of course, leaves the matter open for the plaintiffs, if so advised, to renew their motion for an order of arrest and bail under Art. 33, ch. 12, of the Consolidated Statutes.

Reversed.

I. C. NANCE ET AL v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 6 May, 1925.)

1. Evidence—Principal and Agent—Declarations—Hearsay—Appeal and Error.

Statements of the agent of a railroad company as to the condition of its stockyard, where injuries to plaintiff's shipment of stock is alleged to have been caused from exposure in inclement weather, are not part of the *res gestæ* when made after the alleged injury has occurred, and are incompetent as hearsay, but the error may be cured by defendant's further evidence or admissions on the subject.

2. Evidence—Experts.

Held, in this case the evidence given by an expert in answer to hypothetical questions was incompetent, applying *Hill v. R. R.*, 186 N. C., 475.

APPEAL by defendant from *Stack, J.*, at September Term, 1924, of MONTGOMERY.

W. A. Cochran and R. T. Poole for plaintiffs.
Armstrong & Armstrong for defendant.

ADAMS, J. The plaintiffs bought a carload of horses and mules in Richmond, Virginia, and at 3 p. m., 28 March, 1923, delivered them to the Seaboard Air Line Railway for transportation to Troy, in Montgomery County. The stock arrived in Raleigh the next day at 6 p. m. and were delivered to the defendant for carriage to the place of destination. On 30 March, at 5 p. m., they were delivered to the plaintiffs. In a short time three of the mules died; others, it is asserted, were suffering with pneumonia.

On 29 May, 1923, the plaintiffs brought suit against the defendant to recover damages. The alleged cause of action is the defendant's negligent failure to care for the stock after the car was received by the defendant in Raleigh and before it was forwarded to Troy. Specifically, it was the alleged negligent keeping of the stock for several hours in an open stockyard without suitable nourishment and the negligent failure to protect the stock during this time from exposure to cold and rain. To support these allegations the plaintiffs introduced three witnesses who not only testified that sometime in May "the agent in the station" at Raleigh pointed out to them the "pen" in which he said the stock had been confined when taken from the car, but informed them also as to the contents of an official record made more than a month before. These witnesses were then permitted to testify concerning the condition of the "pen" as they found it to be in May.

This evidence was incompetent. The declarations of the agent were hearsay. "One of the most important of the rules excluding certain classes of testimony is that which rejects hearsay evidence. By this is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information." Jones on Ev. (2 ed.), sec. 297; *King v. Bynum,* 137 N. C., 491; *Chandler v. Jones,* 173 N. C., 427; *S. v. Springs,* 184 N. C., 768. The agent's statement to these witnesses was not competent as a declaration characterizing or qualifying an act presently done within the scope of his agency and constituting a part of the *res gestæ;* it was the narrative of a past event and, of course, inadmissible against the defendant. *R. R. v. Smitherman,* 178 N. C., 595, 599; *Jones v. Ins. Co.,* 172 N. C., 142; *Smith v. R. R.,* 68 N. C., 107.

But this error, otherwise ground for a new trial, was cured by the defendant's evidence. The testimony of W. N. Wilson, defendant's clerk, corroborates the plaintiffs' witnesses as to the condition of the stockyard. True, there is no direct evidence that the witnesses referred to same place, but the main allegation of negligence relates to the condition, not the situation, of the "pen," and as to this there is no substantial difference in the evidence.

We think, however, there was reversible error in the admission of Dr. Martin's answer to the hypothetical question put to him as an expert. His answer is almost identical with an answer which was disapproved in *Hill v. R. R.,* 186 N. C., 475. The reasoning in that case, which need not be repeated now, applies with equal force to the defendant's exception to the question and answer in the instant case. For this error the defendant is entitled to a

New trial.

STATE v. MARTIN BOST.

(Filed 13 May, 1925.)

1. Appeal and Error—Settlement of Case—Notice to Parties—Statutes.

Unless the case on appeal to the Supreme Court has been settled by agreement of counsel, C. S., 644 gives the parties the right to be notified by the judge of the place and time he will settle the case, and where the appellant has asked the judge to fix the time and place for the purpose, it is error for the trial judge to disregard his right to be present.

2. Appeal and Error—Jurors—Challenge—Prejudice—Recordari.

Where the appellant makes a motion in the Supreme Court for a recordari to show that he had been prejudiced by being wrongfully com-

pelled to accept a juror, he must not only show that his peremptory challenge had been exhausted, but that the juror had been retained subject to his exception.

3. Homicide—Murder — Self-defense — Instructions—Provocation—Quitting the Combat—Appeal and Error.

In an action for a homicide, if there was evidence tending to show that the prisoner after provoking a quarrel with the deceased had left him and had gone off to attend to his business, without evidence of his having provoked the quarrel afterwards, an instruction to the effect that the prisoner may not successfully show justification as a defense under the circumstances, is reversible error.

APPEAL by defendant from *Stack, J.*, at October Term, 1924, of CABARRUS.

Criminal prosecution, tried upon an indictment charging the defendant with murder.

When the case was called, the solicitor for the State announced that he would not insist upon a verdict of murder in the first degree, but that he would ask for a verdict of murder in the second or manslaughter as the degree of guilt might be disclosed by the evidence adduced on the hearing.

The defendant, thereupon, admitted the intentional killing of the deceased with a deadly weapon, and pleaded that the same was done in the exercise of his own proper self-defense. Under this admission, the defendant was given the opening and conclusion, both in the introduction of evidence and in the order of argument.

There was evidence on behalf of the defendant tending to show that Jesse Vanderburg, in company with two of his sons and a man by the name of Aiken, came to the home of the defendant on Monday night, directly after dark, 15 September, 1924. They had a 3-gallon jug of wine. Aiken and the two boys left about midnight, but Jesse Vanderburg, who had evidently been drinking, refused to go away with them. The defendant told him he might sleep in one of his beds, but he soon went out, saying he was going home. He was found, however, the next morning lying on the bed which the defendant had offered him the night before. His hat and jug were on the porch and he was still wearing his clothes.

Vanderburg was about the defendant's house all day Tuesday, it being a rainy day, and he talked of going home several times. He even asked the defendant to let him have a mule to ride home. This the defendant consented to do, but he failed to get away. Finally, as night came on, the defendant went out to feed his stock and to milk his cow. On returning to the house, according to the defendant's testimony, the following took place: "I went through the cook room and in the dining room with my milk and I heard him kicking at the

screen door. There was a well at the back end of the kitchen. When I went in the dining room, I went in the door next to the well and through. I never noticed whether the screen in the dining room was fastened. I went to shut the door. He kicked a hole a dog could go through in the screen, and when he saw me he said he had a gun in his pocket and was going to shoot me, and when I pushed the door shut he went off along on the porch; I could see him passing the window and I was coming on through shutting the other door, and I heard him out there cursing me, and I thought I'd get out of the house, and just as I walked to the door he was at the steps, had the axe up this way (indicating), and said he was going to come in there and kill me. If I'd stepped out he was close enough to reach me. If I could have got to the door sooner I could have got away, and I just had to shoot him or be killed. I shot twice with a pistol."

The deceased was a vigorous, active man, weighing about 200 pounds, while the defendant is 63 years of age and weighs about 150 pounds.

It was the theory of the State that the deceased had been shot in the woods and probably carried to the house by the defendant, but there was little more than conjecture to support this theory. Two of the State's witnesses testified that they heard three shots; and there was evidence tending to show that the axe was found some distance away from the porch. Vanderburg died the following day, after having made a statement to his wife about the shooting. In giving his dying declaration, she said: "I asked him what they fell out about. He said: 'We didn't have any fuss at all'; said he was at the woods, started home; 'I don't know what made him shoot me.' He didn't say he shot him at the woods."

From a verdict finding the defendant guilty of manslaughter, and judgment pronounced thereon, he appeals, assigning errors.

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

J. L. Crowell, Hartsell & Hartsell, H. S. Williams and J. Lee Crowell, Jr., for defendant.

STACY, C. J., after stating the case: The defendant, *in limine,* suggested a diminution of the record and lodged a motion for certiorari, or that the case be remanded for settlement in agreement with the provisions of the statute. As a basis for this motion, it is alleged that the defendant's statement of case on appeal, together with the solicitor's objection thereto, was sent from Concord, N. C., to the judge at his home in Monroe, N. C., on 20 February, 1925, with the request that he fix a time and place for settling the case before him. On the following

day the judge settled the case and returned the papers to the clerk without notice to counsel or opportunity for them to appear before him when he settled the case. Counsel for defendant assert that they expected to appear before the judge when the case was settled, and that one of their exceptions was modified or changed to the prejudice of the defendant.

When the case on appeal is not settled by agreement of counsel, and the papers are sent to the judge with a request that he fix a time and place for settling same before him, the statute, C. S., 644, provides: "The judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of the request. At the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or, if the attorneys are not present, file a copy in the office of the clerk of the court. If the judge has left the district before the notice of disagreement, he may settle the case without returning to the district."

The defendant's first exception as it appears in the statement of case on appeal is as follows: "After the State had passed the jury, and after the State had exhausted its peremptory challenges, and after the jury had been tendered to the defendant, and before the jury was empaneled, the State received information that the juror, J. W. Driskill, had committed a homicide himself, and thereupon stated to the court that this information had been obtained, and the State asked the court in its discretion to be permitted to challenge the juror, Driskill, on the ground that he had committed a homicide himself. The defendant objected. Upon being questioned, the juror, J. W. Driskill, admitted that he had killed a man and was put in jail for it, but that the grand jury found no bill against him. The court remarked at the time that it didn't want any one on the jury that had ever killed any one, and to this remark of the court the defendant excepted. The court in its discretion allowed the challenge and stood the juror aside. To all of which the defendant in apt time excepted."

It is averred that at the time the juror Driskill was excused by the court, the defendant, as well as the State, had exhausted his peremptory challenges, and that this circumstance was inadvertently omitted from the case on appeal, which the defendant thinks is material to his exception, and that the judge would insert it if given an opportunity to do so.

There would be merit in the defendant's motion if it appeared, which it does not, that he had undertaken to challenge another juror after the juror Driskill had been stood aside. *S. v. Fuller,* 114 N. C., 886. It is now the settled practice in this jurisdiction that no ruling relating to

the qualification of jurors and growing out of challenges to the polls will be reviewed on appeal, unless the appellant has exhausted his peremptory challenges and then undertakes to challenge another juror. *Oliphant v. R. R.*, 171 N. C., 303. His right is not to select, but to reject, jurors; and if the jury as drawn be fair and impartial, the complaining party would be entitled to no more on a new trial, and this he has already had on the first trial. *S. v. Levy,* 187 N. C., p. 587.

There is on the record, however, an exception which we think must be held for error. In dealing with the defendant's plea of self-defense, the trial court instructed the jury as follows: "Before he can set up that plea, gentlemen of the jury, he must satisfy you that he did not provoke the difficulty, because when a man brings on a difficulty and he is forced to kill he cannot set up the plea of self-defense, because he provoked the trouble. Another principle is, that if the defendant, in this case, entered into the difficulty at the beginning willingly, then he can't set up the plea of self-defense." This instruction was repeated in substance several times during the charge.

There is no substantial evidence on the record tending to show that the defendant provoked the difficulty or entered into it willingly, but if his Honor deemed it wise to emphasize this principle of law, we think, in view of the defendant's evidence, he should have gone further and told the jury that the right of self-defense may be restored to one who has provoked a difficulty, or entered into it willingly, by "quitting the combat" in good faith and giving his adversary notice of such action on his part. *S. v. Kennedy,* 169 N. C., 326; *S. v. Pollard,* 168 N. C., 116. We assume this was an inadvertence on the part of the careful judge who tried the case, but we have repeatedly held that such omission is prejudicial error. *Jarrett v. Trunk Co.,* 144 N. C., 299.

If the defendant had provoked the deceased to anger or had brought on the difficulty at an earlier hour in the day, it would seem that when he went to feed his stock and milk his cow he had then abandoned the dispute or combat. At any rate, we think, the above instruction, while probably not reversible under a given state of facts, must be held for error on the present record, even in the absence of any special request. *Butler v. Mfg. Co.,* 182 N. C., p. 553; *Lea v. Utilities Co.,* 176 N. C., p. 514. "When the judge assumes to charge and correctly charges the law upon one phase of the evidence, the charge is incomplete unless it embraces the law as applicable to the respective contentions of each party, and such failure is reversible error." *Brown, J.,* in *Real Estate Co. v. Moser,* 175 N. C., 259.

For error in the charge, as indicated, there must be another trial, and it is so ordered.

New trial.

J. C. MARTIN, ADMINISTRATOR OF S. W. MARTIN, DECEASED, v. P. H. HANES KNITTING COMPANY.

(Filed 13 May, 1925.)

1. Appeal and Error—Questions and Answers—Objections and Exceptions—Evidence—Motions.

Exceptions to answers unresponsive to questions should be made on motion to strike them out; and general exceptions to evidence incompetent only in part will not be considered on appeal.

2. Evidence—Suffering—Hearsay.

In an action to recover damages for a wrongful death resulting from a negligent personal injury, the remarks or ejaculations of the patient brought forth by present suffering are competent, though incompetent as to past suffering as evidencing the condition of the patient.

3. Evidence—Expert Opinions—Physicians—Questions for Jury—Appeal and Error.

In an action to recover of the employer of intestate damages for its failure to provide him a safe place to work, the death resulting several months after the injury, it is competent for a medical expert to testify his opinion in answer to a question hypothecated upon the jury's finding of negligence, that the injury so inflicted resulted in the intestate's death, and not objectionable as invading the province of the jury.

4. Negligence—Proximate Cause—Instructions—Appeal and Error.

Damages proximately caused by the negligent act of another and recoverable are the efficient cause of the alleged negligent act, not necessarily those that are nearest in time or space, and an instruction thereon given plainly in the substance of this principle is not error.

APPEAL by defendant from *Long, J.*, at the November Term, 1924, of YADKIN.

The intestate was an employee of the defendant. He was injured on 16 December, 1920, and died 1 August, 1921. It is alleged that he was a doffer, and that in performing the duties assigned to him he was required to carry his doffer box with great haste a distance of 150 or 200 feet over the floors of the defendant's mill; that the floors had been made slick and dangerous by the use of water and washing powders; and that the intestate, by reason thereof, had slipped and fallen with such violence as to cause the fracture of certain bones and other injuries which resulted in his death.

A second cause of action had reference to the alleged negligent employment of an incompetent physician, but the issues relating to it were not answered, and it need not be considered.

The verdict was as follows:

1. Was the death of plaintiff's intestate caused by the negligence of the Hanes Knitting Company, as alleged in the complaint of the plaintiff's first cause of action?

Answer: Yes.

2. What damage, if any, is plaintiff entitled to recover of the defendant, P. H. Hanes Knitting Company, on the first cause of action?

Answer: $5,000.00.

Hayes & Jones and Williams & Reavis for plaintiff.
Swink, Clement & Hutchins for defendant.

ADAMS, J. The first exception relates to the manner in which the physician had treated the intestate's injured knee; but the issues concerning the physician's alleged negligence were not considered or answered. The remainder of the witness' answer, if not competent as a dying declaration under C. S., 160, was not responsive to the question, and no motion was made to strike it out. *Dellinger v. Building Co.,* 187 N. C., 845. Moreover, a part of the evidence was unobjectionable, and it has often been held that a general exception will not be entertained unless all the evidence is incompetent. *Smiley v. Pearce,* 98 N. C., 185; *Rollins v. Wicker,* 154 N. C., 559; *Phillips v. Land Co.,* 174 N. C., 542.

The defendant excepted to evidence tending to show that the intestate "complained all the time—leg hurt him day and night." This evidence was admitted, not on the ground, as suggested by the defendant, that it was a dying declaration, but as indicating the declarant's bodily feeling and physical condition. Whenever it becomes material to show a person's condition of health or state of mind, his declarations may usually be received, in the words of *Chief Justice Ruffin,* as the "reasonable and natural evidence of the true situation and feelings of the person for the time being"; but when they refer to the past, such declarations are merely the narrative of one not on oath and, therefore, not admissible. *Roulhac v. White,* 31 N. C., 63; *Biles v. Holmes,* 33 N. C., 16; *Lush v. McDaniel,* 35 N. C., 485; *Wallace v. McIntosh,* 49 N. C., 434; *Gardner v. Klutts,* 53 N. C., 375; *S. v. Harris,* 63 N. C., 1, 6; *Howard v. Wright,* 173 N. C., 339, 343; *Jordan v. Motor Lines,* 182 N. C., 559. Exceptions 2, 3, 4, and 6 are, therefore, overruled.

The plaintiff propounded to Dr. Duncan, a medical expert, a hypothetical question intended to elicit his opinion as to the cause of the intestate's death. The defendant objected on the ground (1) that the hypotheses were not sustained by the evidence, and (2) that the witness was permitted practically to determine one of the essential elements in the first issue, and thereby to invade the province of the jury.

As to the first objection, it may be said there was evidence upon which to base the hypothetical question, and the trial judge was careful to admit the answer only upon the assumption that the jury should find the facts to be as recited in the question.

The second ground of objection also is without merit. *Summerlin v. R. R.*, 133 N. C., 550, does not sustain the defendant's position. There the plaintiff, a minor in an action for the recovery of damages for personal injury, alleged that her mother had been negligently thrown from a train upon the plaintiff, and on the trial this question was propounded to a medical expert: "If the jury find from the evidence that on 13 June, 1901, the mother of this child had it in her arms and on the platform of the rear end of the railroad car, and fell from that platform to the roadbed, and during last summer you made an examination of the child and found the condition of the child's left leg and hip as you testified, to what would you attribute those conditions?" The evidence was excluded because it required the witness, not to express a scientific opinion upon certain assumed facts, but to invade the province of the jury and to decide the very question in dispute as to the cause of the injury to the child. See, also, *Mule Co. v. R. R.*, 160 N. C., 252; *Plummer v. R. R.*, 176 N. C., 279; *Hill v. R. R.*, 186 N. C., 475. But in *S. v. Cole*, 94 N. C., 959, the testimony of an expert in medicine (based upon the jury's finding of hypothetical facts) that death had been caused by strychnia was held to be competent. This is the identical question in the exception we are considering. To the same effect are *S. v. Bowman*, 78 N. C., 509; *In re Peterson*, 136 N. C., 13; *Parrish v. R. R.*, 146 N. C., 125; *Lynch v. Mfg. Co.*, 176 N. C., 98; *Moore v. Accident Assurance Corp.*, 173 N. C., 532, 542.

These cases enunciate the principle that, while a medical expert may not express an opinion as to a controverted fact, he may, upon the assumption that the jury shall find certain facts to be as recited in a hypothetical question, express his scientific opinion as to the probable effect of such facts or conditions. It was upon this principle that the evidence excepted to was admitted and the witness allowed to express his opinion both as to the diagnosis and the practice approved in such cases by the medical profession.

We find no error in the instruction upon the first issue. The equivalent of "proximate cause" was given, though these words were not employed, and we do not see how the jury could have been misled. Proximate cause is the efficient cause, not necessarily that which is nearest in time or space. *Construction Co. v. R. R.*, 184 N. C., 179.

The motion to nonsuit was properly declined, and the remaining exceptions require no discussion.

No error.

MRS. L. W. STANSELL v. T. J. PAYNE AND THE INDUSTRIAL BANK OF MECKLENBURG.

(Filed 13 May, 1925.)

Banks and Banking—Officers—Principal and Agent—Bills and Notes—Endorsers—Holder with Notice.

The president of a bank has no implied right from his official position to use the moneys of the bank for his own advantage, and where he has endorsed in the name of the bank, a note given by a corporation or third person wherein he is pecuniarily interested, to a payee, the transaction puts the payee upon notice of the want of authority of the president to so act for the bank, and where the bank has no financial interest in the transaction and the president no express authority so to bind it, the payee of the note may not recover from the bank as endorser the amount due her thereon.

APPEAL by defendant, Industrial Bank of Mecklenburg, from *Lane, J.*, at February Term, 1925, of MECKLENBURG.

From judgment upon statement of facts agreed, defendant, Industrial Bank of Mecklenburg, appealed to the Supreme Court. The only exception is to the judgment.

John James and James A. Lockhart for plaintiff.
Louis B. Vreeland and Hamilton C. Jones for defendant.

CONNOR, J. On 5 November, 1923, T. J. Payne, acting as and in the name of Carolina Farms and Development Company executed a note, in words and figures as follows:

$2,000 Charlotte, N. C., 5 Nov., 1923.

Four months after date, without grace, we promise to pay to the order of Mrs. L. W. Stansell, at the Security Savings Bank, two thousand dollars, at its banking house, with interest after maturity at the rate of six per cent per annum till paid. Value received. All endorsers of this note waive notice of its dishonor.

CAROLINA FARMS & DEVELOPMENT COMPANY,
By T. J. PAYNE.

Said note was endorsed by T. J. Payne. The said T. J. Payne was on said date, and for some time prior thereto had been president of defendant Industrial Bank of Mecklenburg. At the time he executed and personally endorsed said note, he also placed thereon, with a stamp, the words "Industrial Bank of Mecklenburg, by T. J. Payne, President."

After said note had been thus executed and endorsed by T. J. Payne, he delivered same to plaintiff, who thereupon, as consideration for said note, delivered to said T. J. Payne her four checks, aggregating $1,946.67, payable to Carolina Farms & Development Company. These checks were collected by the said T. J. Payne. No part of the proceeds of said checks was received by defendant, Industrial Bank of Mecklenburg.

Plaintiff had known T. J. Payne since 23 July, 1923, during which time he was president of Industrial Bank of Mecklenburg and a director of the Security Savings Bank. She is a widow. He had looked after her personal business. He applied to her for the loan of this money, which was a part of the proceeds of policies of insurance upon her deceased husband's life. She saw him execute the note and sign his name on the back of the note as president of the defendant company. She relied upon the endorsements on the note. He did not tell her the purposes for which he borrowed the money. She had previously loaned $1,500 to defendant, and had received therefor note signed by the cashier of defendant. This note had been paid promptly, at maturity. Plaintiff acted in good faith in this transaction and believed that the endorsement made by T. J. Payne, as president, was a valid endorsement by defendant.

The note upon which this action is brought was not paid at maturity. This action was begun on 27 August, 1924. T. J. Payne had fled the State, and no personal service of summons has been made upon him. His property in this State was attached and the sum of $459.65 was realized from a sale thereof. This sum was applied as a payment on the note, on 24 December, 1924. No other or further payment has been made on said note. Judgment was rendered that plaintiff recover of defendant, Industrial Bank of Mecklenburg, the sum of two thousand dollars, with interest from 5 March, 1924, and costs, subject to a credit of $459.65 as of 24 December, 1924. Defendants excepted to this judgment, contending that it was not liable on said note, by reason of the endorsement thereon.

T. J. Payne had no express authority from defendant to endorse in its name the note upon which this action is brought. Nor can such authority be implied from the facts agreed as stated in the record. The implication does not arise from the mere fact that T. J. Payne, on the date of the endorsement of the note, was and for some time prior thereto had been, president of defendant. The president of a corporation is but "the executive agent of the board of directors, to perform such duties as may be devolved upon him; he is not the corporation and cannot take the place of the governing board, and make contracts or incur liabilities

outside the ordinary business of the bank, without special authority." 3 R. C. L., 440. *Dowd v. Stephenson,* 105 N. C., 467. There had been no transactions between plaintiff and T. J. Payne, as president of defendant bank, prior to the endorsement of this note, in the interest of the bank, from which his authority to endorse the note could be implied. She had previously loaned $1,500 to the bank, but the note for this loan was executed by the cashier of the bank, and the loan was made to the bank. This loan was made to the Carolina Farms & Development Company. There was no representation that the bank had any interest in the loan; plaintiff's checks, given in consideration of the note, were payable to Carolina Farms & Development Company and delivered to T. J. Payne, who executed the note in its name, and personally endorsed the same.

Defendant bank had no interest in the loan; T. J. Payne had a personal interest in the transaction. In *Brite v. Penny,* 157 N. C., 110, *Justice Brown,* writing for this Court, said: "We recognize the general doctrine held by all courts, that a corporation is not bound by the action or chargeable with the knowledge of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf and does not act in any official or representative capacity for the corporation."

This principle has been approved in numerous opinions of this Court, and has been uniformly and consistently applied in numerous cases brought to this Court by appeal. *Corporation Commission v. Bank,* 164 N. C., 357.

In *Grady v. Bank,* 184 N. C., 158, *Chief Justice Clark,* writing for 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." See, also, *Bank v. West,* 184 N. C., 220.

In *Trust Co. v. Trust Co.,* 188 N. C., 766, we held that the guaranty of the note of a customer of the bank, by its cashier, who had authority to discount notes owned by his bank, was binding on the bank, where the cashier had no personal interest in the transaction and the proceeds of the discount were credited to the account of the bank. The facts of this case make it easily distinguishable from the instant case. So, in *Williams v. Bank,* 188 N. C., 197, we held the bank liable to a customer, for whom the bank had duly discounted a note, the proceeds of which the cashier had not applied as directed by the customer. In that case the cashier had received the proceeds of the note, within the scope of his authority as cashier, and the bank was properly held liable

for the misapplication. The principle of law which was held decisive in *Grady v. Bank, supra,* did not apply.

The principle that where one of two persons must suffer by the wrongful act of another, the loss must fall upon the one who first reposed the confidence and made it possible for the loss to occur, cannot avail plaintiff upon the facts in this case. Defendant is liable for the acts of its agent, T. J. Payne, only when within the scope of his authority, express or implied. It is plaintiff's misfortune that she made no inquiry as to the authority of the president to endorse the note. She had notice that he was acting, in this transaction, not in the interest of defendant bank, but in the interest of himself, or at least of a third party—Carolina Farms & Development Company. She acted in good faith, and believed the endorsement made upon said note, in name of defendant, by its president valid. This fact elicits sympathy for her, but cannot fix defendant with liability for the unauthorized act of T. J. Payne.

The exception to the judgment must be sustained. Upon the facts as stated in this record, defendant is not liable to plaintiff on account of the alleged endorsement. There is error and the judgment must be

Reversed.

BOARD OF EDUCATION OF YANCEY COUNTY ET AL. v. THE BOARD OF COUNTY COMMISSIONERS OF YANCEY COUNTY ET AL.

(Filed 13 May, 1925.)

Schools—Taxation—Elections—Statutes—Ministerial Duties—Mandamus.

C. S., 5645 provides for the holding of another local election for the imposition of a tax in a school district after six months from the time this question had been unfavorably voted upon in the district under C. S., 5640, and where the provisions of 5639, 5640 have been complied with as to the sufficiency of the first petition, no discretionary or judicial power is vested in the commissioners in calling the election under C. S., 5645, and when its provisions have been complied with, the duty of the county commissioners is purely ministerial, and mandamus will lie to compel them to perform it.

APPEAL by plaintiffs from YANCEY Superior Court, *Brown, J.*

Action by plaintiffs Board of Education of Yancey County, and taxpayers and citizens of a school district in said county to require, by mandamus, the defendants Board of County Commissioners, and its individual members, to order a special tax election in this school district. The trial court, upon a hearing, refused to issue the writ of mandamus, and plaintiffs appealed.

The appeal of plaintiffs presents only one question: Has the board of county commissioners any discretion in passing upon a properly executed and endorsed petition for a local tax election in a school district, when an election has already been held, but more than six months prior to the filing of such petition?

The trial court was of the opinion that this was within the sound discretion of the county commissioners and refused the writ and plaintiffs appealed.

A. Hall Johnston, Charles Hutchins for plaintiff.
Watson, Hudgins, Watson & Fouts for defendants.

VARSER, J. It is conceded, and we think properly so, that the duty of the county commissioners in considering the petition for the first election is not discretionary, but only ministerial, and that C. S., 5640 is mandatory. The board of county commissioners, under C. S., 5640, has the power to determine whether the petition complies with C. S., 5639 and 5640, but when it is admitted that the petition for the first election does comply with these requirements, they have no discretion to refuse to order the election. Its language is plain: "It shall be the duty of the board of county commissioners . . . to call an election and fix the date for the same." Another question is presented, when one such election has been held resulting adversely to the local tax, and another election is sought by petition in due form. C. S., 5645 provided: "In the event that a majority of the qualified voters of a district do not at the election cast their votes for the local tax, another election or elections under the provisions of this article may be held after the lapse of six months in the same district."

The trial court was of the opinion that C. S., 5645 vested in the county commissioners a "sound discretion" to order or not to order the election, although the six months since the prior election had elapsed. In our opinion, this construction of C. S., 5645 must be held for error. This section only applies to the frequency of elections as its headnote says. If the statute (C. S., 5645), or some other similar provision, had not been provided, then only one election in a district could have been held under the terms of C. S., 5639 and 5640. In order to provide machinery for recurring elections, it is provided in C. S., 5645 that, after the lapse of six months from the election that resulted unfavorably, another election, or elections, *may be* held under the provisions of this article (C. S., Art. 23, Education). This article provided in C. S., 5639, 5640, 5641, the machinery for originating the petition for the election; the consideration thereof by the county board of

education with full power and discretion to approve and endorse the same (*Key v. Board of Education,* 170 N. C., 125), and the exercise of discretion by it, in determining whether it will endorse and approve. Mandamus only lies to compel action and not to direct it, if the asserted powers *are* discretionary.

Key v. Board of Education, supra; Edgerton v. Kirby, 156 N. C., 347, 351; *Board of Education v. Comrs.,* 150 N. C., 113, 123; *Ward v. Comrs.,* 146 N. C., 534; *Burton v. Furman,* 115 N. C., 166; *Brodnax v. Groom,* 64 N. C., 244; *Attorney-General v. Justices,* 27 N. C., 315; Abbott on Mun. Corp. sec. 1108; High on Extra Legal Remedies (2 ed.) sec. 24; *State v. Vanhook,* 182 N. C., 834; *Person v. Watts,* 184 N. C., 499. *Ward v. Comrs., supra; School Comrs. v. Aldermen,* 158 N. C., 191; *Muller v. Comrs.,* 89 N. C., 171; *Fisher v. Comrs.,* 166 N. C., 238; *County Board v. State Board,* 106 N. C., 81; *Board of Education v. Comrs.,* 150 N. C., 116; *Barnes v. Comrs.,* 135 N. C., 27; *Ewbank v. Turner,* 134 N. C., 77; *Russell v. Ayer,* 120 N. C., 180; *Battle v. Rocky Mount,* 156 N. C., 329; *McNeill v. Somers,* 96 N. C., 467; *Worthy v. Barrett,* 63 N. C., 199; *Glenn v. Comrs.,* 139 N. C., 412; *Vineberg v. Day,* 152 N. C., 355, 358; *Boner v. Adams,* 65 N. C., 639; *Koonce v. Comrs.,* 106 N. C., 192; *Refining Co. v. McKernan,* 179 N. C., 314; *Alexander v. Lowrance,* 182 N. C., 642; *Burke County Road Comrs. v. Comrs.,* 184 N. C., 463; *Britt v. Board,* 172 N. C., 797; *Lucas v. Belhaven,* 175 N. C., 123; *Key v. Board, supra; Dula v. School Trustees,* 177 N. C., 426; *Board v. Board,* 178 N. C., 305.

The interested citizen is entitled to compel the exercise of discretion by public officers, in such as the instant case, but he cannot direct its course.

In our opinion, C. S., 5645 is an enabling statute, by which the interested citizens, pursuant to and in compliance with C. S., 5639, *may,* after the lapse of six months, seek another election. If the county board of education "endorses and approves" the petition according to C. S., 5640, then the county commissioners are limited to their mandatory duty "to call an election and fix the date for the same." "May" in C. S., 5645 *enables, permits,* and *does not require,* the "citizens of any duly created school district" to start again the machinery provided by which they can have another opportunity to vote on the question of a local tax for schools in the given district.

Since the duty of the board of commissioners, under C. S., 5640, is the same in case of the second election, as in the first instance, it is only *ministerial,* and not discretionary and judicial. *Key v. Board of Education, supra.*

Therefore, mandamus is the appropriate remedy to enforce the performance of this ministerial, nondiscretionary duty. *Edgerton v. Kirby,*

supra; Withers v. Comrs., 163 N. C., 341; *Bennett v. Comrs.*, 125 N. C., 468; *Brown v. Turner*, 70 N. C., 93; *Rogers v. Jenkins*, 98 N. C., 129; *Ducker v. Venable*, 126 N. C., 447; *Fisher v. Comrs., supra; Granville County Board v. State Board, supra; Russell v. Ayer, supra; R. R. v. Jenkins, Treas.*, 68 N. C., 502; *Kendall v. U. S.*, 12 Peters, 524; *Barnes v. Comrs., supra; Burton v. Furman, supra; Cotton v. Ellis*, 52 N. C., 545; *Brown v. Turner, supra; Rogers v. Jenkins, supra; Ducker v. Venable, supra; Hargrave v. Board*, 168 N. C., 626; *Refining Co. v. McKernan, supra; Alexander v. Lowrance, supra; Dula v. School Trustees, supra; Britt v. Board, supra.*

Upon the facts appearing in the instant record, and upon the principles herein announced, the trial court was in error in refusing the writ of mandamus. To the end that the writ be issued as prayed for, let the judgment of the trial court be

Reversed.

CROWN RICHARDSON v. AMERICAN COTTON MILLS, INC.

(Filed 13 May, 1925.)

Employer and Employee—Master and Servant—Fellow-Servant—Instructions—Negligence—Appeal and Error.

In an action for damages for a negligent personal injury inflicted on an employee, there was evidence tending to show negligence of another of defendant's employees after he had finished his daily hours of work, and the question was presented as to whether he was at the time of the injury a fellow-servant or a trespasser or licensee: *Held*, this was a mixed question of law and fact under proper instructions from the court, and a charge on the question of negligence which failed to charge the principles of law upon the question of defendant's liability under the fellow-servant principle, and in case its employee was a licensee or trespasser, is reversible error.

APPEAL by defendant from *Lyon, J.*, at October Term, 1924, of GASTON.

Civil action for damages for personal injury.

Plaintiff was an employee of the defendant. He alleged that when injured he was engaged in fixing a loom that had been "flagged" for repair; that while in a position of peril R. L. Lanier, at that time not engaged in any duty in the mill but there as a licensee of the defendant, carelessly put the loom in motion and caught the plaintiff therein, inflicting personal injury. The plaintiff set up also alleged negligence of the defendant concurring with that of Lanier, in that the defendant did not use due care to require Lanier, when his shift ended, to cease

the operation of its machinery and to leave its premises, but negligently permitted him to remain and operate its machinery.

Plaintiff's "shift" was from 6 a. m. to 6 p. m. and that of Lanier from 6 p. m. to 6 a. m. There was evidence tending to show that Lanier put the machinery in motion between 6 and 6:15 a. m.

Defendant denied all allegations of negligence, pleaded contributory negligence, and alleged that the plaintiff's injury was caused by the act of a fellow-servant.

The issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. The defendant appealed, assigning error.

S. J. Durham and Henry L. Kiser for plaintiff.
Garland & Austin for defendant.

ADAMS, J. Primarily the defense is based upon the contention that Lanier and the plaintiff were fellow-servants, and that for this reason the negligence of Lanier cannot be imputed to the defendant. That the fellow-servant doctrine relieves the master from liability where the person injured is a fellow-servant of the tort-feasor is so firmly established it is not essential to our present purpose that we inquire into the fundamental reasons upon which the rule is founded. *Dobbin v. R. R.*, 81 N. C., 446; *Walters v. Lumber Co.*, 163 N. C., 537; *Page v. Sprunt*, 164 N. C., 364; *Brown v. Scofield Co.*, 174 N. C., 4; *Talley v. Granite Quarries Co., ibid.*, 445. We need only say that the principle, formerly unrestricted in its application, has been abrogated by statute as to railroads operating in this State. C. S., 3465; *Kirk v. R. R.*, 94 N. C., 625; *Webb v. R. R.*, 97 N. C., 387; *Nicholson v. R. R.*, 138 N. C., 516; *Bloxham v. Timber Corp.*, 172 N. C., 37.

The defendant excepted to this instruction, which was given the jury: "Now, if you find from the evidence, and the greater weight of the evidence, that the man, Lanier, negligently started that loom on that occasion—that is, that he did something that a reasonably prudent man ordinarily would not have done under the circumstances—and further find that such negligence was the proximate cause of the injury complained of, and you further find that Lanier at the time was not acting in the capacity of a fellow-servant, but was merely a licensee there in the mill, his time having expired some 10 or 15 minutes, then you would answer the first issue, 'Yes,' and if you do not find so, you would answer, 'No.'"

In *Dobbin v. R. R., supra,* the Court had occasion to say: "Who is a fellow-servant within the meaning of the law appertaining to this subject is a difficult question, one that has never been decided in this State.

And, so far as we have been able to find, no definition of the relation as a test applicable to all cases has as yet been adopted by the courts; and we do not think can be, so variant are the relations subsisting between master and servant, principal and agent, colaborer and employee, in the various enterprises and employments, with their numerous and divers branches and departments, the cases frequently verging so closely on the line of demarcation between fellow-servants or colaborers and what are called 'middle men' that it is difficult to decide on which side of the line they fall. Each case in the future as heretofore will have to be determined by its own particular facts."

Whether the plaintiff and Lanier were fellow-servants is a matter which involves both law and fact. To a proper determination of the question, it was essential that the jury should be instructed as to the law applicable to the different phases of the relevant evidence; but it will be observed that his Honor failed to inform the jury whether under given conditions the plaintiff and Lanier were or were not fellow-servants. He very clearly stated the contentions of the parties, but inadvertently omitted to state the appropriate principles of law for the guidance of the jury. The Court has held that a charge which does not embrace the law applicable to the determinative contentions arising upon the evidence is incomplete and is ground for a new trial. *S. v. Thomas,* 184 N. C., 757, 759; *Butler v. Mfg. Co.,* 182 N. C., 547; *Lea v. Utilities Co.,* 176 N. C., 511; *Real Estate Co. v. Moser,* 175 N. C., 255, 259; *Jarrett v. Trunk Co.,* 144 N. C., 299.

In his brief the plaintiff admits that "this charge out of its setting in the case would be error," but contends that it is harmless when considered in the light of the admitted facts. Granting, as insisted by the plaintiff, that Lanier was acting for the defendant and by its authority, and that the instruction directed an affirmative answer to the first issue if the jury should find that Lanier was a licensee and not a fellow-servant, and that his negligence was the proximate cause of the injury, we are yet confronted with the fatal objection that the jury was given no rule by which to determine whether Lanier was a fellow-servant or a licensee. No definition either of "licensee" or "fellow-servant" appears in the charge, nor is the distinction between the two anywhere explained. Their conclusion upon this point was left entirely to conjecture. The jury should have been definitely instructed as to the facts upon which Lanier would be deemed a licensee and as to those upon which he would be deemed a fellow-servant.

New trial.

VAN B. MARTIN ET AL. v. L. VANLANINGHAM ET AL.

(Filed 13 May, 1925.)

Statutes—Amendments — Procedure — Remedial Statutes—Actions—Insolvent Corporations—Receivers—Sales.

Under a statute amendatory of the procedure under an existing statute, the legislative intent, nothing else appearing, is presumed to be that it apply to existing actions and is remedial in its nature, and the statute of 1924 amending C. S., 1214, relating to the sale of the property of insolvent corporations by receivers under certain conditions, retaining the liens and priorities thereon as attached to the proceeds of the sale, is held to apply to pending actions theretofore commenced.

APPEAL by defendants from *Bond, J.*, at April Term, 1925, of HYDE.

Controversy without action, heard upon an agreed statement of facts. From a judgment for plaintiffs, the defendants appeal.

P. W. McMullan for plaintiffs.
Thompson & Wilson for defendants.

STACY, C. J. The defendants have agreed to buy from the plaintiffs, receivers of the North Carolina Farms Company, the property belonging to said corporation, provided they can acquire a free and unencumbered title to said property. It is agreed that all things necessary have been done and that the facts presented properly bring the case under C. S., 1214 as amended by chapter 13, Public Laws, Extra Session, 1924, which authorizes a sale, under certain conditions, free and clear of any and all encumbrances, by the receivers of an insolvent corporation, of the property of such corporation. But it is debated between the parties here as to whether the amendment to this section can apply to the present proceeding, the same having been instituted before the passage of the amendment. The trial court held the whole statute, as amended, applicable, and, by consent, confirmed, in chambers, an order directing a conveyance of the property free and clear of all encumbrances. The correctness of this ruling is challenged by the appeal.

C. S., 1214 provides: "When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court directs." The amendment of

20 August, 1924, adds the following at the end of said section: "And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least ten days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular term of the Superior Court of the county in which the property is situated."

Paragraph 19 of the agreed statement of facts in the case at bar is as follows: "That on the date of the appointment of said receivers of said North Carolina Farms Company, to wit, on 3 August, 1923, and at the time that each of the orders of sale was entered by Judge Devin, to wit, on 17 March, 1924, and on 5 May, 1924, and at the time that each of the orders of confirmation was entered by Judge Bond, to wit, on 13 September, 1924, 28 February, 1925, 13 April, 1925, the said North Carolina Farms Company was an insolvent corporation, its property was encumbered with mortgages, or other liens, the validity, legality, priority and amount of which were in question, and its property was further of such a character as to materially deteriorate in value pending the litigation; that, at the time the order of 13 September, 1924, confirming the sale to defendants, was made, the bid of said defendants, together with the report of said receivers was before the court; and that it was the intention of the court, in entering each of said orders of sale, to wit, on 17 March, 1924, and on 7 May, 1924, and in entering each of said orders of confirmation, to wit, on 13 September, 1924, 28 February, 1925, and 13 April, 1925, to authorize or confirm the sale of all the property of said North Carolina Farms Company, free and clear of all encumbrances, and to direct the execution of a deed in conformity with the terms thereof."

The orders of Judge Bond, which are questioned by the appeal, were entered after the passage of the amendment of 1924, and said orders were intended to be made, and were made, under and by authority of said amendment.

The statute is a remedial one and relates only to the method of procedure in dealing with certain assets of an insolvent corporation. Such statutes, unless otherwise limited, are usually held to be applicable to pending litigation, where the language used clearly indicates that such construction was intended by the Legislature, and especially where no hardship or injustice results, and the rights of the parties are thereby better secured and protected. 36 Cyc., 1216.

"No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending, and future actions." 2 Lewis' Edition Southerland Statutory Construction, p. 1226.

But if this were not so, we see no reason why, upon the facts of the present record, a valid order of confirmation could not be entered at term, directing the purchase money to be paid into court, there to remain subject to the same liens and equalities of all parties in interest as was the property before the sale to be disposed of under the direction of the court. *Lasley v. Scales,* 179 N. C., 578; *Roberts v. Mfg. Co.,* 169 N. C., 27; *Pelletier v. Lumber Co.,* 123 N. C., 596. However, this would seem to be unnecessary, as we think Judge Bond was authorized in entering the orders appealed from.

The decisions in *Hicks v. Kearney, ante,* 316; *Tate v. Davis,* 152 N. C., 177; *Bank v. Peregoy,* 147 N. C., 293, and *Construction Co. v. Brockenbrough,* 187 N. C., 65, in no way militate against this position.

There is no error appearing on the record, hence the judgment in all respects, will be

Affirmed.

J. G. ELMORE v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 13 May, 1925.)

1. Slander—Corporations—Employer and Employee—Qualified Privilege.

Where the superintendent of a railroad company in investigating a conductor employed by the company as to whether the conductor in collusion with its agent, was not punching the tickets taken from passengers on his train, but selling them again, and misappropriating the money, tells the agent that the conductor was so acting when such was not the fact, which is the subject-matter in the conductor's action against the company for slander, the words of the superintendent are qualified privilege, and in the absence of malice are not actionable.

2. Same—Malice Implied.

And where the superintendent under these circumstances, has informed the agent in his conversation that the conductor has taken up cash fares

from passengers and has misappropriated the money, the false words so spoken are actionable *per se*, implying malice in law, and being spoken by the superintendent in pursuance of his duties to the company, such words are actionable, and the company may be held liable in damages.

3. Same—Damages.

Where in pursuance of his duties to his employer a railroad company, its superintendent has uttered slanderous words to its agent in reference to the conductor, though in the conversation the superintendent may have spoken words that were actionable upon several charges, they can be made the subject of only one action.

4. Same—Judgment—Appeal and Error.

Where in an action for slander the words falsely spoken were in part *quasi* privileged and not actionable and in part part actionable, and damages have been awarded in plaintiff's favor by the jury upon separate issues, the Supreme Court on appeal, may affirm the judgment on one of the issues, and reverse the judgment on the other.

5. Pleadings—Evidence—Justification.

Where the defendant, in an action of slander, has pleaded qualified privilege in defense only, he may not contend on the trial in justification that the alleged defamatory words were true.

6. Same—Good Faith.

Where the defamatory matter in an action for slander is the published statement of the defendant corporation, uttered by its superintendent in the discharge of his duties, affidavits upon which he had based his remarks are inadmissible as hearsay.

STACY, C. J., dissenting; VARSER, J., not having heard this case, did not take part in the decision.

APPEAL by defendant from *Lyon, J.*, and a jury, at September Special Term, 1924, of HALIFAX.

The plaintiff who had been an employee for 29 years of defendant company, as flagman, baggage master, freight conductor and finally as a passenger conductor, brought this suit against defendant company for slander.

The first cause of action is as follows: "That on or about 2 October, 1923, the defendant company, through C. M. Cobb, its superintendent, unlawfully and maliciously said and published of and concerning the plaintiff in the presence of one C. M. Starke, and others, the following false and defamatory matters in substance, to wit: "That the said plaintiff did in many instances while acting as passenger conductor for defendant as aforesaid take up tickets on his train and not punch and report said tickets to the company as it was his duty to do, but took said tickets unpunched and in collusion with the agent at Norfolk, Va., resold them and appropriated the proceeds, or a part thereof, to his own use."

The second cause of action is as follows: "That on or about 2 October, 1923, the defendant, through C. M. Cobb, its superintendent, unlawfully, falsely and maliciously uttered and published of and concerning the plaintiff, in the presence of one C. M. Starke, and others, the following false and defamatory slander in substance, to wit: That the plaintiff had theretofore, while acting as passenger conductor of the defendant company, taken cash fares received by him on the train from passengers and appropriated said cash fares to his own use instead of turning the same in to the railroad company as was his duty so to do."

The defendant answering the first cause of action, says: "Article 3 of the complaint is not true and is denied. But, if defendant company's agent and employee, C. M. Cobb, had said the things which are imputed to him, as having been said to C. M. Starke, and others, which is denied, the same are privileged communications for that the said C. M. Cobb was and is superintendent of the Norfolk district of defendant company, and, as such superintendent, had an interest or a duty in the matter under discussion, or alleged to have been communicated for that it came within the duties delegated to and to be performed by his office and position. And said C. M. Starke was at the time the ticket agent of defendant company at Norfolk, Va., and is the person or individual referred to by plaintiff in his complaint as being in collusion with plaintiff. As such person, individual and agent, the said Starke has a very vital corresponding interest or duty in and about the matter alleged to have been communicated. The alleged statement or communication, if made, was in protection of said Cobb's interest or in the performance of his official duty as superintendent aforesaid."

The defendant's answer to the second cause of action is the same as the answer to the first cause.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendant maliciously speak of and concerning the plaintiff in substance, the words alleged in the first cause of action in the complaint? Answer: 'Yes.'

"2. If so, what damage is the plaintiff entitled to recover? Answer: '$10,000.'

"3. Did the defendant speak of and concerning the plaintiff in substance the words alleged in the second cause of action set out in the complaint? Answer: 'Yes.'

"4. If so, what damage is the plaintiff entitled to recover? Answer: '$10,000.'"

C. M. Starke, for plaintiff, testified, in part, as follows:

"My name is C. M. Starke; I live in Norfolk, and have lived there six years. Prior to 2 October, 1923, I was ticket agent for the Atlantic

Coast Line Railroad Company at York Street Station, Norfolk. I know C. M. Cobb, who at the time was superintendent of the Norfolk Division of the Atlantic Coast Line Railroad Company, and my office was in his jurisdiction. On 2 October, I was notified by Mr. Cobb to report to his office at 9 o'clock. He told me Captain Elmore was to be let out of the service at Rocky Mount, and he said it was on account of Captain Elmore's collecting tickets and not punching them and turning them in, but that he put them back to be resold by me and we divided the proceeds. Captain Elmore never returned any unpunched tickets to me to be resold; I never divided any proceeds from such tickets being resold. He told me Captain Elmore had been called up to his office twice before that about cash fares; that the last time he was up there he had told him his cash fares did not come up to and correspond with the other conductor's; that soon after he had this talk with him and after that other time, that the cash fares commenced to pick up and he supposed that was the time he commenced taking his tickets up. In respect to this conversation Mr. Cobb again talked to me about the 15th I think it was. He called me up over the telephone and said he wanted to see me and asked me to come to his office. I went to his office and he told me he had said something about Captain Elmore in our other conversation and asked me if I had said anything about it to Captain Elmore, and I said 'No,' and he said he was glad of that, because he thought maybe I said something about it, and he was glad because he had been 'shooting off his lip' or his mouth or something. I had no conversation with him at a subsequent time."

The plaintiff then offered evidence of about 75 witnesses from all over Eastern North Carolina and parts of Virginia, as to his good character, and also several witnesses as to the good character of the witness, Starke, and rested his case.

C. M. Cobb, for defendant, testified, in part:

"I was born near Tarboro, N. C., at Mildred; am 57 years old; have lived part of the time at Mildred, Tarboro and Norfolk; have been working for the Coast Line Railroad nearly thirty-three years; have held the position of flagman, baggage master, freight conductor, conductor on passenger trains, trainmaster and superintendent. When I was trainmaster I lived in Tarboro; when promoted to superintendent of the division I lived in Norfolk. As superintendent, my duties involved the investigation of matters such as we have been discussing here. I first had knowledge that Captain Elmore was under investigation when I was notified to investigate Agent Starke the day before, 1 October, 1923. The police department did the investigating. W. W. Morrison was chief of that department. I had no knowledge whatever that the investigation was being made. I had nothing whatever to do with the

initiation of the investigation. I received my knowledge from Mr. W. H. Newell, General Superintendent, that the investigation of Elmore was being made. He called me to his office on 1 October, and showed me a bunch of affidavits, giving me the duplicates of those he had, and told me—my first knowledge was when the superintendent called me to his office, and he showed me these various affidavits giving me duplicates, and he keeping the originals, which brought out the fact of the irregularity in handling of tickets. That was the first day of October, 1923. I took those affidavits home. They came from the police department, Mr. Morrison's department. I had instructions to take these affidavits and have Ticket Agent Starke in Norfolk to come to my office and go over the same with him. These affidavits were sixteen in number. As these affidavits had reference to irregularities between C. M. Starke and Conductor Elmore, I handled according to instructions. I had Starke to come to my office on the morning of the 2d, at nine o'clock, went over the affidavits with him in detail, the affidavits which I had, showing what each man said he had done. (The court admitted the above testimony of Cobb to show good faith and want of malice.) . . . Elmore was involved in various affidavits showing that tickets were bought from Starke, used on Elmore's train, and were brought back to Starke and he sold them again. Some tickets showed they had been bought twice. I don't know as I could tell you exactly how many had been returned by other conductors. I don't remember, but the affidavits will show. These tickets were all numbered. When the conductor took up these tickets he was required to punch them and surrender them. Each conductor has an individual punch, showing the different marks and from it you can tell which conductor made the punch. . . . No reference was had to cash fares. Captain Elmore's name was not mentioned at all, except when I asked if any one other than he and Captain Elmore had been involved with respect to the irregular handling of tickets. No other reference was made to Captain Elmore in that conversation. I did not say anything to Mr. Starke about the cash fares. I was present when an investigation was held in the office of Mr. Newell, at Captain Elmore's request. . . . I had a second conversation with Starke ten or fifteen days later. I called Starke up that morning and asked if he would come down to the office, as I wanted to see him and have a talk with him. He came in and wanted to know what I wanted. I said, 'I want to know if you will sign a statement in reference to the things you told me about the other day.' He remarked, 'I haven't told you anything.' He seemed mad and in a very different attitude altogether from the first time. There was nothing about my 'Shooting my mouth off.' Nothing of the kind occurred

because of his attitude in the beginning. I could see he was very rebellious. Nothing of the kind occurred. The affidavits upon which I acted and upon which I was making the investigation were furnished me by Mr. Newell, the general superintendent. I had absolutely nothing to do with procuring them. In the course of this conversation nobody's name was mentioned as involved in this matter except Captain Elmore and Mr. Starke. In making this investigation I was performing my duty simply and solely as an official of the company. I had no feeling of animosity towards Elmore at all. I didn't know he was involved in these affidavits until 1 October. I took action then pursuant to instructions. There would not have been any investigation except under the directions of the general superintendent, upon these affidavits. I remember the names of some of the gentlemen who made the affidavits."

W. H. Newell, testified for defendant, in part:

"Mr. Cobb is superintendent of the Norfolk District, and I am general superintendent. My division is from Richmond, Va., to Augusta, Ga., and western part of South Carolina. My division lies in three different states, Virginia, North Carolina and South Carolina. I have known Mr. Cobb ever since he has been in the service. I think about thirty years. I gave him his first job on the railroad. He started as flagman and worked his way up. He has been superintendent of the Norfolk district for five or six years. As such superintendent he would not be expected to investigate matters except when the police department had made investigation and made report to the general superintendent for such action as he might take. All investigations of this kind are made by the police department. When I came into possession of these affidavits we have been referring to I called Mr. Cobb to come to my office and we went over all of these affidavits, and we arranged that he should call Mr. Starke, the ticket agent in Norfolk, to his office, and I was to call Conductor Elmore to my office simultaneously, which I think was done at 9:30 the morning of 2 October and I showed these affidavits to Mr. Cobb when he came to my office. I gave them to Superintendent Cobb, the copies, and he was to call Starke to his office and I was to call Conductor Elmore to my office at the same time. The import of these affidavits was that Starke and Elmore had been charged with irregular handling of tickets sold at the Norfolk Agency and were involved in these affidavits we had. The affidavits were that the agent at Norfolk was selling tickets two or three different times for various trains and that tickets had been returned to Norfolk for resale uncanceled. The affidavits were that tickets had been sold by the Norfolk agent some more than twice and the parties buying them had ridden the trains and they were not turned in to the auditor as provided for

by the rule, but had come in on later or subsequent trains by different conductors under different punch marks, and that there were as many as four or five conductors who had turned in these tickets with their own punch that had been purchased on certain dates previous for Captain Elmore's train."

On cross-examination, he said, in part:

"Subsequent to the conversation I had with Mr. Cobb, Captain Elmore was called to my office. I had him in my office on 2 October, at the same time that Starke was called to Mr. Cobb's office. He asked for an investigation several times after he had been dismissed from the service. I think in about five or six days after the 2d of October he asked for another investigation. I took him off the train on the 2d day of October, and ordered him to come to my office; took him off the train and put somebody else in his place to run the train. He was not formally discharged until five or six days later. He requested an investigation under the rules under which he was working, and when he requested it we were willing to give it to him. Mr. Cobb was not in my office as a witness."

REBUTTAL EVIDENCE

Capt. J. G. Elmore, the plaintiff, testified, in part:

"I am fifty-two years old. I was born and raised at Mt. Olive, Wayne County. I have been in the service of the railroad twenty-nine years. Before that I taught school and worked in telegraph office a year. I have been with the A. C. L. Railroad twenty-nine years. I first worked in the telegraph office, then flagman, baggage master, freight conductor and passenger conductor. I was passenger conductor on 2 October, 1923, and ran between Rocky Mount and Norfolk and Goldsboro and Norfolk. I would make one trip for a week night run to Rocky Mount, and then for two weeks through to Goldsboro on different trains. One week I would work the night run to Rocky Mount and then two weeks I would have the day run to Goldsboro. We would alternate upon the trains running from Norfolk to Rocky Mount and Goldsboro. I have been passenger conductor since 1912, extra passenger conductor since 1910. About fifteen years ago Mr. Cobb came to me one morning and said he was going to report me to the Masonic Lodge. I was a member of the Masonic Lodge at Weldon. He said, 'I am going to report you to the Masonic Lodge about some remarks respecting me as to some remarks about Mrs. ..... and me,' because I did not go to him first about it. Said he understood I had made some remarks about him and agent .....'s wife, that he had had improper relations with her or had made improper advances to her. He said it to me twice. He said he was going to report me to the Masonic Lodge, and I told him he could do so,

it was already known to the Masonic Order. He first stated that the first he knew of it was the day before when Sinclair had told him that I had made the remark that if the reports were not true, some one ought to go to him and tell him about it, and that if it were true his face ought to be broken. Then he said that he hadn't slept any for several nights, that it worried him so, and that he had sent his wife to Norfolk to keep her from finding it out. He said Sinclair had told him the day or night before was what he first told me. He said that Sinclair told him that I had said if it were true his face ought to be broken, and if it were not true somebody ought to tell him." He further stated: "Mr. Cobb has acted very indifferent and cold towards me since that time," etc. . . . "I never took up tickets on my train and didn't turn them in, and didn't have a collusion with Starke to resell the tickets and divide the proceeds. I never took up a ticket and failed to return it to the company. Mr. Cobb did have me there and asked me some questions about cash fares. I remember once he asked me in Norfolk why it was that some of the other conductors turned in so much more cash fares than I did. I told him the reason was that I did not run Saturdays. I laid off on Saturdays every time I possibly could, and Saturdays and Mondays are the highest days. There are more cash fares taken up on Saturday and Monday than on other days. In addition to that many of the passengers had been using mileage and some reported that in as cash fares. We had no regulations for handling as such, and I did not do it. Saturdays the crowds are going home to spend Sunday, and Monday they are returning. Saturday and Monday have the heaviest travel of any other day of whole week through. I lay off every Sunday that I could so that I could spend the day with my family. My family lived in Norfolk. . . . At the time he asked me about my cash fares as compared to the other conductors and I gave him an explanation he seemed satisfied about it. I thought he was until I was told about what he said about it to Starke. That happened a couple of years ago. I thought that my explanation of the matter had satisfied him. . . . When this matter occurred these various reports were made out in the form of affidavits and Mr. Newell read them to me. He called me to his office and nobody was present but he and I. He asked me to make explanation and I told him it was just like a clap of thunder out of a clear sky. I was very much surprised."

He denied that he took up tickets and didn't turn them in and denied collusion with Starke to resell the tickets and divide the proceeds. He denied that he collected cash fares and never turned in the money.

The defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material ones and other necessary facts will be considered in the opinion.

Geo. C. Green, Ashby Dunn and E. L. Travis for plaintiff.

Frank S. Spruill, John H. Kerr, W. L. Long and D. Mac. Johnson for defendant.

CLARKSON, J. It will be noted that plaintiff alleges two causes of action of slander against the defendant:

(1) That defendant falsely and maliciously published of and concerning plaintiff "That the said plaintiff did in many instances while acting as passenger conductor for defendant as aforesaid take up tickets on his train and not punch and report said tickets to the company as it was his duty to do, but took said tickets unpunched and in collusion with the agent at Norfolk, Va., resold them and appropriated the proceeds, or a part thereof, to his own use."

(2) That defendant falsely and maliciously published of and concerning plaintiff "That the plaintiff had theretofore, while acting as passenger conductor of the defendant company, taken cash fares received by him on the train from passengers and appropriated said cash fares to his own use instead of turning the same in to the railroad company as was his duty so to do."

The defendant denied the allegations of the complaint, and sets up the defense of privileged communication. If defendant's agent said the things imputed to him as having been said by C. M. Starke, they were privileged communications and in the performance of his official duty as superintendent of defendant company. The conversation with Starke was a publication. *Hedgepeth v. Coleman,* 183 N. C., 309.

C. M. Starke, witness to whom the publication was made, testified that the charges were made by C. M. Cobb, superintendent of defendant company in one conversation on 2 October, 1923. The question arises, can plaintiff have two causes of action growing out of one conversation? We think not. There can be but one recovery.

From a careful examination of the authorities, we find that it is laid down in Estee's Pleadings (4 ed.) sec. 1717, as follows: "A count of a petition in an action for slander, which sets out the entire conversation in which the slander was spoken, contains only one cause of action, although the conversation consists of several parts, each of which is actionable."

The same principle is stated in Maxwell on Code Pleadings, p. 352: "When there are different sets of words, spoken at a particular time, although they charge distinct offenses, there will be but one cause of action. The rule, in case of torts, being that each trespass or conversion or fraud gives a right of action, and but a single one, however numerous the items of the wrong or damage may be."

In *Cracraft v. Cochran,* 16 Iowa, p. 304, it was said: "It is true that the words set out in the petition charge the plaintiff, in effect, with two offenses, one of store breaking (Rev., sec. 4235) and the other of larceny (Rev., sec. 4237); but such charges were, as appears by the petition, made in the same conversation and at the same time, and of course gave but one right of action. It is well said by *Strong, J.,* in *Secor and others v. Sturgis and others,* 16 N. Y., 548, that 'in the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be.' Under this rule, it matters not how numerous were the offenses charged in the same conversation; they, together, constitute but one cause of action. A plaintiff could not sue and recover for one of the slanderous charges specified, and then bring another action for another of the slanderous charges made in the same conversation; for the reason that he has but one cause of action growing out of the same conversation, although the items of slander were numerous. To allow a party thus to bring several causes for the same slanderous course, would be to sanction the splitting of actions, which both the common law and The Code prohibits." *Galligan v. Sun Prtg. & Pub. Assn.,* 54 N. Y., Supp. p. 471; *Thompson v. Harris,* 91 Am. St. Rep. p. 187; (64 Kan., 124); *Macdougall v. Knight,* 25 Queens Bench Div. p. 1.

Plaintiff in his brief says: "The plaintiff conceded at the trial, and concedes now, that the language charged in the first cause of action was qualifiedly privileged, but insists that there was evidence of actual malice sufficient to destroy the privilege. . . . The words alleged in the first cause of action were qualifiedly privileged and not actionable unless the plaintiff has shown actual malice." We think this proposition of law so sound and well settled that actual malice must be shown where the cause of action is qualifiedly privileged, that we do not cite authorities.

But defendant in its answer contends that the communication was privileged. We think it was qualifiedly privileged. The matter of absolute privilege is well stated in Newell Slander and Libel (4 ed.), sec. 350, as follows: "In this class of cases it is considered in the interest of public welfare that all persons should be allowed to express their sentiments and speak their minds fully and fearlessly upon all questions and subjects; and all actions for words so spoken are absolutely forbidden, even if it be alleged and proved that the words were spoken falsely, knowingly and with express malice. This rule is, however, confined to cases in which the public service or the administration of justice requires complete immunity—for example, words spoken in legislative bodies, in debates, etc., in reports of military officers on military matters

to their superiors; words spoken by a judge on the bench and by witnesses on the stand. In all such cases the plaintiff cannot be heard to say that the defendant did not act under the privilege, that he did not intend honestly to discharge a duty, but maliciously availed himself of the occasion to injure his reputation." Qualified Privilege, sec. 389:

"In the less important matters, however, the interests and welfare of the public do not demand that the speaker should be freed from all responsibility; but merely require that he should be protected so far as he is speaking honestly for the common good. In these cases the privilege is said not to be absolute but qualified; and a party defamed may recover damages notwithstanding the privilege if he can prove that the words were not used in good faith, but that the party availed himself of the occasion wilfully and knowingly for the purpose of defaming the plaintiff. In this class of cases it will be convenient to divide the occasions into four classes:

"(1) Where the circumstances of the occasion cast upon the defendant the duty of making a communication to a certain other person to whom he makes such communication in the bona fide performance of such duty.

"(2) Statements made for the protection of private interests.

"(3) Where the defendant has an interest in the subject-matter of the communication, and the person to whom he communicates it has a corresponding interest.

"(4) Reports of the proceedings of courts of justice and legislative bodies."

Pearson, J., in *Brooks v. Jones,* 33 N. C., p. 260, defines malice: "General malice is wickedness, a disposition to do wrong, a 'black and diabolical heart, regardless of social duty and fatally bent on mischief.' . . . Particular malice is ill-will, grudge, desire to be revenged on a particular person." *S. v. Long,* 117 N. C., p. 799; *S. v. Knotts,* 168 N. C., p. 184.

The plaintiff, to show actual malice, relies upon an unpleasant circumstance between himself and the witness Cobb some 15 years before the trial of the cause, and incidents since testified to—his viewpoint of Cobb's attitude towards him, slight and trifling.

In *Lewis v. Carr,* 178 N. C., p. 580, it was said: "In cases of qualified privilege the falsehood of the charge will not of itself be sufficient to establish malice, for there is a presumption that the publication was made bona fide. *Fields v. Bynum,* 156 N. C., 416; *Gattis v. Kilgo,* 140 N. C., 106; *Ramsey v. Cheek,* 109 N. C., 270." *Harrison v. Garrett,* 132 N. C., p. 176; *Riley v. Stone,* 174 N. C., 588; 17 R. C. L., p. 322, par. 65.

Newell Slander and Libel (4th ed.) part sec. 280, is as follows: "The question of malice or no malice is for the jury. The presumption in favor of the defendant arising from the privileged occasion remains till it is rebutted by evidence of malice; and the evidence merely equivocal, that is, equally consistent with malice or bona fide, will do nothing towards rebutting the presumption. The facts tendered as evidence of malice must always go to prove that the defendant himself was actuated by personal malice against the plaintiff."

Under the facts and circumstances of this case, to destroy the qualifiedly privileged communication set forth in what is termed the first cause of action, we do not think the evidence of actual malice sufficient. The case in the court below was tried out on the theory that the plaintiff had two causes of action from the one conversation, but under the law there could be but one cause of action and one recovery. The issues were submitted on two causes of action for the one conversation and the contest waged and the verdict rendered on these issues unexcepted to by either party to this action. We do not think under such circumstances, although two alleged causes of action are set forth in the complaint as arising out of the one conversation, that a new trial should be granted, but that the allegations comprising what is denominated the second cause of action should be considered and determined on the record. This under plaintiff's evidence, taken to be true, is the only charge in the one conversation on which recovery can be had. As stated, if the action had been brought for the one conversation only one recovery could be had on the allegations in the two causes of action set forth in the complaint, but the first cause alleged in the complaint, from the view we take of the evidence, was qualifiedly privileged and no actual malice shown—no recovery could be had.

The conversation on which recovery can be had is on the charge of taking cash fares—embezzlement or misappropriation, excess of privilege. This being true, the present action, denominated the second cause of action, can be determined on the record. Our liberal practice permits this. Under the facts and circumstances of this case, no exception being made to the issues, the first cannot be sustained—the second can.

As to the second cause of action, C. M. Starke, testified that C. M. Cobb, division superintendent of defendant, in the conversation "Told me Captain Elmore had been called up to his office twice before that about cash fares; that the last time he was up there he had told him his cash fares did not come up to and correspond with the other conductors'; that soon after he had this talk with him and after that other time, that cash fares commenced to pick up and he supposed that was the time he commenced taking his tickets up."

The defendant in the argument said: "At the outset, the attention of the court is respectfully directed to the vast difference between the language of the witness and that of the complaint as to the second cause of action."

The court below, on this aspect, we think, in a clear and accurate charge laid down the rule of law: "The third issue is, did the defendant speak of and concerning the plaintiff the words alleged in the second cause of action—that is the witness, Starke, testified that Cobb told him that Captain Elmore had been called up to his office twice before that about cash fares; that the last time he, Elmore, was up there, he was told by Cobb that his cash fares did not come up to and correspond with the other conductors; that soon after he had this talk with him and after that other time, that the cash fares commenced to pick up and he supposed that was the time he commenced taking his tickets up. Now, gentlemen of the jury, if you find from the evidence and by its greater weight, that the agent, Cobb, used that language on that day, and he thereby intended to charge Elmore with appropriating to his own use the cash fares, it would be your duty to answer the third issue 'Yes'; if you do not so find, you should answer it 'No.' That would not be a privileged communication, because he did not have instructions from his superior, Mr. Newell, to have anything to do or say about cash fares being taken, and that would not be a qualified privileged communication, and, if you find that he did use the language and thereby intended to have it understood that Elmore had collected and appropriated to his own use cash fares, you should answer the third issue 'Yes'; if you are not so satisfied, you would answer it 'No.' The evidence of Starke is—that Cobb did use that language, and Cobb says that he did not use it. You have the testimony of the two witnesses as to the language used, and the burden is upon the plaintiff to satisfy you that it was used, and if you find it was used, then you would answer the third issue 'Yes,' if you find it was not used, you would answer the issue 'No.'"

Newell Slander and Libel (4 ed.) part of par. 267, says: "In all cases of ambiguity it is purely a question for the jury to decide what meaning the words should convey to persons of ordinary intelligence. The question always is: How did the persons to whom the words were originally spoken or published understand them?—the legal presumption being that they were persons of ordinary intelligence. We must assume, too, that they gave to ordinary words their ordinary meaning, to local or technical phrases their local and technical meaning." 17 R. C. L., pp. 312-315, inclusive; *Studdard v. Linville,* 10 N. C., 474; *McBrayer v. Hill,* 26 N. C., 139; *Pugh v. Neal,* 49 N. C., 369;

McCall v. Sustair, 157 N. C., 179; *Cotton v. Fisheries Products Co.,* 177 N. C., 56; *Vincent v. Pace,* 178 N. C., 421.

Walker, J., in *Beck v. Bank,* 161 N. C., p. 206, says: "As to the accusation he made, that plaintiff, H. L. Beck, had embezzled timber or money, was equivalent to charging them with the commission of a felony, or an infamous offense punishable by imprisonment in the penitentiary, 'as in cases of larceny' (Revisal, sec. 3406) (now C. S., 4268), the burden is cast upon the defendant to prove the truth of the charge, or any matter in justification or mitigation. *Osborn v. Leach,* 135 N. C., 628; *Ramsey v. Cheek,* 109 N. C., 270; *Harris v. Terry,* 98 N. C., 131; *McKee v. Wilson,* 87 N. C., 300. Malice, which is an essential element of slander, is, generally speaking, presumed where the words are actionable *per se,* until the contrary is proved, except in those cases where the occasion is privileged or prima facie excuses the publication. This presumption, however, may be rebutted. Newell on Slander and Libel (2 ed.) p. 39 (5) and 319 sec. 12, and cases *supra.*" *Ivie v. King,* 167 N. C., 174, rehearing denied 169 N. C., 261.

The charge made against the plaintiff and so understood by the jury was that of embezzlement or misappropriation of cash fares—a felony under C. S., 4268. This was actionable *per se,* and malice is presumed.

If C. M. Cobb's (division superintendent of defendant company) publication to C. M. Starke, as to collusion between plaintiff and Starke as to the tickets, was qualifiedly privileged, no actual malice being shown to destroy the privilege, yet the charge as to cash fares or embezzlement was actionable *per se* and malice is presumed from the felony charged. Defendant says, in answer to this, that if defamatory language was used about cash fares by Cobb, which is denied, he exceeded his authority and it is not liable.

In 25 Cyc., p. 386, it is said: "That where the party exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected and the fact that a duty, a common interest or a confidential relation existed to a limited degree is not a defense, even though he acted in good faith." Newell Slander and Libel (4 ed.) sec. 394, in part: "A communication which goes beyond the occasion exceeds the privilege." In some jurisdictions it has been held "that expressions in excess of what the occasion warrants do not *per se* take away the privilege, although such excess may be evidence of malice for the consideration of the jury." 25 Cyc., 387.

In the present case, the excess is *per se* actionable, and malice is presumed. It may be under different facts and circumstances—different pleadings and issues, expressions in excess may be evidence of malice, but here malice is presumed from the *per se* actionable words.

In *Ange v. Woodmen,* 173 N. C., p. 35, *Hoke, J.,* citing a wealth of authorities, says: "It is now fully established that corporations may be held liable for negligent and malicious torts, and that responsibility will be imputed whenever such wrongs are committed by their employees, and agents, in the course of their employment, and within its scope." *Munick v. Durham,* 181 N. C., p. 193.

In *Cook v. R. R.,* 128 N. C., p. 336, it was said: "Acting within the general scope of his employment, means while on duty, and not that the servant was authorized to do such acts." *Gallop v. Clark,* 188 N. C., p. 186; *Sawyer v. Gilmers, Inc., ante,* 7; *Southwell v. R. R., ante,* 417; *Seward v. R. R.,* 159 N. C., 241; *Cooper v. R. R.,* 170 N. C., 492; *Cotton v. Fisheries Products Co., supra,* 59; *Jenkins v. Sou. R. R. Co.* (S. C.), 125, S. E. Rep., 912.

After the testimony of Elmore, the plaintiff again rested his case, and the defendant then offered as evidence the sixteen affidavits referred to in the testimony of C. M. Cobb and W. H. Newell. This evidence was objected to by plaintiff and the objection sustained, and defendant assigned this as error.

C. S., 542, is as follows: "In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken. The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification on trial or not, he may give in evidence the mitigating circumstances."

Defendant in its answer had the legal right under the statute to set up the plea of justification, to show the truth of the charge. If found true by the jury, plaintiff could not recover. *Hamilton v. Nance,* 159 N. C., p. 59. It did not do this, but relied on, as its defense, privileged communication and denial. It could not offer any evidence to show the truth of the charge nor any evidence which tended to show the truth of the charge. The defendant had already been permitted, for the purpose of showing the good faith of Superintendent Cobb, to prove that he had these affidavits on the occasion of speaking the words, and also to show the names of the persons who made the affidavits and had permitted both Superintendent Cobb and Newell to state the purpose of these affidavits. This was all that was necessary to be shown as a basis of the alleged good faith of Superintendent Cobb. After this was done, the affidavits themselves could only tend to prove the truth

of the charge. It would be noted that the affidavits were not offered until after the plaintiff had closed his evidence in rebuttal and the plaintiff Elmore had been cross-examined as to whether or not he did in fact take the tickets as charged. Then, in sur-rebuttal, the defendant offered these affidavits evidently for the purpose of contradicting his statement as to whether or not he did in fact take the tickets and in reply to his testimony on that point. In *Burris v. Bush,* 170 N. C., p. 395, it is said: "The statute (Rev., sec. 502) (now C. S., 542), permits a defendant in actions for libel or slander to allege 'both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of the damages; and, whether he prove the justification or not, he may give in evidence the mitigating circumstances,' but, in the absence of a plea in justification or mitigation, evidence of the truth of the charge is incompetent. *Upchurch v. Robertson,* 127 N. C., 128; *Dickerson v. Dail,* 159 N. C., 541."

Newell Slander and Libel (4 ed.) p. 758, part sec. 692, is as follows: "*Truth under the plea of the general issue.* In most jurisdictions under this plea the defendant cannot be permitted to give in evidence the truth of the defamatory matter, either in bar of the action or in mitigation of damages."

If, in a plea of justification—the truth of the charge had been pleaded, defendant could have produced evidence to sustain the plea allowed it by statute. It could have had the witnesses at the trial, who made the affidavits, to show the plaintiff's conduct—collusion with the ticket agent Starke to defraud the defendant—but the affidavits were nothing more than hearsay, and incompetent, for any purpose other than to show the good faith of defendant and they had been used and spoken of by witnesses for this purpose. This evidence was addressed to the first cause of action and not now material from the position we take as to that cause.

The final exception and assignment or error we cannot sustain, which is as follows: "For that the court declined to give the instructions prayed by defendant, 'The court charges you that in no aspect of this case is plaintiff entitled to punitive damages, or smart money, and the jury in assessing damages, if you reach that issue, will not allow any such damage.' "

The court below charged the jury as to punitive damages: "As to punitive damages, gentlemen of the jury, you are not compelled or required by law to give punitive damages, but that is a matter in your discretion. You may in your discretion award punitive damages for the purpose of punishing the defendant. Punitive damages are punishing damages. Punitive damages are awarded to the plaintiff when he has been maliciously injured by some act or wrong-doing of the defend-

ant, and the damages are awarded to the plaintiff as a punishment to the defendant. That is entirely in your discretion."

We think, under all the facts and circumstances of this case, the charge was correct and fully sustained in *Ford v. McAnally,* 182 N. C., p. 419; *Baker v. Winslow,* 184 N. C., p. 5, and cases cited. There was no separate issue as to punitive damages, and on the record there is no way to ascertain if any of the damages awarded plaintiff were punitive.

The first cause of action alleged in the complaint, for the reasons heretofore given cannot be sustained. The publication was qualifiedly privileged, and no sufficient actual malice shown by the evidence to destroy the privilege.

The second cause of action was brought by plaintiff against the defendant for publication made by defendant's agent of a charge or accusation against him of embezzlement or misappropriation of cash fares—which is a felony. The jury found that the publication made was false, and the words are actionable *per se*—malice is presumed—and damages were awarded plaintiff. It was in evidence that the plaintiff had been in the employ of defendant company for 29 years and offered evidence of about 75 witnesses from all over Eastern North Carolina and parts of Virginia as to his good character.

Under our statute the defendant could have set up in its answer that the charge was true, the plea of justification. If it had evidence sufficient to sustain this plea and the jury believed it, plaintiff could not have recovered. It denied the allgation, plead privileged communication, and made no plea of justification. It could have in its answer set up mitigating circumstances to reduce damages. It did not do this. The jury by its verdict has said that defendant has falsely and maliciously slandered plaintiff. A cause of action for slander has come down to us from time immemorial. Slander is so hurtful that it is a Proverb: "The words of a talebearer are as wounds." Material things are trifling in comparison with character—"A good name is rather to be chosen than great riches." The record shows that the case was carefully tried in the court below. It has been ably argued here. On the first cause of action a nonsuit should have been granted, and that cause of action dismissed. On the second cause of action, we can in law discover no error.

Error as to first cause of action.

No error as to second cause of action.

STACY, C. J., dissents; VARSER, J., not having heard this case, did not take part in the decision.

JOHN HOWARD ET AL. v. THE BOARD OF EDUCATION OF CATAWBA COUNTY ET AL.

(Filed 13 May, 1925.)

1. Appeal and Error—Findings of Lower Court—Appellant Must Show Error—Schools—School Districts.

While on appeal from a judgment refusing to continue an order restraining the formation of a new school district within a county for nonconformity with the statutes applicable, the Supreme Court may disregard the finding of fact of the lower court and conclude differently upon its own findings, it is upon appellant to show error, and in the present case the facts found by the lower court are sustained.

2. Schools—School Districts—County-wide Plan—New Districts—Statutes—Injunction—Appeal and Error.

C. S., 5481 is now solely applicable to the creation, etc., of new school districts within the county, and upon the facts found on this appeal, it not sufficiently appearing that the proposed changes come under the provisions of this statute, it is *Held*, that the order dissolving the preliminary restraining order was properly entered, and will not be disturbed unless it is more clearly made to appear in the Superior Court that the new contemplated district to be voted on comes within the provisions of said section.

APPEAL by defendants from *Webb, J.*, from CATAWBA.

Action by plaintiffs, citizens, residents and taxpayers of Balls Creek School District, in Catawba County, against the County Board of Education of Catawba County, the Board of Commissioners of Catawba County, and the committeemen of Balls Creek School District, and the registrar and judges of election, to restrain the holding of an election called by the defendant commissioners of Catawba County, upon the petition of the defendant board of education, to submit to the qualified voters in a certain territory the question of a special school tax in addition to a general county tax for school purposes. Judgment for plaintiffs continuing the restraining order until the final hearing. Affirmed.

A temporary restraining order was issued by Stack, J., on 26 January, 1925, restraining the defendants from holding this school-tax election until further orders of the court and, pursuant to this order, a hearing was had, and the following order was entered:

"This cause coming on to be heard and being heard on 9 February, 1925, before his Honor, James L. Webb, judge presiding at the February Term, 1925, of Catawba Superior Court upon the motion of the plaintiffs to continue to the final hearing a restraining order heretofore granted upon their application, and the court having heard and con-

sidered the affidavits filed by all parties, which are now referred to, and the argument of counsel thereon, finds the following facts: That there are two public school districts, among others in Catawba County, one known as the Balls Creek District, and one as the Catawba District; that each have a high school and the former some years ago voted a special tax of ten cents on the hundred dollars of property to supplement the general school fund, and the latter fifty cents on the hundred dollars for similar purposes, and both taxes have been since levied and collected for such purposes;

"That in December, 1924, certain citizens and voters residing in the Balls Creek District and owning property there filed a petition with the school trustees of the Catawba District, asking that a large part of the territory of the Balls Creek District and certain other territory not in any special taxing district be annexed to the Catawba High School District and for an election thereon in the territory upon the question of levying a twenty cents tax upon the proposed new part and also upon the question of annexation, which petition was laid before the county board of education at its December meeting;

"That the nontaxing territory referred to lies between the other two aforesaid districts; that also at the said December meeting certain other citizens and voters in the Balls Creek District and its trustees or committeemen filed a petition with said board, asking for a special election in that district upon the question of the levy of a special tax increase from the present ten cents to not exceeding thirty cents on the hundred dollars to supplement the general school funds; that there was then and still is an indebtedness of $15,000 on the Balls Creek District incurred for high school building purposes; that the board of education made no order in regard to the application for annexation to the Catawba District, nor for any election thereon, but entered an order running an irregular line through the Balls Creek District with a view to cutting off from said district about 80 of the voters therein and about $75,000 of taxable property and to that extent reducing the size and voting population of said district and then applied to the board of county commissioners to order an election in the territory which they intended to retain as the Balls Creek District upon the question of increasing the special tax in that territory to not exceeding 30 cents on the hundred dollars, which election was ordered, the time set for 17 February, 1925, and registrars and judges appointed; that therefore the plaintiffs some of whom reside, are voters and own lands within the territory in which the election is called and some voters and landowners in the excluded territory brought this action and obtained a temporary restraining order against the holding of said election.

"According to the records as made by the county board of education the excluded territory is not now in any taxing district or at present in any school district at all.

"The court being, therefore, of the opinion that the election ought not to be held in the restricted territory in the way and manner proposed and that the plaintiffs are entitled to the relief sought herein,

"It is now, therefore, considered, adjudged, and ordered that the restraining order heretofore issued in this action be and the same is hereby in all respects continued to the final hearing."

To this order the defendants excepted and appealed.

E. R. Cline and Wilson Warlick for plaintiffs.
W. C. Feimster and Thos. P. Pruitt for defendants.

VARSER, J. The appeal in this case is based on one exception only, and that to the continuance of the restraining order until the final hearing.

The defendants asked this Court to disregard the findings of fact by the trial court and to examine all the evidence appearing in the record, and to find therefrom that the plaintiffs are not entitled to the relief sought.

We recognize in such cases the jurisdiction of this Court to review the evidence and determine questions of fact as well as of law. *Cameron v. Highway Commission,* 188 N. C., 84; *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. However, there is a presumption always that the judgment and proceedings below are correct, and the burden is upon the appellant not only to assign, but to show, error. *Hyatt v. DeHart, supra;* and upon the instant record we do not feel justified in finding the facts to be other than set out in the order of the trial court.

Defendants contend, however, that, from this record, it ought to be determined that a county-wide plan of organization has been adopted according to C. S., 5481, Public Laws 1923, ch. 136, sec. 73a, on authority of *Scroggs v. Board of Education, ante,* 110. The *Scroggs case* was an appeal from a judgment entered on a verdict of a jury. In that case the minutes of the Board of Education of Clay County were much fuller than in the instant record, and showed clearly the purpose and intent of the board of education to adopt the county-wide plan of organization for Clay County, and the order of 14 May, 1923 was, therefore, valid. In the instant case, the record, together with the finding of the trial court, are not sufficient to satisfy this Court that

the county-wide plan has been adopted. This is said, however, only with reference to the showing on the present record; the facts may be otherwise.

Inasmuch as it is now required that the county board of education shall create no new district or divide or abolish a district or consolidate districts, or parts thereof, except in accordance with the county-wide plan of organization, we are of the opinion that the order entered by the board of education, "running an irregular line through the Balls Creek District, with a view to cutting off from said district about 80 of the voters therein and about $75,000 of taxable property and to that extent reducing the size and voting population of said district," and the application of the board of education to the board of county commissioners to order an election in the territory which they intended to retain as the Balls Creek District, was not valid. Unless the order entered had the effect to create a new district comprising the territory in which the election was sought and ordered, then the election cannot be held. *Jones v. Board of Education,* 187 N. C., 557; *Perry v. Comrs.,* 183 N. C., 387; *Paschal v. Johnson,* 183 N. C., 129; *Hicks v. Comrs.,* 183 N. C., 394. While these latter authorities relate to the laws applying prior to the adoption of chapter 136, Public Laws 1923, they present the difficulties in the way of the execution of the order of the board of education in the instant case, because such order does not comply with chapter 95, C. S., vol. 3, sec. 5480-5490, inclusive. This was intended by the Legislature to be a complete recodification of the school law, and that the common school system of the State should be, thereafter, conducted in accordance therewith.

Since the order was entered by the board of education not in accordance with the county-wide plan of organization, and since it is not proved that the county-wide plan of organization has been adopted; and in the light of the positive prohibition contained in C. S., 5481, such order is void and of no effect, and the county board of education may proceed as it may be advised in reference to the adoption of the county-wide plan of organization (if the same has not, in fact, already been adopted), and if it has been, or when, adopted, it may proceed in accordance therewith to form such districts as it may determine are just and proper, *provided, however,* that no rights of any creditor are illegally affected.

We have not discussed the question of indebtedness of the Balls Creek School District, because it is not necessary upon the instant record to do so.

Upon the order entered, and the facts contained therein by the trial court, we are forced to conclude that there is no error in continuing the restraining order until the final hearing, and it is, therefore,

Affirmed.

W. W. STORM v. THE TOWN OF WRIGHTSVILLE BEACH, AND GEORGE E. KIDDER, AS MAYOR OF THE TOWN OF WRIGHTSVILLE BEACH, AND J. A. TAYLOR, B. J. JACOBS AND L. S. STEIN AS ALDERMEN OF THE TOWN OF WRIGHTSVILLE BEACH.

(Filed 20 May, 1925.)

1. Constitutional Law—Taxation—Faith and Credit—Municipal Corporations—Cities and Towns.

A town may not pledge its faith or credit for the issuance of bonds for municipal purposes, unless under statutory authority given in conformity with the requirements of the State Constitution, Art. II, sec. 14, by its passage on separate days by each branch of legislation, or when so given without the approval of its voters at an election held for the purpose, unless for necessary expenses. Const., Art. VII, sec. 7.

2. Same—Necessary Expenses—Statutes—Seaside Resorts—Jetties.

What are necessary expenses for which a town may issue bonds without submitting the question to its electors for approval may, to some extent, vary in accordance with local conditions, and in this case of a seaside resort: *Held*, that an incinerator for the burning of refuse matter is necessary to health requirements, as well as the building of sea jetties for the preservation of the lands, were necessary expenses within the contemplation of Art. VII, sec. 7. *Held*, likewise, as coming within the term "necessaries," are systems of waterworks, constructing streets and sidewalks and boardwalks, enlarging sewer systems, and, where the special statute is unconstitutional, bonds for these purposes may be so issued under the Municipal Finance Act. C. S., vol. 3, sec. 2918.

3. Same—Ratification—Ordinances.

Where a municipality has obtained temporary loans to pay for necessary expenses, C. S., 2932, 2934, 2935 (vol. 3), and thereafter seeks to issue bonds therefor under the provisions of the Municipal Finance Act, C. S., 2918, and the municipal authorities have accordingly ratified this indebtedness and included it with certain further sums for which the bonds are to be issued, it is a ratification and sufficient to sustain the issuance thus to be made.

APPEAL by plaintiff from *Dunn, J.*, submission of controversy without action, 25 April, 1925, NEW HANOVER.

Judgment for defendant—Affirmed.

The material facts are as follows:

The 1925 session of the General Assembly passed a Special Act entitled "An act to authorize the town of Wrightsville Beach to issue bonds." Under the provisions of the act, the town of Wrightsville Beach is authorized to issue bonds to the aggregate amount of $60,000 for the following purposes:

(1) Constructing or reconstructing jetties along the beach in the town of Wrightsville Beach, in order to protect the town against encroachments by the ocean and to build up the town; (2) acquiring

and improving a waterworks system or plant for the town; (3) constructing or reconstructing public boardwalks on the streets or other public places of the town; (4) constructing or acquiring an incinerator for the destruction of garbage in the town; (5) enlarging the sewer system of the town; and (6) funding or paying $13,000 of outstanding indebtedness of the town incurred before 6 March, 1925, for the purpose of constructing jetties as aforesaid and constructing a sewer system for the town.

The bonds are to be issued without a vote of the people of the town and are to be issued either under the authority of the special act referred to, or under "The Municipal Finance Act, 1921," (Consolidated Statutes, vol. 3, sec. 2918).

The Senate Journal shows that the first and second readings of the bill (the special act hereinabove referred to) in the Senate took place on the same day.

The court was of the opinion that for this reason the special act was unconstitutional, but was further of the opinion that all of the purposes for which the bonds are to be issued are for necessary expenses and that therefore, the town of Wrightsville Beach has authority to issue the same, independently of the special act, and under the authority of the Municipal Finance Act, and thereupon signed the following judgment:

"This controversy without action, coming on to be heard by consent of the parties before his Honor, Albion Dunn, judge, on 25 April, 1925, and after hearing the same upon the agreed case herein, and hearing the arguments of counsel for the plaintiff and the defendants, the court is of the opinion that all of the purposes for which bonds herein referred to are to be issued, constitute necessary expenses of the town of Wrightsville Beach within the meaning of section 7, Article VII, of the Constitution of North Carolina, and while the court is of the opinion that the act of the General Assembly of 1925, being entitled, 'An act to authorize the town of Wrightsville Beach to issue bonds,' ratified 6 March, 1925, was not enacted in accordance with the requirements of the Constitution of North Carolina, yet the proper officers of the town of Wrightsville have authority under the Municipal Finance Act of 1921 to issue said bonds, and that, therefore, the issuance of said bonds for the purposes set out in the agreed case herein, should not be enjoined.

"The court further finds as a fact that all requirements of the Municipal Finance Act of 1921 have been complied with and that the said bonds issued thereunder will be a valid and binding obligation of the said town of Wrightsville Beach."

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

K. O. Burgwyn for plaintiff.
Marsden Bellamy and Reed, Dougherty & Hoyt for defendant.

CLARKSON, J. Are the purposes for which the town of Wrightsville Beach desires to issue $60,000 in bonds "necessary expenses" within the meaning of section 7 of Art. VII, of the Constitution of North Carolina? We think they are, and "a vote of the majority of the qualified voters therein" is not necessary.

The constitutional provision 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 question, what is a necessary expense, which is a judicial one for the courts to determine, is one that cannot be defined generally so as to fit all cases which may arise in the future. As we progress, we look for better moral and material conditions and the governmental machinery to provide them. "Better access to the good things of life for all people," safety, health, comfort, conveniences in the given locality. Webster defines necessary: "A thing that is necessary or indispensable to some purpose; something that one cannot do without; a requisite; an essential." What is a necessary expense for one locality may not be a necessary expense for another. *Fawcett v. Mt. Airy,* 134 N. C., p. 125; *Keith v. Lockhart,* 171 N. C., p. 451.

It is conceded by able counsel of both parties to this controversy, that waterworks and sewerage system included in the bond issue are necessary expenses.

The term in the Constitution "necessary expenses" is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality, but it has a more comprehensive meaning. It has been held in this jurisdiction that streets, waterworks, sewerage, electric lights, fire department and system, municipal building, market house, jail or guard house are necessary expenses. *McLin v. New Bern,* 70 N. C., 12; *Fawcett v. Mt. Airy, supra; Greensboro v. Scott,* 138 N. C., 181; *Comrs. v. Webb,* 148 N. C., 122; *Hightower v. Raleigh,* 150 N. C., 569; *Bradshaw v. High Point,* 151 N. C., 517; *Jones v. New Bern,* 152 N. C., 64; *Underwood v. Asheboro,* 152 N. C., 641; *Hotel Co. v. Red Springs,* 157 N. C., 137; *Robinson v. Goldsboro,* 161 N. C., 668; *Gastonia v. Bank,* 165 N. C., 511; *Leroy v. Elizabeth City,* 166 N. C., 93; *Power Co. v. Elizabeth City,* 188 N. C., 296.

Plaintiff contends that expenditures for jetties are not a necessary expense, and says: "It is noteworthy also that it has never been decided that expenditures for the garbage incinerator or for boardwalk are necessary expenses."

If streets are a necessary expense, it naturally follows that sidewalks are. 28 Cyc., p. 833: "The sidewalk is the part of the street set apart for pedestrians. The word 'street,' as ordinarily used, includes a sidewalk, although it is sometimes used in its restricted sense as including only the roadway."

The very name of defendant—Wrightsville Beach—indicates it is a town on the beach, and it is a matter of common knowledge that it prospers mostly by its summer visitors and tourists. They go there for health and recreation. The location of the hotels, boarding houses and other houses will naturally be along the beach, and "it goes without saying" that boardwalks are a necessary expense to conveniently get from place to place in that kind of locality.

An incinerator for the destruction of garbage in a town, of all things, especially a town on a beach that functions mostly in the summer, is a necessary expense. It eliminates the odor that comes from filth and is a great health precaution. It destroys the breeding place of flies—annoying, to say the least, to man and beast. It is a medical fact that flies breed so rapidly that in a short period their increase is enormous. Of course they die, but they must have filth to breed in and food to live on. The breeding places must be eliminated; if not, from these places of filth they come into the habitation of man (hence the growth in screening), and pollute and poison food and drink. To this army of little marauders, the medical fraternity claim that in consequence of this filth- and disease-carrying fly, not only the strong, but the weak and especially children are liable to, in common parlance, "catch" such diseases as typhoid fever, dysentery, diarrhea of infants, etc. The old saying is "Cleanliness is indeed next to Godliness." Many cities and towns in the State have erected incinerators and taken it for granted that this Court would hold they were a necessary expense. The idea is as old as the Mosaic law."

"Municipal corporations are usually given more power to abate nuisances, and to suppress sources of filth and causes of disease. Under this power a municipal corporation may undertake the task itself and provide an incinerator to consume garbage and dead animals and similar substances, as a means of conserving the health of the inhabitants." 19 R. C. L., p. 787.

The Century Dictionary defines "jetty," in part: "A projection of stone, brick, wood, or other material (but generally formed of piles) . . . serving as a protection against the encroachment or assault of the waves; also, a pier of stone or other material projecting from the bank of a stream obliquely to its course, for the purpose of directing the current upon an obstruction to be removed, as a bed of sand or gravel, or to deflect it from a bank which it tends to undermine."

In the agreed state of facts (6) is the following: "The town of Wrightsville Beach has been encroached upon by the ocean and such encroachments are likely to continue and may cause serious loss and damage to said town unless checked or prevented by means of jetties to be constructed along the beach or ocean front."

The locality of the beach, a matter of common knowledge, the topography of the land, the storms in the vicinity and the effect of the waves eating into the beach and destroying it, all are determining factors on the question of necessary expense. The governing body of the municipality has determined the need of these jetties. No fraud or abuse of discretion being shown, we think, under the facts and circumstances of this case, that they are a necessary expense.

The Municipal Finance Act, 1921 (Consolidated Statutes, vol. 3, sec. 2918 *et seq.*), provides (section 2937), as follows: "A municipality may issue its negotiable bonds for any one or more of the following purposes: 1. For any purpose or purposes for which it may raise or appropriate money except for current expenses."

The defendant has heretofore contracted certain indebtedness—$9,000—for jetties "in order to protect said beach against damage from storms and the waves of the ocean and to build up the beach." It has heretofore contracted certain indebtedness—$4,000—"for the purpose of paying the cost of constructing and enlarging the sewerage system of said town." The bond ordinances recite in regard to said indebtedness "which temporary indebtedness is hereby ratified and confirmed, notwithstanding that it was incurred prior to the passage of this ordinance."

Under the view we take as to what are necessary expenses, bonds under the finance act can be issued for the indebtedness heretofore incurred, with the ratification provision above recited. We think, under such circumstances, the subsequent ratification cures the prior requisite of the statute. C. S., 2932-4-5, vol. 3, "Temporary Loans." Although we think it better to follow the statute in the first instance.

In *Construction Co. v. Brockenbrough,* 187 N. C., p. 77, we said: "As was said in *Board of Education v. Comrs., supra* (183 N. C., p. 302): 'Subject to certain exceptions, the general rule is that the Legislature may validate retrospectively any proceeding it might have authorized in advance.'" The municipality can do the same.

We think the town of Wrightsville Beach had the legal right to pass the ordinances set forth in the case agreed—ordinances authorizing the issuance of bonds for the construction, etc., of water works and system $26,000, jetties $25,000, sewer system $5,500, public boardwalks $3,500—Total $60,000.

The governing body has the sound discretion to determine matters of this kind. This extensive power, given by the Legislature to munici-

palities should be exercised with the utmost deliberation and consideration for the best interest of all the people of the municipalities.

In *Harris v. Durham,* 185 N. C., p. 577, we said: "These powers should be used with caution for the common good, without extravagance or waste, but with economy and care." The courts will not go behind this discretion, unless for fraud or abuse of discretion. Of course, the municipality must have legislative power.

The special enabling act, ratified 6 March, 1925, is clearly unconstitutional *because the journal of the State Senate affirmatively shows that the first and second readings of the bill in the Senate took place on the same day,* in violation of section 14, Art. II of the State Constitution, as follows: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal." This provision is mandatory and the proposition established by the decision in *Smathers v. Comrs.,* 125 N. C., 480, 34 S. E., 554. See, also, *Glenn v. Wray,* 126 N. C., 730; *Black v. Comrs.,* 129 N. C., 121; *Comrs. v. DeRosset,* 129 N. C., 275; *Brown v. Stewart,* 134 N. C., 357; *Comrs. v. Packing Co.,* 135 N. C., 62; *Claywell v. Comrs.,* 173 N. C., 657; *Road Comrs. v. Comrs.,* 178 N. C., 61. A different state of facts were presented in *Brown v. Comrs.,* 173 N. C., 598, and *Edwards v. Comrs.,* 183 N. C., 58.

On the entire record, we think the judgment of the court below correct. The judgment below is

Affirmed.

C. E. COWAN, TRUSTEE, v. A. N. DALE, J. A. WHITENER, AND THOMAS GARRISON.

(Filed 20 May, 1925.)

1. Sales—Merchandise in Bulk—Statutes.

While the sale of merchandise in bulk of practically or nearly all of the seller's property is void without compliance with C. S., 1611, it is necessary to effect this result to show the insolvency of the seller, and applies only between the purchaser and one holding a debt, etc., pre-existing the time of the sale.

2. Deeds and Conveyances — Mortgages—Probate—Interest—Statutes—Registration—Constructive Notice.

The probate of a deed or mortgage is a judicial act and may not in case of a mortgage be taken by a probate officer who is likewise one of the mortgagees, and his act in so doing is insufficient to pass the title against subsequent purchasers, etc., for value, and the registration of the mortgage when this is apparent is not constructive notice under the provisions of the statute, C. S., 3311.

3. Same—Trusts—Trustee—Purchasers for Value.

A trustee in a deed of general assignment for the benefit of creditors is a purchaser for value within the intent and meaning of our Registration Act, C. S., 3311.

4. Chattel Mortgages—Registration—Constructive Notice—Possession.

Where before making a deed of assignment the creditor had given a mortgage on his stock of merchandise (personal property), and the mortgagee was in peaceful possession thereof at the time the general assignment was made, the trustee under this deed takes with notice, notwithstanding the mortgage was ineffectual under our registration law as constructive notice, and a temporary restraining order of sale under the mortgage is properly dissolved.

APPEAL by plaintiff from *Harding, J.*, at September Term, 1924, of BURKE.

On 30 January, 1924, D. E. Flowers bought from W. T. Carswell a stock of goods kept in a store near Morganton. He paid part of the agreed price and secured the remainder ($1,200) by notes due in four, eight, and twelve months. These notes were endorsed by the defendants; and on the same day and as a part of one transaction Flowers executed and delivered to the defendants a chattel mortgage on the goods purchased from Carswell and acknowledged the execution thereof before A. N. Dale, one of the mortgagees, who was deputy clerk of the Superior Court. Upon Dale's certificate the mortgage was filed for registration on 29 and registered on 31 March, 1924. Flowers retained possession of the goods and sold and replenished the stock under an agreement with the mortgagors that goods subsequently purchased to keep up the stock should take the place of those that had been sold, and that the notes should become due upon his failure to maintain the stock at its estimated value. The mortgagees did not file an inventory. Flowers made default in payment and the defendants brought suit on 1 September, 1924, and under proceedings in claim and delivery acquired possession of the mortgaged property and gave public notice that it would be sold on 27 September, 1924.

On 15 September, 1924, and prior to the advertised day of sale, D. E. Flowers, the mortgagor, executed and delivered to the plaintiff a deed of assignment for the benefit of his creditors, which was filed for registra-

tion on 20 and duly registered on 24 September, 1924. The plaintiff instituted this action on 22 September to enjoin the sale and to recover possession of the property in the hands of the mortgagees.

Upon the hearing it was adjudged that the restraining order be dissolved and the mortgagees be allowed to make sale under the terms of the mortgage. The plaintiff excepted and appealed.

C. E. Cowan and Spainhour & Mull for plaintiff.
Avery & Hairfield for defendants.

ADAMS, J. The chattel mortgage did not create a preference within the meaning of C. S., 1611; but the plaintiff asserts that in effect it was an assignment for the benefit of creditors and void because the trustees or mortgagees did not file an inventory as required by section 1610. It has been held that where one who is insolvent makes a mortgage of practically all his property to secure one or more preëxisting debts, the instrument will be considered an assignment and the result will not be changed by the omission of a small part of his property; but to apply this doctrine it is necessary to show that the grantor was insolvent, that the secured debts were preëxistent, and that there were other creditors. *Bank v. Gilmer,* 116 N. C., 684, 707; *S. c.* 117 N. C., 416; *Cooper v. McKinnon,* 122 N. C., 447; *Pearre v. Folb,* 123 N. C., 237; *Brown v. Nimocks,* 124 N. C., 417; *Taylor v. Lauer,* 127 N. C., 157; *Odom v. Clark,* 146 N. C., 544; *Powell v. Lumber Co.,* 153 N. C., 52; *Williamson v. Bitting,* 159 N. C., 322, 327; *Wooten v. Taylor, ibid.* 604; *Eakes v. Bowman,* 185 N. C., 174; *Bank v. Tobacco Co.,* 188 N. C., 177. Under these decisions the chattel mortgage cannot be deemed an assignment for the benefit of the grantor's creditors because the secured debt was not preëxistent but contemporaneous with the contract of purchase from Carswell, constituting a part of one continuous transaction.

The chief controversy grows out of the question whether the rights of the mortgagees are not subordinated to those of the plaintiff as trustee under the deed of assignment. The plaintiff contends that while the chattel mortgage may be good *inter partes* its registration is insufficient as notice because the probate is defective; the defendants contend that the probate is defective, if defective at all, only as to the mortgagee who took the grantor's acknowledgment, not as to the others, and in any event that they had actual possession of the litigated property at the time the assignment was executed and registered and that such possession gave them a right of foreclosure which is paramount to the plaintiff's claim of title.

The probate of a deed or mortgage is a judicial act; hence if the probate or the grantor's acknowledgment be taken by an officer who is disqualified the probate or certificate of acknowledgment will be void and the registration of the instrument will be ineffective to pass title and may be regarded a nullity as to subsequent purchasers or encumbrancers. *Nemo debet esse judex in propria sua causa. Todd v. Outlaw,* 79 N. C., 235; *White v. Connelly,* 105 N. C., 65; *Blanton v. Bostic,* 126 N. C., 418; *Allen v. Burch,* 142 N. C., 524; *S. v. Knight,* 169 N. C., 333, 342. A. N. Dale, the deputy clerk who probated the chattel mortgage, was one of the grantees therein and by reason of his interest was not qualified to exercise this particular judicial function. An officer who has a pecuniary interest in a deed or mortgage as a party, trustee, or *cestui que trust* is disqualified to probate it or to take the acknowledgment of its execution. *Long v. Crews,* 113 N. C., 256; *Lance v. Tainter,* 137 N. C., 249; *Holmes v. Carr,* 163 N. C., 122.

In the circumstances the registration of the mortgage in the office of the register of deeds did not amount to constructive notice. Formerly the law was otherwise; certainly so under the act of 1715. The professed design of this act was "to prevent frauds by double mortgages, which design was accomplished by giving priority to a subsequent mortgage, if registered before a prior one, unless the latter was registered within fifty days. . . . The law was designed to give notice to persons so situated; but if it was clearly established in proof that a subsequent mortgagee had notice of a prior mortgage, although not registered, in equity he was bound by it, although he had obtained a priority at law; for having this notice he could protect himself from harm by forbearing to proceed." *Pike v. Armstead,* 16 N. C., 110. But this was changed by the act of 1829, the substance of which is incorporated in C. S., sec. 3311. This statute provides that no deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage, etc.; and as held in a number of our decisions the statute implies that no actual notice of a prior unrecorded mortgage, however clear and formal, will supply the notice which is given by registration of the instrument in question. *Fleming v. Burgin,* 37 N. C., 584; *Robinson v. Willoughby,* 70 N. C., 358; *Blevins v. Barker,* 75 N. C., 436; *Brem v. Lockhart,* 93 N. C., 191; *Bank v. Mfg. Co.,* 96 N. C., 298; *Hinton v. Leigh,* 102 N. C., 28; *Wood v. Lewey,* 153 N. C., 401; *Fertilizer Co. v. Lane,* 173 N. C., 184.

The plaintiff occupies the position of a trustee under the deed of assignment and is therefore a purchaser for value. In *Potts v. Blackwell,*

57 N. C., 58, it is said that whatever distinction may formerly have been supposed to exist between present and antecedent debts may "be regarded as now exploded," and that a deed in trust executed in good faith for the security of actual creditors, whether for debts old or new, must be treated as a conveyance for value. *Brem v. Lockhart, supra.* Also in *Starr v. Wharton,* 177 N. C., 323: "A trustee in a general assignment for the benefit of creditors is a purchaser for value within the meaning of the statute, some of the decisions being directly to the effect that such a trustee when the instrument under which he acts is first registered, will take precedence over the rights of a vendor whose interests are protected and embodied in a conditional sale prior in date but subsequently registered."

But the defendants urge the further argument that they took actual possession of the mortgaged property for the purpose of enforcing their lien before the plaintiff's rights attached and that their possession for this purpose is good against the plaintiff. In our opinion this argument is sound. A written instrument is not required for the transfer of personal property as it is for the conveyance of land; so *Wood v. Tinsley,* 138 N. C., 507, is not applicable here. At common law, as between the parties the delivery of personal property to the mortgagee was not essential to the validity of the mortgage, but to give such mortgage validity against creditors and purchasers it was necessary that the custody and possession of the property be delivered. *McCoy v. Lassiter,* 95 N. C., 88. Our registration laws were intended in part to take the place of such notice by possession; for the record of a chattel mortgage "is a mere substitute for a delivery and change of possession." 5 R. C. L., 455, sec. 90. It is generally held that such possession is notice. The doctrine is thus stated in Jones on Chattel Mortgages, sec. 178: "If a mortgagee take possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity."

To the same effect is a uniform line of decisions. "The object of requiring a mortgage of personal property to be filed or recorded is to give creditors and subsequent purchasers notice of its existence when the mortgagor retains possession of the property. If the actual possession of the property is changed, then the necessity for recording or filing the chattel mortgage fails. And the same may be said in respect to an imperfect or insufficient description of the mortgaged property. If the mortgagee takes possession of the mortgaged property, that is sufficient. That is an identification and appropriation of the specific property to

the mortgagee." *Morrow v. Reed,* 30 Wis., 81. "If a mortgagee or pledgee takes possession of the mortgaged or pledged chattels before any other lien attaches thereto, his title is valid as against subsequent attachment or execution creditors, there being no fraud in fact, although the mortgage was not filed or the chattels delivered when the contract of pledge was made." *Prouty v. Barlow,* 76 N. W., (Minn.), 946. "If a mortgagee take possession of mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity. *Chipron v. Feikert,* 68 Ill., 284; *Frank v. Miner,* 50 Ill., 444; *McTaggart v. Rose,* 14 Ind., 230; *Brown v. Webb,* 20 Ohio, 389. Subsequent possession cures all such defects. *Morrow v. Reed,* 30 Wis., 81. No particular mode of taking or retaining possession is required. It is not necessary that the property be delivered to the mortgagee in person; delivery to his agent is equally effectual." *Bank v. Commission Co.,* 64 N. E. (Ill.), 1097, 1104. See, also, *Ogden v. Minter,* 91 Ill. App., 11; *Bank v. Gilbert,* 174 Ill., 485. "In case of a mortgage (of personal property) the right of property is conveyed to the mortgagee, by a perfect title, which title is liable to be defeated by the payment of the mortgage debt, and if the mortgagee takes possession of the property, he takes it as his own, and not as the mortgagor's." *Janvrin v. Fogg,* 49 N. H., 310, 351. "Such a lien (mortgage) is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely." *Hauselt v. Harrison,* 105 U. S., 401, 26 Law Ed., 1075. See, also, 11 C. J., 587, sec. 281.

Upon reason and authority therefore we are of opinion that the plaintiff is not entitled to a continuance of the restraining order. This conclusion does not impair the validity of our statutes regulating the registration of written instruments or modify the force and effect of the decisions which hold that no actual notice of a prior unrecorded mortgage will supply the place of registration; but it upholds the principle that where a mortgagee takes possession of mortgaged property in good faith for the purpose of foreclosing a chattel mortgage which secures his debt before any other right or lien attaches, his title under the mortgage is good and a subsequent encumbrancer takes subject to the mortgagee's lien.

The judgment is

Affirmed.

J. P. SLOAN v. PIEDMONT FIRE INSURANCE COMPANY.

(Filed 20 May, 1925.)

1. Usury—Actions—Counterclaim—Penalty—Statutes.

Where interest at an usurious rate has been charged for the loan of money, the note therefor is stripped of its interest-bearing quality under the provisions of our statute, C. S., 2306, and the penalty is recoverable either in reduction of the principal sum in counterclaim in the payee's action upon the note, or in the payor's action as in the nature of a debt.

2. Same—Limitation of Actions.

Where a note is given for money borrowed, and extended upon the payment of usury knowingly received, C. S., 2305, the statute of limitations bars the right of recovery of the penalty two years after each usurious transaction, C. S., 442 (2); and in this action, the plaintiff having elected to sue under the statute for the penalty, the action will not be considered as one for an accounting, regarding the payment of the usurious interest as payment upon the note, and thus repel the bar of the statute.

APPEAL by plaintiff from *Shaw, J.*, at October Term, 1924, of MECKLENBURG.

On 19 March, 1924, plaintiff executed his note for $2,800 due and payable, with interest from date at six per cent, on 1 September, 1914. Within a few days thereafter, this note was transferred by endorsement of the payee named therein to defendant. Plaintiff paid to defendant, as interest on said note, in advance, the sum of $224, defendant agreeing in consideration therefor to extend the payment of said note to 18 March, 1915; thereafter during March of each year, plaintiff paid to defendant, as interest on said note, in advance, the sum of $224, defendant agreeing, immediately before or contemporaneously with each payment to extend payment of said note for the succeeding year. Payment of the note was thus extended to 18 March, 1923. On 30 March, 1923, plaintiff paid to defendant $2,808.10, thus paying principal and interest accrued from 18 March to 30 March, 1923.

The aggregate amount paid by plaintiff to defendant, as interest, annually in advance, prior to 1 March, 1922, was $1,792; the amount paid subsequent to 1 March, 1922, as found by the jury, was $233.10. The total amount paid as interest on said note was $2,025.10. The interest for each year was paid in advance at the rate of eight per centum per annum. Defendant knowingly charged, and took and received from plaintiff a rate of interest in excess of six per centum per annum.

This action was begun on 7 December, 1923, by plaintiff to recover of defendant the penalty prescribed by statute for usury charged by defendant and paid by plaintiff.

From judgment that plaintiff recover of defendant the sum of $466.20 and costs, plaintiff appealed to the Supreme Court. Plaintiff contends that there was error (1) in the instruction of his Honor that if the jury should find the facts to be as testified by the witnesses they should find that the amount paid by plaintiff to defendant as interest subsequent to 1 March, 1922, and prior to the commencement of the action was $233.10, and that plaintiff was entitled to recover of defendant the sum of $466.20; (2) in the instruction of his Honor that if the jury should find the facts to be as testified by the witnesses, plaintiff's cause of action for the penalty on account of payments of interest at a rate in excess of six per centum per annum prior to 1 March, 1922, was barred by the statute of limitations; and (3) in the refusal of his Honor to hold that the amounts paid annually as interest at a rate in excess of six per centum per annum should be applied as payments on the principal of the note, thus reducing the principal sum due on 30 March, 1923, and to adjudge that plaintiff recover of defendant the difference between the principal thus reduced and the amount paid, to wit: $2,808.10, as an overpayment.

These contentions are presented by exceptions duly noted upon which assignments of error are based.

J. F. Flowers for plaintiff.
Tillett & Guthrie, C. W. Tillett, Jr., and D. W. Spencer for defendant.

CONNOR, J. This is an action to recover the penalty prescribed by statute (C. S., 2306) for taking, receiving, reserving or charging a greater rate of interest than six per centum per annum. The legal rate of interest in this State is six per centum per annum, and no more. (C. S., 2305). Interest at a rate in excess of six per centum per annum, when knowingly taken, received, reserved or charged is usury.

The penalty prescribed by statute for charging usury is 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. A debt, upon which usury has been charged and agreed to be paid is stripped of its interest-bearing quality. In an action upon such a debt, only the principal can be recovered.

The penalty prescribed by statute, for taking, receiving, reserving or charging usury, when the same has been paid, is liability to the person or his legal representatives, or the corporation by whom it has been paid, for twice the amount of interest paid, to be enforced in an action in the nature of an action for debt, or to be allowed as a counterclaim in an action by the creditor against the debtor to recover the debt upon which the usury has been paid. An action to recover the penalty, or a

demand for the penalty as a counterclaim, as prescribed or allowed by the statute, must be brought or made within two years from the date on which the cause of action for the penalty or the right to demand the penalty as a counterclaim accrues; otherwise, it is barred. C. S., 2305; 2306; 442, subsection 2.

The late *Chief Justice Clark,* in *Tayloe v. Parker,* 137 N. C., 418, says: "The whole subject of usury is a matter of public policy, resting in legislative discretion, and the courts have no concern save to execute the law as it is written."

Upon the facts as found by the jury in this case, defendant is liable to plaintiff, under the statute, for the penalty for the usury paid by plaintiff and charged and received by defendant. This penalty—twice the amount paid and received as interest at a rate in excess of six per cent—is recoverable in this action, unless the action for the penalty, in whole or in part, is barred by the statute of limitations. The several amounts paid as usury were paid from year to year, each payment being immediately preceded by or contemporaneous with an agreement by defendant, in consideration of such payment, to extend the payment of the note for one year thereafter. The payments of the respective amounts as usury were separate and distinct, each from the other. The several agreements for extension were unrelated. The cause of action for the penalty for each payment of usury arose immediately and accrued at once upon the date of the payment. The action to recover the penalty for each usurious transaction was therefore barred under C. S., 442, subsection 2, upon the expiration of two years from the date of the payment.

The cause of action for the penalty for usury accrues at the date of the usurious transaction, and unless this date is within two years prior to the commencement of the action to recover the penalty or prior to the demand for the penalty as a counterclaim in an action to recover the debt, on which usury has been paid, the action or the demand is barred; C. S., 442, subsec. 2. So much of chapter 69, Laws of 1895 as provided that the action to recover the penalty for usury shall be commenced within two years after the payment in full of the indebtedness is no longer the law. Rev., 1905, sec. 5453, C. S., 8101. The usurious transaction for which the penalty is allowed, occurs when interest at a rate in excess of six per centum per annum is knowingly charged, taken, received or reserved. All payments of interest made by plaintiff to defendant, in excess of six per centum per annum on the note for $2,800, prior to 1 March, 1922, are barred, and plaintiff's contention that his Honor was in error in so holding, cannot be sustained.

Nor can the first contention be sustained. All the evidence is to the effect that the only payments made to defendant by plaintiff subsequent

to 1 March, 1922, as interest were the sum of $224, paid on or about 18 March, 1922, and $8.10 paid on 30 March, 1923. It is conceded that there is an error of $1 in the jury's finding. The aggregate should be $232.10 and not $233.10. The judgment should be for $464.20, and not for $466.20. This is manifestly an error in addition, and will be corrected by the clerk of the Superior Court of Mecklenburg County. There is no error of law or legal inference sustaining the contention of plaintiff.

Plaintiff's third contention is that the amounts paid annually as interest at the rate of eight per centum per annum should be applied as payments on the principal of the note, which by reason of the charge of usury has been stripped of its interest-bearing quality. Plaintiff contends that judgment should have been rendered that he recover of defendant the difference between the principal, without interest, thus reduced and the amount paid on 30 March, 1923, this difference being an overpayment by plaintiff to defendant on the note.

This is not an action for an accounting; it is an action, under the statute, in the nature of an action for debt to recover the penalty prescribed by statute for usury paid. It is alleged in the complaint that the respective payments were made and received as and for interest. The evidence sustains the allegations, and it is found by the jury that the payments were made knowingly as interest at a rate in excess of six per centum per annum. Plaintiff's third contention cannot be sustained; *Cobb v. Morgan,* 83 N. C., 211; *Rogers v. Bank,* 108 N. C., 574.

Plaintiff, after paying usury annually through a series of years, elected to pay off and discharge the principal of his note, and then to sue under the statute for the penalty provided therein. Defendant pleads and relies upon the statute of limitations. Their respective rights and remedies are statutory. The judgment rendered by his Honor upon the facts found by the jury is in accordance with the statutes applicable to the facts shown by the evidence and found by the jury.

We find

No error.

CHESS TRIPLETT AND MRS. ELLEN POPLIN v. W. A. HENDRIX.

(Filed 20 May, 1925.)

Limitation of Actions—Deeds and Conveyances—Color of Title.

Held, on this appeal, no error in the judgment upon the verdict that the plaintiff's action to recover lands was barred by the statute of limitations upon the question of defendant's adverse possession under color of title.

TRIPLETT *v.* HENDRIX.

APPEAL from *Long, J.*, and a jury, at October Term, 1924, of WILKES.

John Greenwood owned the tract of land in controversy, which plaintiffs seek to recover in this action. He and his wife made a deed to his son, Thomas J. Greenwood, 8 November, 1886. Thomas J. Greenwood and his wife, on 14 August, 1907, made a deed to the land to W. A. Hendrix, defendant in this action. All the deeds were duly registered at the time in the register of deeds office of Wilkes County. Thomas J. Greenwood went west, returned and then went west again. The record discloses that he was married and separated from his wife, who is now dead, that he had no children and had not been heard from in years—since 1912.

Plaintiffs are grandchildren of John Greenwood, and the owners in their own right and by quit-claim deed of all the interest of the other heirs at law of John Greenwood, and, as such, claim the land in controversy. Plaintiffs contend that Thomas J. Greenwood only took a life estate in the land deeded by his father and their grandfather, and had no right to make a fee-simple title to defendant, W. A. Hendrix. That their cause of action is not barred by the statute of limitation.

The defendant, W. A. Hendrix, contends to the contrary. He claims that he made a contract to purchase the land from Thomas J. Greenwood and declined to take it on account of the ambiguous clause in the warranty clause of the deed. That Thomas J. Greenwood sued him in the Superior Court of Wilkes County. When the case was tried, the judge held that the deed from John Greenwood conveyed a fee-simple title to Thomas J. Greenwood, and rendered judgment against him, compelling him to take the land and pay the purchase price—full value for the land, and in good faith he made valuable improvements on the land. "That the defendant, ever since 15 August, 1907, has been in the actual exclusive possession of the lands described in the complaint, under known and visible lines and boundaries, and under colorable title, for more than 7 years prior to the commencement of this suit, said possession having extended continuously from 15 August, 1909, until the commencement of this action, and the summons in this action not having been issued until 15 July, 1924; the said possession has been adverse to all persons, and this defendant has exercised every act of ownership over it of which it was susceptible, and had no intimation or suggestion that any other persons asserted any claim or right to the same until just a few days before the summons was issued the plaintiff, Chess Triplett, informed this defendant that he was going to bring suit to recover." (C. S., 428.)

The issue submitted to the jury and their answer thereto, was as follows:

"Is the plaintiffs' cause of action barred by the statute of limitation? Answer: 'Yes.'"

There was judgment upon the verdict, as follows:

"It is therefore, ordered and adjudged that the plaintiffs are not the owners in fee and are not entitled to recover the lands described in the complaint, and that the defendant is not in the wrongful or unlawful possession thereof; and the plaintiffs and the surety on their prosecution bond are adjudged to pay the costs to be taxed by the clerk."

Many exceptions and assignments of error were made in the court below by plaintiffs and appeal taken to the Supreme Court.

John H. Folger, William M. Allen, Floyd Crouse and Charles G. Gilreath for plaintiffs.

Hayes & Jones and J. H. Burke for defendant.

PER CURIAM. We have heard the oral arguments in this case. We have examined the record carefully, the charge of the court below, and the able briefs of counsel. We have gone carefully over the assignments of error, and, on the entire record, we can find no prejudicial or reversible error.

No error.

STATE v. GREENE MILLER.

(Filed 20 May, 1925.)

Criminal Law—Evidence—Unrelated Offenses—Motive—Identification.

While the general rule is that substantive evidence of a separate and distinct criminal offense is inadmissible on the trial of a felony, it is an exception to this rule when the evidence of the former conduct of the defendant on trial tends to establish malice or motive in the instant case, or identify him as the one who committed the felony for which he is being tried.

APPEAL by defendant from *Long, J.*, at September Term, 1924, of WATAUGA.

Criminal prosecution tried upon an indictment charging the defendant with a secret assault in violation of C. S., 4213, and with an assault with a deadly weapon with intent to kill, in violation of C. S., 4214.

From an adverse verdict and judgment pronounced thereon, the defendant appeals, assigning errors.

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

J. H. Burke, F. A. Linney and W. C. Newland for defendant.

STACY, C. J. There was ample evidence to warrant the jury in finding, as it did, that the defendant, in a secret manner, maliciously committed an assault with a deadly weapon upon one J. C. Watson by waylaying and with intent to kill, such purpose being unknown to the prosecuting witness. This, under the statute, C. S., 4213, is denominated a felony. Watson was shot from ambush between ten and eleven o'clock on the night of 23 April, 1921, while traveling along a public highway in Watauga County. The evidence also supports the second count in the bill, charging an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, in violation of C. S., 4214. *S. v. Oxendine,* 187 N. C., p. 663.

As bearing on the question of malice and felonious intent, the State was allowed to show that a week or two before the happening of the offenses charged in the bill of indictment, the defendant had been seen about the home of the prosecuting witness; that he had shot at his house and threatened to shoot him.

The defendant stressfully contends that error was committed in permitting the State to offer this evidence, over objection, of a separate offense of shooting at the house of the prosecuting witness only a short time prior to the commission of the assaults for which the defendant was then being tried.

It is undoubtedly the general rule of law, with some exceptions, that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. *S. v. McCall,* 131 N. C., 798; *S. v. Graham,* 121 N. C., 623; *S. v. Frazier,* 118 N. C., 1257; *S. v. Jeffries,* 117 N. C., 727; *S. v. Shuford,* 69 N. C., 486. But to this there is the exception, as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge, or *scienter,* when such crimes are so connected with the offense charged as to throw light upon this question. *S. v. Simons,* 178 N. C., 679, and cases there cited. Proof of other like offenses is also competent to show the identity of the person charged with the crime. *S. v. Weaver,* 104 N. C., 758. The exceptions to the rule are so fully discussed by *Walker, J.,* in *S. v. Stancill,* 178 N. C., 683, and in a valuable note to the case of *People v. Molineux,* 168 N. Y., 264, reported in 62 L. R. A., 193-357, that we deem it unnecessary to repeat here what has there been so well said on the subject.

The evidence, above mentioned and which is the subject of one of defendant's exceptions, clearly falls within the exceptions to the rule and was properly admitted.

In the case of *Rex v. York,* R. & R., C. C., 531, it was held that if, upon an indictment for malicious shooting, it be questioned whether the shooting was by accident or design, evidence may be given that the prisoner at another time intentionally shot at the same person. This holding is cited with approval in *S. v. Murphy,* 84 N. C., 742.

The other exceptions are without material significance. We have found no reversible error on the record, and hence the verdict and judgment will be upheld.

No error.

ADAH ANDREWS, PERSONALLY, AND ADAH ANDREWS, AS ADMINISTRATRIX OF LEROY ANDREWS, v. MOST WORSHIPFUL GRAND LODGE OF NORTH CAROLINA FREE AND ACCEPTED ORDER OF MASONS.

(Filed 20 May, 1925.)

1. Insurance—Fraternal Orders—Beneficiaries—Statutes — Contracts—Policies—Change of Beneficiaries.

A policy of life insurance of a fraternal order is limited to the wife, certain relations and dependents by statute, C. S., 6508 (Public Laws of 1913, ch. 89, sec. 5), with the right of the assured to change the beneficiary at any time, and where he has named his wife as beneficiary and afterwards substitutes the name of another, disqualified to take under the statute, such attempted change is not a revocation of the provisions of the policy first issued and leaves it in force.

2. Same—Vested Rights—Constitutional Law.

Where an insured in a fraternal insurance order has named his wife as a beneficiary before the enactment of the laws of 1913, limiting those who may lawfully so take, and afterwards when the amended law is in effect attempts to change the beneficiary to a person prohibited thereby, the effect of the amendment is to prevent the beneficiary from making such change and cannot be considered as an unconstitutional reactive law impairing the obligations of a contract.

APPEAL from *Lane, J.,* and a jury, February Term, 1925, of MECKLENBURG.

This action is brought by Adah Andrews, personally and as administratrix of Leroy Andrews, against defendant on the following certificate, hereafter designated as policy:

"This certifies that Brother Leroy Andrews is a beneficiary member of this department, and as such, on his death, his heirs, beneficiaries, or legal representative, whose name appears in the margin of this certificate (Adah Andrews, wife), shall be entitled to the sum of $350.00, to be paid within sixty days after the death of the aforenamed

brother, subject to the following conditions, viz., that the said brother at the time of his death shall be a financial member of both a subordinate lodge of this jurisdiction and of the Endowment Department.

Given under our hands and seal, this 22 October, 1907.

James H. Young, Grand Endowment Secretary.
R. B. McRary, Most Worshipful Grand Master."

From the complaint and answer, it is admitted that defendant is a North Carolina corporation, and is and has been at the time hereinafter mentioned engaged in the business of life and health insurance and other kinds of insurance within this State, being ordinarily known as a fraternal order.

The plaintiff alleges that Leroy Andrews died 11 May, 1922, and at the time of his death Adah Andrews was his lawful wife, and all the premiums and dues on the policy had been paid and the policy was valid and in full force and effect at the time of the death of Leroy Andrews, and that she personally, or as administratrix, under the policy, was entitled to the sum mentioned in the policy.

The defendant denies that Adah Andrews was the lawful wife of Leroy Andrews and denies the validity of the policy held by plaintiff, Adah Andrews, and denies that it is liable or indebted to her in any amount. In its answer it says: "That it is admitted that Leroy Andrews was a member of the Masonic Lodge for many years and that he was financial in the Endowment Department at the time of his death; that upon compliance with stipulations recited in policy, the amount therein named should be paid the legal wife of the said Leroy Andrews." And as a further defense alleges:

(1) That it is informed and believes that at the time policy was issued to the late Leroy Andrews that he was legally married to and lived with Hattie Andrews as his wife and who at his request was named as beneficiary therein.

(2) That at the time of the death of the said Leroy Andrews, Hattie Andrews was and is his legal wife, and as such is entitled to the face value of said policy.

To sustain defendant's contention on the hearing, it introduced an exact copy of the policy sued on, except "Hattie Andrews, wife," was in the policy in place of "Adah Andrews, wife." This policy was dated 28 August, 1916.

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

"1. Was Adah Andrews the lawful wife of Leroy Andrews at the time of his death? Answer: Yes.

2. Was Hattie Andrews the lawful wife of Leroy Andrews at the time of his death? Answer: No.

3. Did Leroy Andrews direct the name of Hattie Andrews to be substituted for the name of Adah Andrews as beneficiary in the policy of insurance issued on or about 22 October, 1907? Answer: Yes.

4. What amount, if any, is due Hattie Andrews on said policy? Answer: Nothing.

5. What amount, if anything, is due Adah Andrews on said policy? Answer: Nothing.

6. What amount, if anything, is due Adah Andrews, administratrix, on said policy? Answer: $350.00 and interest from date of qualification as administratrix."

The court below rendered judgment as follows:

"The court being of the opinion that Hattie Andrews was not entitled to recover instructed the jury to answer 'Nothing' to the fourth issue, and the court being of the opinion that Adah Andrews was not entitled to recover, having granted 'nonsuit' as to her personally, instructed the jury to answer the fifth issue 'Nothing.' The jury having answered the sixth issue '$350.00 and interest from 19 February, 1924.' It having been agreed by plaintiff and defendant that this amount due, if any, under the rules of the court.

"Ordered, adjudged and decreed, that the plaintiff, Adah Andrews, administratrix of Leroy Andrews, have and recover of the defendant the sum of $350.00, with interest on $350.00 from 19 February, 1924, until paid; and that the cost of this action be taxed against Adah Andrews, administratrix, by the clerk."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

Preston & Ross for plaintiff.
P. H. Bell and J. T. Sanders for defendant.

CLARKSON, J. From the pleadings it will be noted that there is no denial on the part of the defendant that it is due the amount set forth in the policy, but in its answer as a defense to plaintiff's action alleges "That at the time of the death of the said Leroy Andrews, Hattie Andrews was and is his legal wife, and as such is entitled to the face value of said policy."

C. S., 6508 (Public Laws 1913, chap. 89, sec. 5), is as follows:

"The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; but if after the issuance of the original certificate the member shall

become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions, each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of the member. Any society may, by its laws, limit the scope of beneficiaries within the above classes."

Under the issues submitted in the court below, the jury found that Adah Andrews, and not Hattie Andrews, was the wife of Leroy Andrews. Under C. S., 6508, *supra,* Leroy Andrews had no legal right to substitute the name of Hattie Andrews for his lawful wife, Adah Andrews, as beneficiary in the policy of insurance issued by the defendant 22 October, 1907.

Under a similar statute in Ohio, construed in *Applebaum v. Commercial Travelers,* 171 N. C., p. 435 (similar facts), *Clark, C. J.,* said: "Naming her as the applicant's wife in the application was a fraud, and does not entitle her to be a beneficiary of the contract." In fact, naming Hattie Andrews, who was not his wife, was void as to her and contrary to the plain provisions of the statute. This did not revoke the former policy, but left Adah Andrews, the lawful wife, the beneficiary under the policy—she being named in the policy—the policy having been kept in force according to the rules of defendant company.

The matter is well stated in Bacon on Benefit Societies, sec. 310-C, citing numerous cases, as follows: "The question occurs as to the effect on the rights of the beneficiaries first designated by an attempted change of beneficiary which is incomplete, or where the change, being effected by compliance with the required formalities and the issuance of a new certificate, is illegal, because the second beneficiaries are not entitled to take. While it seems to be taken for granted in the cases cited in the preceding sections that if the attempted change of beneficiary is not complete the rights of the first beneficiaries are not affected, because the revocation is not made complete by the issuance of the new certificate, it is now settled that if for any reason the change of beneficiaries is invalid, the rights of the first beneficiary remain in force." Joyce on Insurance (2d vol.), sec. 753; *Pettus v. Hendricks,* 113 Va., p. 326, 74 S. E., p. 191; *Page v. Bell,* 146 Ga., 680, 92 S. E., 54. In *Royal League v. Shields,* 159 Ill. App., 54, it is *held,* if the original certificate issued by a society has been canceled and surrendered and a new certificate issued, such new certificate is a nullity if it names an ineligible beneficiary, and in consequence the original certificate is considered effective and in force.

In *Pollock v. Household of Ruth,* 150 N. C., p. 213, *Hoke, J.,* says: "It is further established, certainly by the weight of authority, that, in the absence of some restriction of the kind indicated, some inhibitory provision of the general law or the charter, or some rule of the company affecting the matter, a member holding a policy or benefit certificate may change the beneficiary at his election. If certain formalities are required, they must, as a rule, be observed, but unless restrained, as indicated, the member may change the beneficiary at will, and the last holder properly designated will be entitled to the fund. Niblack on Benefit Societies, pp. 331-409; Bacon on Benefit Societies and Life Insurance, vol. 1, 291a, 308."

After the original policy was issued, 22 October, 1907, in which Adah Andrews was the beneficiary, the Legislature passed C. S., 6508 (1913), *supra,* confining the payment of death benefits to certain parties—wife, husband, close kin, etc. Leroy Andrews, the husband of Adah Andrews, on 28 August, 1916, attempted to substitute, with the consent of defendant, and it issued a new policy and put in the policy "Hattie Andrews" for "Adah Andrews." The jury found that Hattie Andrews was not his wife at the time, and, therefore, she did not come within the limited parties under the 1913 act.

Before the act of 1913, Leroy Andrews could have designated any one he saw fit as a beneficiary, nothing in the rules of defendant company or the law of the State prohibiting this. Under the rules of the defendant company and the law then existing, he designated Adah Andrews as the beneficiary of the policy. The statute of 1913 limits the beneficiaries. The serious question arises: Does the statute of 1913 destroy or interfere with vested rights or impair the obligation of a contract? Since the passage of the 1913 act, could Leroy Andrews, who under the former law and rules of defendant company had the right to, change the beneficiary from Adah Andrews, his wife, to whomsoever he pleased —and he named Hattie Andrews, not his wife, and not within the limited parties under the 1913 act. Could he do this? We think not. Leroy Andrews was presumed to know the law, and, after it was passed, with this knowledge, he attempted to make a new policy contrary to the changed law. Under such facts and circumstances, the new beneficiary named—Hattie Andrews—could not take advantage of any plea of vested rights. If Leroy Andrews had any vested rights, he deliberately waived them by changing the policy when the new law was in force.

It may be that if the first beneficiary named—Adah Andrews—who was his wife, and an act was subsequently passed nullifying the class to which she belonged, that this would impair her vested right. This question does not arise here.

Bacon on Benefit Societies and Life Insurance (3 ed.), sec. 187, p. 379: *After Enacted, Laws Must Not Be Retroactive or Affect Vested Rights.* The latter part of the section, quoting from a case, says: "As the law of the society is prospective in its operation, it did not affect Freeman's contract with the defendant. It did not by its terms nor by implication require him to change his policy. It would only have affected his contract in the event he should have revoked the appointment of the plaintiff as his beneficiary, and then only to the extent of requiring him to appoint a beneficiary that should belong to the specified classes. There is not a word in the law requiring any member to make a change of his beneficiary, or in case of his failure to do so, as contended for by the appellant, that his benefit certificate should revert to the society. It may be conceded that Freeman was bound by all subsequent laws enacted, but as the law in question is not retroactive, it does not affect his contract. It only affects him or any other member of the society in the issue of certificates after its passage." In *Hicks v. Kearney, ante,* p. 319, *Adams, J.,* discusses clearly the operation of statutes—when prospective or retroactive.

In the record it is admitted that the defendant is a North Carolina corporation. We are inclined to think, under our Constitution, that the law of 1913, limiting the beneficiaries, would not impair the obligation of the policy contract or any vested right in relation to this kind of fraternal insurance, where the husband had taken out insurance and named his wife (Adah Andrews) his beneficiary.

In *Grand Lodge v. McKinstry,* 67 Mo. App., p. 86, under facts similar to these in the present case, it was said: "It is insisted, however, by his counsel, that as he could have lawfully been named as a beneficiary at the time the insurance contract was entered into, the subsequent change in the statute could not have a retroactive operation. It may be true that the statute as amended could not affect existing designations, but all subsequent designations or change of the beneficiaries must conform to it, as it must be considered as an amendment to the charter of every such corporation previously incorporated under the article. As the designation of Harry as a beneficiary occurred subsequently to the amendment of the statute, his right to take must be governed by it, as he was in no wise related to the deceased, he cannot take as a dependent."

The able and well-considered opinion of *Connor, J.,* in *Howell v. Insurance Co., ante,* p. 212, was decided on one of the ordinary life insurance policies, the facts were different and has no application to the case here.

From the evidence, we think the court below made no error in regard to allowing the copy of the original policy to be produced.

The issues framed from the pleadings in the contest in the court below was to ascertain who was the legal wife of Leroy Andrews. The jury answered "Adah Andrews." The court below nonsuited Adah Andrews for the reasons given—we think this was error. From the finding of the jury that she was the lawful wife of Leroy Andrews, judgment should have been rendered in her favor. She did not appeal from the judgment of nonsuit to this Court. *Thayer v. Thayer, ante,* 504.

After the death of Leroy Andrews, a question arose as to which of two women, each claiming to be his wife, was the beneficiary under his policy. Upon this question appropriate issues were submitted to the jury, and the defendant had the privilege of contesting the right of either to recover. The issues were answered as they appear of record, and upon the return of the verdict his Honor held that the administratrix, and not the wife of the deceased in her individual capacity, was entitled to the amount due. The question being which of the two had a right to the money, his Honor held that the wife was not entitled to it because the administratrix was. The judgment involved these two inseparable propositions. If there was error in one, there was necessarily error in both, and the correction of one automatically corrects the other. We think the converse of his Honor's judgment is true; that is, that the wife and not the administratrix is entitled to recover on the policy and that a reversal on one proposition essentially works a reversal of the other, although the wife did not appeal. Therefore, we hold that Adah Andrews is entitled to judgment against the defendant in the sum of $350 with interest and costs, and that the administratrix is not entitled to recover. Hence, this cause is remanded to the end that judgment may be entered in the court below in accordance herewith. The judgment appealed from is accordingly

Reversed and remanded.

S. C. CLARK v. CAROLINA HOMES, INC.

(Filed 20 May, 1925.)

1. Wills—Sales—Powers.

Where a will directs the executor to exercise its discretion in making a physical equality of the division of the estate, or otherwise make the division thereof as it should decide, and acting within this discretion it has concluded that a sale of certain of the testator's lands was more beneficial to the devisees and legatees, it is not required that the will expressly specify that the lands be sold, as this power is implied, and a fair sale thereof for the stated purpose will not be disturbed on appeal.

2. Same—Judgments.

Where a court of competent jurisdiction of the parties and the subject-matter has construed a will and finally adjudged that certain of the testator's lands be sold for distribution as the will directs, the purchaser may not set up a lack of title in an independent action against him to compel performance of the terms of his purchase, there being no element of fraud in the judgment previously rendered, and all parties in interest having been represented.

3. Judgments—Courts—Jurisdiction—Irregular Judgments.

Where an irregular judgment has been rendered by a court having jurisdiction of the parties and the subject-matter of the action, it is voidable only as distinguished from one that is void, and may not be collaterally attacked.

4. Same—Venue Partition—Statutes.

Objection that the executor having power under a will to sell lands lying in different counties has wrongfully filed a petition for the sale in the county of such portions of said lands lying in a different county from that wherein he has qualified is to the venue and not to the jurisdiction of the court, and proper motion should be taken in apt time to change the venue from the county wherein the proceedings had been pending, or the proper venue will be taken as waived, and the irregularity may not be taken advantage of by an independent action, and in case of partition, our statute expressly confers jurisdiction in either of the counties wherein the land is situate. C. S., 3214.

5. Wills—Probate—Clerks of Court—Jurisdictions—Statutes.

By express provision of statute, the clerk of the Superior Court who first gains and exercises jurisdiction in probate matters acquires sole and exclusive jurisdiction over the decedent's estate, and the objection is untenable that an executor thus appointed has not authority, for the existence of equitable principles, to file a petition for the partition of lands in another county wherein the same are situate. C. S., 2.

6. Same—Guardian and Ward.

Where the executor is given power to sell lands for partition to make distribution under the terms of the will, in an adversary proceedings, it is *Held*, the fact that it is also guardian for minor beneficiaries does not affect the matter, the proceedings being proper to put the interests of the minors at arms' length, and have disinterested representation for them if the preservation of their rights should thereafter require it.

7. Mortgages—Place of Sale.

Where no place of sale is specified in a mortgage, a sale under the power, when not required by the statute to be at the courthouse door, may be made elsewhere in the county to be selected by the mortgagee with due regard to the interests of the mortgagor, and when such appears to have been done and the property sold has brought a fair price, it will not be disturbed on appeal.

8. Laws—Mortgagor and Mortgagee—Estoppel.

Where a mortgagor attends the sale of the land by an executor of a will for the purpose of making certain distributions among the beneficiaries, in accordance with the terms of the will, and makes no objection, he is estopped to question the validity of the sale.

CLARK *v.* HOMES.

APPEAL by plaintiff from *McElroy, J.*, of GUILFORD.

This is a submission of controversy without action under C. S., 626, wherein plaintiff seeks to require defendant to accept and pay for certain land in Guilford County, according to the terms of a written contract of sale, and defendant declines to accept and pay the contract price therefor on the ground that plaintiff's title to said lands is defective. Judgment for defendant. Reversed and remanded.

The parties stipulated that the title offered was in fee simple and indefeasible, except as to defects alleged by defendant which may be summarized as follows:

1. No power of sale given to the executor, Greensboro Loan & Trust Company, in the will of O. R. Cox, deceased, who was an owner of *locus in quo* at the time of his death.

2. That the clerk of the Superior Court of Randolph County had no jurisdiction to entertain the special proceeding entitled, "Greensboro Loan & Trust Company, Executor, v. Sarah E. Cox *et al.*," and to make and confirm the orders of sale therein.

3. That the foreclosure of the Steele mortgage was invalid, for that the sale was conducted in the city of High Point at the Wachovia Bank & Trust Company building.

It appears from the agreed facts herein that a suit was instituted in Randolph Superior Court, and a decree entered in 1913, construing the will of O. R. Cox, deceased.

In 1917 the Greensboro Loan & Trust Company, executor of O. R. Cox, filed its petition before the clerk of Randolph Superior Court to sell the realty, so as to make a distribution thereof in accordance with the will of O. R. Cox, deceased, as construed in this decree. The said will, among other provisions, contains the following:

"My wife, Sarah E. Cox, and my children, or their heirs, shall first be made equal with A. F. Cox in the distribution of my estate; after this is done my estate shall be divided equally between, or as near as possible, between Sarah E. Cox and my living children or their heirs.

"This apportionment to be made by the president and secretary and treasurer of my executor, hereinafter named, and one other disinterested party, to be selected by them should they desire assistance."

The *locus in quo* is a part of the O. R. Cox estate, and is situate in the county of Guilford and in the city of High Point, but not adjoining the Wachovia Bank & Trust Company building site.

In plaintiff's title there is a mortgagee's deed executed by one E. D. Steele, resulting from a sale under the power of sale contained in a mortgage which did not specify the place of sale in case of default. The sale was had, however, in front of the Wachovia Bank & Trust

Company building, in High Point, and this is a prominent and conspicuous place where sales customarily take place.

The mortgagor, Erie H. Hedgecock (who had assumed the mortgage indebtedness by special contract), was present at the sale and made no objection to the sale; and the lands brought an adequate price.

The trial court rendered judgment in favor of the defendant on all questions presented, and plaintiff excepted and appealed.

R. C. Strudwick and Frank Nash for plaintiff.
Austin & Jerome for defendant.

VARSER, J. The will of O. R. Cox, deceased, did not confer on the Greensboro Loan & Trust Company, the executor, the power of sale of the lands devised; this will, however, did enjoin upon the executor a duty to carry out its provisions, and it directed the "apportionment" of this estate, both real and personal, to be made by the president, secretary and treasurer of the Greensboro Loan & Trust Company, providing that one other, a disinterested party, might be called in by these officers of the executor, if they desired any assistance. In the suit in Randolph Superior Court, instituted by the executor against the devisees of O. R. Cox for a construction of this will and for advice as to the proper administration of said estate, a decree was rendered in 1913, wherein it was adjudged that the executor should distribute said property in accordance with this decree. This decree determined the intention of O. R. Cox to be that his wife, Sarah E. Cox, and his children, other than John Clyde Cox and Lewis Tax Cox, should first be made equal with A. F. Cox in the distribution of his estate out of the real and personal property other than his home place and certain personal effects on the premises, and that the balance of his real and personal property should be equally divided among his wife and children, and that if John Clyde Cox and Lewis Tax Cox failed to comply with certain conditions named in the will, then the personal property and real estate given to Sarah E. Cox for life should be divided equally among all the children of O. R. Cox, deceased, or their heirs, at her death. The testator desired that these officers of his executor, whoever they might be at the time of his death, should make this "apportionment" by actual partition, if practicable. It is also clear that he did not intend to require them to make an actual partition if such could not be had without injury to the several devisees, or any of them. He desired equality in this division on the basis named in his will. The testator named for this important duty those parties who had been elected officers of the Greensboro Loan & Trust Company. The "apportionment" was a duty of the executor to be performed, if actual partition

was practicable, by its named officers. This provision in the will was only the machinery for the "apportionment" by actual partition, instead of leaving this to be provided for by the board of directors. These officers, so designated, found that an actual partition could not be had without injury to the several parties interested; they were clothed with the duty and the power to determine this, and when they so determined, their decision was accepted by the executor. This appears in the petition filed in the partition proceeding and is admitted in all the answers filed, and then found as a fact by the court. These officers had performed their duty as fully as if they had found it to be practical to make actual "apportionment" or partition. In this situation, the question was not presented to the clerk of the Superior Court of Randolph County for him to determine whether they ought to make the apportionment or not.

The executor desiring to perform its duty, as set out in the will, and as determined in the decree rendered by the Superior Court of Randolph County construing the said will and advising the executor, applied to the clerk of the Superior Court of Randolph County in 1917, upon petition in due form, asking for partition by sale in order to complete the settlement of the estate committed to it by the will of O. R. Cox. In due course an order of sale was entered, executed, and title made to plaintiff for the *locus in quo* upon payment of his bid, which was a fair value for the property.

This partition proceeding is attacked in the instant case by the defendant, as noted above.

This attack on the judgment in the partition proceeding is indirect and collateral. Only void judgments are subject to such an attack. *Moore v. Packer,* 174 N. C., 665; *Reynolds v. Cotton Mills,* 177 N. C., 412.

The invalidity must appear affirmatively, either on the face of the record or in one of the accepted ways, in order to permit a successful collateral attack. *McKellar v. McKay,* 156 N. C., 283; *Harrison v. Hargrove,* 109 N. C., 346; *Smathers v. Sprouse,* 144 N. C., 637; *Brickhouse v. Sutton,* 99 N. C., 103; *Doyle v. Brown,* 72 N. C., 393; *Lynn v. Lowe,* 88 N. C., 478; *Burgess v. Kirby,* 94 N. C., 575, 579.

There is, in this State, one apparent exception to the rule set forth in these cases as applied to probate courts. If the person alleged to be dead is not, in fact, dead, this prevents the probate court from granting letters of administration or administering his estate. *Springer v. Shavender,* 116 N. C., 12; *Springer v. Shavender,* 118 N. C., 33; *Fann v. R. R.,* 155 N. C., p. 140; *Bernhardt v. Brown,* 119 N. C., p. 507; *Trimmer v. Gorman,* 129 N. C., p. 163; *Dowd v. Watson,* 105 N. C., 476; *Batchelor v. Overton,* 158 N. C., p. 398.

Bailey on Jurisdiction, vol. 1, p. 182, classes North Carolina as one of the States holding that decrees of probate courts are entitled to the same presumptive validity as decrees of courts of general jurisdiction, but notes *Springer v. Shavender, supra,* as establishing the exception.

A void judgment is not a judgment and may always be treated as a nullity. It lacks some essential element; it has no force whatever; it may be quashed *ex mero motu. Stallings v. Gully,* 48 N. C., 344; *McKee v. Angel,* 90 N. C., 60; *Carter v. Rountree,* 109 N. C., 29; *Mann v. Mann,* 176 N. C., 353; *Moore v. Packer,* 174 N. C., 665; *Burgess v. Kirby, supra; McKeller v. McKay, supra; Harrison v. Hargrove, supra; Smathers v. Sprouse, supra; Balk v. Harris,* 122 N. C., 64; *Hervey v. Edmonds,* 68 N. C., 243; *May v. Getty,* 140 N. C., 310; *Dalton v. Webster,* 82 N. C., 279.

A lack of jurisdiction or power in the court entering the judgment always avoids the judgment. This is equally true when the court has not been given the jurisdiction of the subject-matter, or has failed to obtain jurisdiction on account of a lack of service of proper process. *Johnson v. Whilden,* 171 N. C., 153; *Starnes v. Thompson,* 173 N. C., 466; *Massie v. Hainey,* 165 N. C., 178; *Graves v. Reidsville,* 182 N. C., 331; *Pinnell v. Burroughs,* 168 N. C., 315; *Doyle v. Brown,* 72 N. C., 393; *McCauley v. McCauley,* 122 N. C., 288.

In *Card v. Finch,* 142 N. C., 144, *Mr. Justice Connor* says: "It is axiomatic, at least in American jurisprudence, that a judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void and may be treated as a nullity whenever it is brought to the attention of the court. We think that no case can be found in the courts of this country, State or Federal, in which this principle is questioned. Certainly in this jurisdiction it is fundamental." Citing *Doyle v. Brown, supra; Condry v. Cheshire,* 88 N. C., 375; *Lynn v. Lowe,* 88 N. C., 478; *Harrison v. Harrison,* 106 N. C., 282.

In *Card v. Finch, supra,* the authorities are collected and distinguished with clearness and with a full and proper regard of the right of all citizens to "due process of law." *Mr. Justice Connor* was entirely familiar with this doctrine and he believed and trusted in it as a basic principle of law and government.

There is a wide distinction (which is especially prominent in determining the methods of attack) between judgments that are *void* and judgments that are only *voidable.* The former yield to collateral attack, but the latter never yield to a collateral attack. It requires a direct attack to set aside or correct a voidable judgment. *McKeller v. McKay, supra; Harrison v. Hargrove, supra; Pinnell v. Burroughs,*

supra; Glisson v. Glisson, 153 N. C., 185; *Rackley v. Roberts,* 147 N. C., p. 204; *Doyle v. Brown, supra; Grant v. Harrell,* 109 N. C., 78; *Carter v. Rountree, supra; Yarborough v. Moore,* 151 N. C., 116; *Millsaps v. Estes,* 137 N. C., 544; *Carraway v. Lassiter,* 139 N. C., 145.

Judgments that are voidable for some irregularity, until impeached or set aside, according to the recognized methods of direct attack, estop all parties thereto. A void judgment has not the essential virtue of a judgment and it has no force to estop any person. It does not obligate the parties thereto to protect the rights of subsequent purchasers who claim under such judgment. *Springer v. Shavender, supra; Card v. Finch, supra; Pinnell v. Burroughs, supra.*

The defendant challenges the validity of the partition proceeding in Randolph County in 1917 under which the plaintiff claims title, for that the *locus in quo* is situated in Guilford County, contending that, at most, the clerk had jurisdiction only of the lands in Randolph County, and that he could not take jurisdiction over any lands in Guilford County unless the Guilford lands were either a part of a tract lying in Randolph and Guilford, or in case the Guilford land adjoined the Randolph land.

This question is not a question of *jurisdiction* under our present statute, but is only a question of venue. This question was decided against the defendant's contention in *In re Skinner's Heirs,* 22 N. C., 63. This case holds that land in two counties could be partitioned in one suit instituted in either county. C. S., 3214, said directly: "If the land to be partitioned lies in more than one county, the proceeding may be instituted in either of the counties." In *Ellis v. Adderton,* 88 N. C., 472, it was held that the probate court of Davidson County had jurisdiction of the petition to make real estate assets, because the land was situate in Davidson County, and because the former rule requiring the application to be made in the court having jurisdiction of the administration had been changed by statute, which is now C. S., 74. The language in C. S., 74, and in C. S., 3214, in this regard, is substantially the same. Mordecai's Law Lectures, 1326.

In fact, this exception, presenting only a question of venue, is open only to the parties to the suit by proper motion, in apt time, to change the venue. It is not vital, even if the venue had been improperly laid. The venue was properly laid in Randolph County under the express terms of the statute (C. S., 3214). *Thames v. Jones,* 97 N. C., 121.

Venue and jurisdiction must be considered in relation to the remedies provided for removal to the proper county. The Revisal of 1905, with its many provisions, was one act. So was the Consolidated Statutes enacted by the Legislature in 1919. It is proper to consider all the provisions of the Consolidated Statutes as one and the same statute, and

particularly is this true in construing those portions which are in *pari materia.* It is a well-recognized rule of construction that particular clauses and phrases of a legislative act should not be studied as detached or isolated expressions, but the whole act, as well as every part thereof, must be considered in fixing the meaning, or the meaning of any of its parts, so as to give effect to all of its clauses and provisions. *Hardwood Co. v. Waldo,* 161 N. C., 196.

A like rule of construction was applied in *Sanderson v. Sanderson,* 178 N. C., 339, as to the Consolidated Statutes.

Venue is not *jurisdictional* and may be waived, and *cannot* be *tested by demurrer, but by motion in the cause. Allen-Fleming Co. v. R. R.,* 145 N. C., 37; *Zucker v. Oettinger,* 179 N. C., 277; *McCullen v. R. R.,* 146 N. C., 568; *Sugg v. Pollard,* 184 N. C., 494. This latter case holds that venue now is not *jurisdictional* and may be *waived. McArthur v. Griffith,* 147 N. C., 545; *Allen-Fleming Co. v. R. R., supra; Garrett v. Bear,* 144 N. C., 23; *Cooper v. Cooper,* 127 N. C., 492; *McMinn v. Hamilton,* 77 N. C., 300; *Devereux v. Devereux,* 81 N. C., 12; *Cloman v. Staton,* 78 N. C., 236; *Lafoon v. Sherron,* 91 N. C., 370; *Morgan v. Bank,* 93 N. C., 355; *County Board v. State Board,* 106 N. C., 81; *Baruch v. Long,* 117 N. C., 509; *McNeill v. Currie,* 117 N. C., 346; *Hines v. Vann,* 118 N. C., 7; *Herring v. Pugh,* 126 N. C., 582.

Therefore, construing C. S., 469, 470 and 3214, in *pari materia,* and in the light of the foregoing decisions, venue cannot be jurisdictional and it may always be waived. Pleading to the merits waives defective venue. *Brown v. Harding,* 170 N. C., 253; *Brown v. Harding,* 171 N. C., 686; *Morgan v. Bank, supra; McMinn v. Hamilton, supra; Lucas v. R. R.,* 122 N. C., 937. Venue is a matter not to be determined by the common law, but by legislative regulation. *Latham v. Latham,* 178 N. C., 12; *Cooperage Co. v. Lumber Co.,* 151 N. C., 456.

Chapter 62, Public Laws, Extra Session, 1924, amended C. S., 3214, by making express provision against a like contention hereafter. By so doing, it did not declare the law to have been otherwise theretofore. It was simply declaratory and did not create a new rule.

Therefore, we conclude that the defendant has no power to raise the question of venue affecting the commissioner's deed in plaintiff's chain of title, and that the venue, if properly challenged, was correctly laid, and if not, that the parties waived the same by pleading to the merits. The venue of this partition proceeding was properly laid in Randolph County, not only as to the lands in Randolph County, but as to those in Guilford and Davidson, as well.

The defendant again challenges the validity of this partition proceeding in Randolph County, for that the petitioner therein is not a tenant in common, and that the petition calls for the exercise of dis-

tinctly equitable principles, and that the clerk of the Superior Court had no jurisdiction to entertain the petition.

Clerks of the Superior Court have, by virtue of C. S., 1, probate jurisdiction, such as was formerly exercised by the probate judge. *Edwards v. Cobb,* 95 N. C., 4; *Lewis v. Roper,* 109 N. C., 19. The power of a court of probate to exercise its independent jurisdiction is clearly shown in its methods of practice. *In re Johnson,* 182 N. C., 522; *In re Meadows,* 185 N. C., 99.

By statute, C. S., 2, the clerk of the Superior Court who first gains and exercises jurisdiction in probate matters acquires sole and exclusive jurisdiction over decedent's estate. The clerk of the Superior Court of Randolph County had domiciliary jurisdiction of the estate of O. R. Cox, deceased. The will was probated there; the *situs* of the personal property of said estate was there, and a considerable portion of the real property of said estate was in Randolph County. The executor had a duty to perform in the settlement of the said estate, in the "apportionment" or distribution and partition of the same, so as to carry out the express directions of the testator and to effectuate his intent, as adjudged by the Superior Court of Randolph County in 1913, and from the terms of the said will it was necessary to make this "apportionment" of the estate as a part of the settlement imposed upon his executor. Therefore, the resort to the probate court of Randolph County was within the probate jurisdiction of said court. It was necessary in the settlement of the estate of O. R. Cox. A petition to sell lands to pay debts is no more a duty of the executor when such debts exist and cannot be paid out of the personal estate than is the requirement to make the distribution of the property in equality as directed by the testator in the instant case. *Hyman v. Jarginan,* 65 N. C., 97. Probate jurisdiction includes the power to decree partition, when necessary to settle the estate, in accordance with the will. *Edwards v. Cobb, supra; Sprinkle v. Hutchinson,* 66 N. C., 450; *Hunt v. Snead,* 64 N. C., 176. In this latter case, *Mr. Justice Rodman* discusses probate jurisdiction and holds that when provisional remedies, such as injunction, are necessary and incidental to the exercise of probate jurisdiction, the same may be had upon application to the judge of the Superior Court in the main cause. These remedies are then used as aids to the exercise of the probate jurisdiction. *Hutchinson v. Roberts,* 67 N. C., 223; *Hendrick v. Mayfield,* 74 N. C., 626; *Barnes v. Brown,* 79 N. C., 401; *Simpson v. Jones,* 82 N. C., 323; *Stancill v. Gay,* 92 N. C., 455; *Baker v. Carter,* 127 N. C., 92; *Hardee v. Williams,* 65 N. C., 56; *In re Battle,* 158 N. C., 388; *Miller v. Barnes,* 65 N. C., 67; *Staley v. Sellars,* 65 N. C., 467. The clerk has concurrent jurisdiction in the settlement of estates with the Superior Court. *Shober v. Wheeler,* 144

N. C., p. 409; *Haywood v. Haywood,* 79 N. C., 42; *Fisher v. Trust Co.,* 138 N. C., 90; *Olden v. Rieger,* 145 N. C., p. 257; Mordecai's Law Lectures, 1341.

Probate courts in other jurisdictions are held to have the power to partition lands according to the will. 15 C. J., 1016; *Blackwell v. Blackwell,* 86 Tex., 207; *Pelham v. Murray,* 64 Tex., 477.

Probate jurisdiction means the exercise of the ordinary power of what, *ex vi termini,* is generally understood to be the authority of courts of that name, and includes the establishment of wills; the settlement of decedents' estates; the supervision of the guardianship of infants; the control of their property; the allotment of dower and other powers pertaining to this subject. *Chadwick v. Chadwick,* 6 Mont., 566. In North Carolina partition is included in probate powers under this rule, as well as by statute. The probate forum is often spoken of as limited in jurisdiction, but the powers of this Court are not only general, but plenary in cases where it is authorized to act. *Fitzpatrick v. Simonson Bros. Mfg. Co.,* 86 Minn., 140; *Monastes v. Catlin,* 6 Ore., 119.

A petition for partition is a special proceeding which is within the original jurisdiction of the probate court. *Wahab v. Smith,* 82 N. C., 229; *Tate v. Powe,* 64 N. C., 644; *Capps v. Capps,* 85 N. C., 408; *Baggett v. Jackson,* 160 N. C., 26; *Geer v. Geer,* 109 N. C., 679.

A partition proceeding is governed by the rules applying in equitable cases, and a plaintiff is not entitled to take a voluntary nonsuit. The defendants are entitled to partition, although the plaintiff may, after the proceeding is instituted, find that he is not entitled to partition, or may not desire it, if entitled. *Haddock v. Stocks,* 167 N. C., 70; *Purnell v. Vaughan,* 80 N. C., 48. In *Haddock v. Stocks, supra,* the defendant answered, praying for partition, and the plaintiff was, thereafter, allowed by the clerk to submit to a nonsuit, and this was held to be error in the Superior Court and a trial was had upon the issues raised and the relief granted; and this Court, upon appeal, says: "Any tenant in common, party to the proceeding, without regard to which side of the case he may be arrayed on, whether as plaintiff or as defendant, has a right to prosecute the proceeding to final judgment."

In the partition proceeding attacked in the instant case, each defendant joined in the prayer for partition by sale.

We see no defect in the partition proceeding, which was conducted with great skill and care in all respects in accordance with the rights of the parties, as fixed in the will of O. R. Cox. This was a necessary proceeding in the settlement of the estate of O. R. Cox. The venue was correctly laid. The clerk of the Superior Court of Randolph County had jurisdiction to enter the orders and confirm the sale. The commissioner's deed had the effect to vest a fee-simple title in the purchaser.

The defendant again contends that the Greensboro Loan & Trust Company, although executor of O. R. Cox, on account of being named as testamentary guardian of his "minor heirs," is limited to the provision of C. S., 2180, as its only authority to seek partition. This contention is not well founded. C. S., 2180, does not apply either to the settlement of estates or to partition. In fact, when the duties of the Greensboro Loan & Trust Company, as executor, appeared to be in conflict with its duties as guardian of the "minor heirs," it was both necessary and proper to have its wards put at "arms'-length" in an adversary proceeding, so that the rights of its wards could be properly protected by a disinterested representation. Mordecai's Law Lectures, 1329; *Covington v. Covington,* 73 N. C., 168; *Carraway v. Lassiter, supra; Irvin v. Harris, ante,* 465; *Wilson v. Houston,* 76 N. C., 375; *Batts v. Winstead,* 77 N. C., 238; *George v. High,* 85 N. C., 113.

The only other contention set up by the defendant is that the foreclosure of the E. D. Steele mortgage was invalid, for that the mortgage sale under power was had at the Wachovia Bank & Trust Company building, in the city of High Point, instead of at the courthouse door in Greensboro. The mortgage did not fix the place of sale, but authorized a sale under the power.

It is in accord with the weight of authority to hold that, when a mortgage or deed in trust contains no stipulation as to the place of sale, but confers the power of sale, this vests in the mortgagee or trustee the sound discretion to select the place of sale so as to conserve and promote the interest of all parties. His duty requires that this selection of a place must be fairly and prudently exercised. A failure to obtain an adequate price is usually fatal to his selection. Jones on Mortgages (6 ed.), sec. 1846; Wiltsie on Mortgage Foreclosure, vol. 2, 1317, sec. 938; *Meier v. Meier,* 105 Mo., 411; *Greenwood v. Fontaine* (Tex.), 34 S. W., 826; *Morris v. Virginia State Ins. Co.,* 90 Va., 370; *Olcott v. Bynum,* 84 U. S., 44. This latter case arose in the Circuit Court of North Carolina. This doctrine applies in the absence of a statute to the contrary. We direct attention to C. S., 2590, when the land lies in two or more counties.

The facts admitted in the instant record are that Hedgecock, who had become mortgagor on account of an assumption of the mortgage indebtedness, as well as the other parties interested, were present at the sale, which was open and fair, and made no objection thereto, but acquiesced therein, and that the land was sold for a fair and adequate value. Upon these facts, Hedgecock is estopped to question this sale, and the title is good. *Jenkins v. Daniels,* 125 N. C., 161. Hedgecock, however, is not a party to this submission of controversy without action,

and, therefore, the admitted facts are not binding on him. Either of the parties hereto, in the Superior Court of Guilford County, may make Hedgecock a party hereto, to the end that the facts now admitted may be established as against him, if the proof will warrant, so that he may not thereafter question the title to the *locus in quo*.

Upon the facts admitted in the instant record, the title offered by plaintiff to the defendant is free from defects, and the court was in error in rendering judgment for the defendant.

To the end that judgment may be entered for the plaintiff and such other proceedings may be had herein, in accordance with this opinion as the parties may be advised; let it be entered.

Reversed and remanded.

TOWN OF CORNELIUS, INCORPORATED, v. CLARK S. LAMPTON AND ROY W. BURKS, PARTNERS, TRADING AS LAMPTON-BURKS COMPANY; LAMPTON-BURKS COMPANY, A CORPORATION, AND NATIONAL SURETY COMPANY, INCORPORATED.

(Filed 3 June, 1925.)

Contracts—Principal and Surety — Highways — Construction—Bonds—Material—Labor—Electricity.

Electric power used in the crushing of rock for the construction of a highway and coming within the terms of the contract of construction, is a part of the value of labor or material necessary for the construction of a highway and comes within the intent and meaning thereof when thus expressed and covered by the bond accordingly given.

APPEAL by defendants from *Lane, J.*, on agreed statement of facts, at February Term, 1925, of MECKLENBURG.

The following is the agreed statement of facts:

The plaintiff, the town of Cornelius, is a municipal corporation, duly organized, existing and doing business under the laws of North Carolina, being located in the county of Mecklenburg, State of North Carolina, and was fully authorized to enter into the contract to furnish electric power, hereafter mentioned, and such contract was duly and properly entered into between the plaintiff by its proper officers and the defendants hereafter named.

The defendants, Clark S. Lampton and Roy W. Burks, partners, trading as Lampton-Burks Company, entered into a contract with the State Highway Commission of North Carolina, which is described in the bond hereinafter set forth, and later this contract was taken over by the defendant, Lampton-Burks Company, a corporation which had in the meantime been organized.

The defendant, National Surety Company, is a corporation duly organized, existing and doing business under the laws of the State of New York, but maintaining an office and doing a surety and bonding business in the State of North Carolina.

On 20 March, 1922, the defendants, Clark S. Lampton and Roy W. Burks, entered into a contract with the State Highway Commission of North Carolina, which is described in the following bond, and on the same date the said defendants as principals and the National Surety Company as surety executed the following bond:

CONTRACT BOND PROJECT No. 654

Know all men by these presents, That we, Lampton and Burks of Louisville, Ky., hereinafter called the "Principal," and National Surety Co., a corporation incorporated under the laws of the State of New York, hereinafter called the "Surety," are held and firmly bound unto the State Highway Commission of North Carolina in the full and just sum of one hundred and thirty-seven thousand, six hundred and eight dollars ($137,608), lawful money of the United States of America, to be paid to the said State Highway Commission of North Carolina, its successors or its assigns, to which payment well and truly to be made and done we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20 March, A. D. 1922.

Whereas, the above bounded "Principal" has entered into a contract with the said State Highway Commission of North Carolina, bearing even date herewith, for the improvement of a certain section of highway known as Road, between Project No. 653 and Mecklenburg-Iredell County line, beginning at Sta. 355-40.8 and ending at Sta. 892-08, situated in the county of Mecklenburg, North Carolina, being approximately 10.1 miles long. Approximately estimated to cost two hundred and seventy-five thousand, three hundred and sixty dollars ($275,360); and,

Whereas, it was one of the conditions of the award of the State Highway Commissioner, acting for and on behalf of the State Highway Commission of North Carolina, pursuant to which said contract was entered into, that these presents should be executed;

Now, therefore, the conditions of this obligation are such that if the above bounded "Principal" as contractor shall in all respects comply with the terms of the contract and conditions of said contract, and his, their, and its obligations thereunder, including the specifications therein referred to and made part thereof, and such alterations as may be made in said specifications as therein provided for, and shall well and truly,

and in a manner satisfactory to the State Highway Engineer, or his duly authorized assistant, complete the work contracted for, and shall save harmless the State Highway Commission of North Carolina from any expense incurred through the failure of said contractor to complete the work specified, or for any damages growing out of the carelessness of said contractor, or his, their, or its servant, or for any liability for payment of wages due or material furnished said contractor; and shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway all and every sum or sums of money due him, them, or any of them for all such labor and materials for which the contractor is liable;

And, also, shall save and keep harmless the said State Highway Commission of North Carolina against and from all losses to it from any cause whatever, including patent, trade-mark, and copyright infringements in the manner of constructing said structures, then this obligation to be void, or otherwise to be and remain in full force and virtue.

(Signed) Lampton & Burks. (Seal)
By Clark S. Lampton. (Seal)

Witness: John A. Vetter.
Allen E. Smith.

National Surety Co.
(Surety Company)
(Signed) By Max T. Payne,
Attorney in Fact.

Attest: Kate Renn, Secretary.

The defendants, Lampton & Burks, proceeded to construct Project No. 654 as described in the above bond and contract therein referred to, and early in 1922 entered into a contract with the plaintiff by which the plaintiff agreed to furnish the defendants the electric power necessary to operate a rock crusher which belonged to said Lampton & Burks, and also to operate cable cars as hereinafter mentioned. In accordance with said contract, the plaintiff furnished said Lampton & Burks, partners, and their successor, Lampton-Burks Company, Incorporated, electric current over a period from May, 1922, until 1 July, 1923. The plaintiff was paid according to contract for all the electric power so furnished, except a balance of fifteen hundred twenty and no-100 dollars ($1,520.00), which became due on 1 July, 1923. The defendant, National Surety Company, if liable to the plaintiff at all is liable for the sum of $1,520.00 with interest thereon from 1 July, 1923, until paid. Demand was properly made by plaintiff upon defendant, National Surety Company, for payment of this amount, which demand

was refused. The liability of Lampton & Burks, as partners, and Lampton-Burks Company, Incorporated, is admitted, but the court found as a fact, by agreement of counsel upon evidence taken at the hearing, that these defendants are insolvent, and a judgment has been rendered against them in this action, but has not been, and cannot be, collected at this time. The due execution of the above-mentioned bond by defendant, National Surety Company, is admitted.

The electric current or power furnished by plaintiff to said defendants was used by said defendants to operate a rock-crusher belonging to them, and to operate cable cars in the following manner: rock was taken out of a quarry belonging to one T. B. Knox, with whom the said defendants had contracted for the removal of such rock, to the crusher approximately seventy-five yards distant by means of electrically driven cable cars, and when it had been crushed in said crusher into sizes varying from very fine gravel to about two-inch rock was then hauled by means of motor trucks to the said roadway or highway above described, and was there put into the roadbed and became an essential and permanent part of said roadway; it being necessary that the rock taken from the quarry be crushed before it could be used in the construction of said roadbed; since the rock as taken from the quarry was in large sizes totally unfit for use in road building in that condition. All of the electric current on which the plaintiff's claim is based was actually used in operating the crusher, as above set forth, and in operating cable cars as above mentioned, and the entire roadway, known as Project No. 654, more than ten miles long, was constructed of rock crushed in the above mentioned crusher, which was operated by electric power furnished by the plaintiff with the exception of a few cars of rock purchased elsewhere by the defendants, and with the exception of cement and asphalt used in said roadway.

The plaintiff filed its claim, as above described, with the defendant the National Surety Company, and with the State Highway Commission of North Carolina within six months after completion of work upon said highway.

Frank H. Kennedy for plaintiff.
S. Brown Shepherd and Pharr & Currie for defendants.

CLARKSON, J. The sole question presented is, whether electric power furnished by the plaintiff, the town of Cornelius, for a rock crusher and cable cars is "material or labor" or both, within the terms of the bond signed by the National Surety Company in behalf of Lampton & Burks on a highway job near Charlotte, the wording of the said bond being

as follows: "And shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway all and every sum or sums of money due him, them, or any of them for all such labor and materials for which the contractor is liable."

We are not construing a lien statute, but a contract. It will be noted that the contract is elastic, it covers "furnishing material or performing labor *in and about the construction of said roadway.*" There is no dispute that crushed rock is material and covered by the contract. If the crushed rock for the roadway was purchased outright, we would have no controversy. Its value would be determined by the rock and cost of crushing it. To build the roadway, under the contract for which the bond is given, the rock varies in size from very fine gravel to about two-inch rock. It is necessary that this kind of rock be used under the contract in the construction of the roadbed. Instead of buying this rock crushed for the roadway, it can be presumed that the contractor, to get the crushed rock cheaper would use all reasonable means to do it themselves, probably making a less liability on the Surety Company. The contractors purchased the rock and removed it from the quarry about 75 yards distant to the rock crusher, which crushed it. Instead of using manual labor, the rock material and manual labor undoubtedly coming under the very language of the contract, the contractors substituted for manual labor electric power. This power was used to operate the rock crusher and crush the rock and operate the cable cars to carry the rock from the quarry to the crusher. The crushed rock was then hauled in motor trucks to the roadway. The crushed rock is material, and the electric current or power is substituted for labor—the liability of the Surety Company for manual labor cannot be disputed, and the man-power is exchanged for electric power. The liability of the bond is not increased by the exchange one for the other, and a just interpretation of the contract to furnish material or perform labor in and about the construction of the roadway would include the electric power and current. In the progress of the age, the substitution of electric power for manual labor is taking place in every conceivable way. It was only a few decades past that most of the rock for public roads was crushed by manual labor. Contracts are not scraps of paper to be lightly treated, but should be carefully construed and kept by all parties, and we think the position taken here a correct and reasonable interpretation without any injustice to the Surety Company. The plaintiffs' charge for power, under the facts and circumstances of this case, we think, is included in the contract of the Surety Company.

In *Coal Co. v. Electric Light Co.*, 118 N. C., p. 236, (under a statute) it was held: "There is no contention that the terms of the act

do not include the fireman who shoveled the coal into the furnace. And, if it includes him, why should it not include the man who furnished the coal? One was as necessary to the operation of the concern as the other. And that was certainly one of the objects in view in passing the enactment. We must conclude that coal, which was necessary to run the concern, is embraced within the terms 'material furnished.'"

The case of *Scheflow v. Pierce* (and the National Surety Co. same defendant as in present case), 176 N. C., p. 93, was under a statute, but the Court in that case said: "It would be strange if the plaintiff, who did practically all the work on the job, should not have recourse to the bond for the amount due him, *solely because he did the work with a machine instead of with his own hands or by hiring laborers to work with their hands.*"

We do not think the power furnished to operate the rock crusher and cable cars comes under what defendants in their brief term "instrumentalities" or "tools," under the facts here. The power furnished by plaintiff is an integral part of the work. We would say that the "rock crusher" and "cable cars" were instrumentalities and not included in the contract.

In *Brogan v. National Surety Co.*, 246 U. S., p. 257 (62 Law. Ed. 703), the Court said: (p. 260) "The supplies furnished by Brogan under these circumstances were clearly used in the prosecution of the work, just as supplies furnished for the soldier's mess are used in the prosecution of war. In each case the relation of food to the work in hand is proximate. . . . (p. 262) As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work. . . . (p. 263) But here, according to the undisputed facts and the findings of the trial court, the furnishing of board by the contractor was an integral part of the work and necessarily involved in it. Like the supplying of coal to operate engines and dredges, it was indispensable to the prosecution of the work, and it was used exclusively in the performance of the work. Groceries furnished to a contractor under such circumstances and consumed by the laborers are materials supplied and used in the prosecution of the public work."

A wealth of authorities of counsel on both sides are collected and set forth in the above case as reported in 62 Law Ed.

The authorities are in conflict, but the great weight, we think, are in conformity with the position we take here.

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

Affirmed.

BOON-ISELEY DRUG COMPANY v. R. A. DOUGHTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 3 June, 1925.)

Taxation—Gifts—Chance—Gaming—License—Statutes.

An advertising arrangement by which the purchaser of certain merchandise at a store by the payment of one cent in addition to the price asked for one article may obtain two, is a definite proposition free from the element of chance or gambling, and does not fall within the provisions of our revenue statute taxing any person or establishment offering articles for sale and proposing to present the purchaser with a gift or prize, and is not within the intent and meaning of the criminal law.

CONTROVERSY without action (C. S., 626), heard by *Daniels, J.*, at May Term, 1925, of the Superior Court of Wake County, on appeal from a justice of the peace, upon the following facts:

1. The plaintiff is a corporation of the State of North Carolina, having its principal office and place of business in the city of Raleigh, in Wake County, and conducts a retail drug store and merchandise of the kind and character usually sold in a first-class drug store.

2. The United Drug Company is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, having its principal place of business in the city of Boston, in the Commonwealth of Massachusetts. It manufactures and sells medicinal preparations, toilet articles, candy, rubber products, stationery and merchandise of various kinds, which, however, are not sold generally or promiscuously, but such sales are restricted to one druggist in any one town in North Carolina, and such druggist is required to be owner and holder of one or more shares of its capital stock. Said company does not sell any goods, wares or merchandise in North Carolina to any merchant or druggist except one who is its stockholder and especially authorized by contract with it to deal in its goods.

3. The plaintiff is the duly designated agent for the sale of the products of said United Drug Company in the city of Raleigh, and has the exclusive right to sell them therein. It is the owner of twelve shares of the capital stock of said company, and is its selling agent, appointed by contract, a copy of which is attached and made a part of this statement.

4. For more than 18 years, prior to the submission of this controversy, said United Drug Company has permitted its stockholder-agents, not more than twice in any one year, to make special sales of its goods, at which time they are permitted to sell certain articles manufactured and furnished by said company in the following way, to wit: They may sell to a customer one article of merchandise of a particular kind at the

regular retail price, or two of such articles of the same kind to a customer for the regular price of one plus one cent.

5. Each of such special sales authorized to be made generally embraces about three hundred articles of merchandise selected from approximately twenty thousand articles manufactured and distributed by said company: This method of special sales of merchandise was devised and is employed by said drug company and the plaintiff as a means of advertising the products of said company. The goods sold by said company to the plaintiff and its other stockholder-agents to be offered and sold by them at these special sales are sold by it to them at greatly reduced prices, and the difference between such reduced prices and the usual prices therefor is charged by it to advertising expense.

6. The plaintiff has no competitor in the city of Raleigh in the sale of the goods of said United Drug Company, for the reason that no other druggist or merchant in said city is supplied with them, or has the right to purchase from said drug company.

7. The plaintiff desires and proposes to conduct a sale of the kind and character hereinbefore referred to, which sales are generally known and advertised as "The Original Rexall One Cent Sale," the word "Rexall" being the trade mark and trade name applied by the United Drug Company to all of its products, under which name they are manufactured and sold, said trade mark and trade name being the exclusive property of said drug company.

8. Section 53 of the Revenue Law of North Carolina, being chapter 101 of the Public Laws of 1925, imposes a tax as follows: "On any person or establishment offering any article for sale and proposing to present purchasers with any gift or prize as an inducement to purchase, twenty-five dollars ($25.00); *Provided,* that this section shall not be construed as giving license or relieving such person or establishment from any penalties incurred by violation of the criminal law."

9. The plaintiff has been notified by the defendant that it cannot lawfully conduct the sale above referred to unless and until it pays to the defendant, for the use of the State of North Carolina, the sum of $25.00, being the tax provided in the foregoing section of said revenue law, and because of the penalties denounced by said chapter—of the Public Laws of 1925, for failure to pay the taxes imposed by it the plaintiff has paid to the defendant the sum of $25.00 under written protest, protesting that it is not subject to the tax, and that said act does not contemplate a tax upon sales of the kind and character hereinbefore referred to; that to exact said sum from it is unlawful and illegal, and amounts to a taking of its property without due process of law in violation of the provisions of the Constitution of the United States and of the State of North Carolina, and to denying to the plaintiff the equal

protection of the law in violation of the Constitution of the United States, and, but for this submission of this controversy without action, the plaintiff would sue the defendant to recover the amount so paid, but in order to save costs and trouble and to expedite the determination of the controversy existing between it and the defendant, the parties hereto have agreed to submit their controversy in this way and to ask the decision of the Court as to whether or not, upon the foregoing statement of facts, the plaintiff is required to pay the tax hereinbefore referred to, and if not that it have judgment against the defendant for the sum of $25.00, paid by him as aforesaid.

In the Superior Court it was adjudged that the plaintiff take nothing by its action and that the defendant go without day and recover his cost. The plaintiff excepted to the judgment and appealed.

Fuller & Fuller for plaintiff.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Harwood for defendant.

ADAMS, J. At the session of 1866-1867 the General Assembly imposed the following privilege tax under Schedule B of the Revenue Act: "On all gift enterprises, or any person or establishment offering any article for sale, and proposing to present purchasers with any gift or prize, as an inducement to purchase, within the limits of the State, ten dollars for each day such person or establishment continues its operation. This tax shall not be construed to relieve such persons or establishment from any penalties incurred by violation of law." Laws 1866-'67 ch. 72, Schedule B, sec. 7. In substance, but in varying phraseology, this statute was biennially reënacted and retained until modified by the last Legislature so as to read as follows: "On any person or establishment offering any article for sale and proposing to present purchasers with any gift or prize as an inducement to purchase twenty-five dollars ($25); *Provided,* that this section shall not be construed as giving license or relieving such person or establishment from any penalties incurred by violation of the criminal law." Revenue Act, 1925, sec. 52. The material change is the omission of the words "all gift enterprises."

On 18 October, 1922, the plaintiff contracted to sell certain drugs and articles of merchandise as the "stockholder-agent" of the United Drug Company. The plaintiff is permitted not more than twice a year, as a means of advertising the products of the United Drug Company, to sell to a customer one article of merchandise of a particular kind at the regular retail price or two articles for the regular price of one plus one cent. When the plaintiff proposed to conduct a sale in which two articles should be sold in this way and upon these terms the defend-

ant demanded payment of the prescribed tax on the ground that such sale would constitute a "gift" or "prize" within the meaning of the statute. The plaintiff paid the tax under protest and seeks in this suit to recover the amount paid. Whether the defendant's position can be maintained or whether the plaintiff is entitled to recover is the question presented for decision.

In *Winston v. Beeson,* 135 N. C., 271, the subject is incidentally discussed, though the decision turned upon the construction of another statute. The charter of the city of Winston imposed a license tax on "each gift enterprise or lottery" within the corporate limits, and it was insisted on behalf of the city that the sale of trading stamps was a gift enterprise. The Court accepted Black's definition of "gift enterprise" (Law. Dic. 540) as "a scheme for the division or distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme."

Although applying the doctrine of *noscitur a sociis* and saying that the word "lottery" signifies a plan for the distribution of prizes, or for obtaining money or goods by chance, the Court declined to be circumscribed by this doctrine and declared: "It would seem plain from the connection in which the words are used, and also by the very use of the words themselves, that the legislature intended to tax only those enterprises, schemes, and offers of bargains which involve substantially the same sort of gambling upon chances as in any other kind of lottery, and which appealed to the disposition or propensity for engaging in hazards and chances with the hope that luck and good fortune may give a good return for a small outlay. The provision refers to gifts or prizes, the precise nature of which is not known at the time, and to cases in which the element of uncertainty is always present. It is restricted therefore to the kind of enterprises which appeal to the gambling instinct." These words, it should be noted, do not refer exclusively to the charter of the city of Winston. *Mr. Justice Walker* had before him the Revenue Act of 1903, ch. 247, sec. 51, and the Revenue Act of 1891, ch. 323, sec. 15, and he construed in language easily to be understood the words "gift" and "prize" which, closely associated with "gift enterprise," have been retained in every Revenue Act since 1866. In like manner with a gift enterprise they import the "element of uncertainty" and "appeal to the gambling instinct." This conclusion, we think, is fortified by the proviso appearing in the section before us, and in the sections previously enacted, that the statute shall not be construed as relieving such person or establishment from any penalties incurred by violation of the criminal law (Rev. and Mach. Act, 1925, sec. 53) and by section 81 which provides that nothing in the act shall be construed to apply to a manufacturer or to a merchant who sells the goods of such

manufacturer from offering to present to the purchaser or customer a gift of certain value as an inducement to purchase such goods. A gift of this kind is deemed a legitimate method of advertising goods and attracting customers.

In the several Revenue Acts in which they are used the terms "gift enterprise" and "gift" or "prize," are so closely associated that, as suggested in *Winston v. Beeson, supra,* they limit and explain each other, and indicate the nature or character of the "enterprise" or the "gift or prize" upon which the privilege tax is laid. If the statute as repeatedly enacted applied to gifts or prizes the precise nature of which was not known and to cases in which the element of uncertainty was always present, none the less does it now apply to such gifts or prizes because the words "gift enterprise" have been omitted from the present statute.

In the sale proposed by the plaintiff we see no such element of chance or uncertainty as appeals to the gambling instinct, no such temptations as lure the unwary into hidden snares. Whether the sale of one of two similar articles for a penny be denominated a gift or a prize the purchaser knows precisely how much he is paying and what he is getting and the seller parts with precisely what he has offered.

In our opinion the plaintiff is not subject to the tax imposed and is entitled to judgment for the tax paid.

The judgment is therefore

Reversed.

J. T. HORNEY v. THOMAS C. MILLS.

(Filed 3 June, 1925.)

1. Courts—Jurisdiction—Demurrer—Waiver—Supreme Court—Statutes.

A demurrer to the jurisdiction of the court for that the allegations of the complaint are insufficient to constitute a cause of action, may be made upon motion to dismiss at any time when properly brought before the court, and originally in the Supreme Court under the provisions of C. S., 518, and a failure to have previously done so cannot be held as a waiver of the right.

2. Same—Pleadings—Questions of Law.

Upon demurrer to the jurisdiction of the court that the allegations of the complaint are insufficient to constitute a cause of action, the rule that the allegations of fact of the pleader are taken to be true for the purposes of passing upon the demurrer is inapplicable to his erroneous conclusions of law.

3. Same—Principal and Agent—Commission—Sales.

Where an agent for the sale of land sues the owner for compensation for his services, the allegations of his complaint in effect that he was

to sell the lands so as to give the owner the right to reject the sale provided the amount did not exceed a certain sum, that at the sale accordingly made this sum was not realized and the owner refused to confirm: *Held*, the further allegation that as a part of this contract he was to receive a certain sum of money to pay for expenses is construed as depending upon his effecting a sale within the terms of the contract, and a demurrer is good.

4. Pleadings—Answer—Verification—Demurrer.

Where the complaint has been verified, an unverified answer is insufficient, and a proper motion for judgment for the want of an answer aptly made will be sustained.

APPEAL by defendant from *Stack, J.*, at February Term, 1925, of BUNCOMBE.

On 11 May, 1923, defendant owned a tract of land situate in or near the town of Tryon, Polk County, N. C., containing 63 acres, more or less. Plaintiff was, on said date, engaged in business at Asheville, N. C., as a regular land auctioneer, maintaining an organization to handle sales of real estate. Said organization consisted of a force of highly trained and expensive men, including surveyors, advertising men, musicians, ground men, etc. On said date plaintiff and defendant entered into a contract, in writing, by which plaintiff agreed to offer for sale, at public auction, or otherwise, for defendant, on or before 25 June, 1923, the said tract of land. Plaintiff agreed to subdivide said tract of land into as many lots or tracts as he deemed advisable, and to advertise said sale in newspapers and by handbills, posters, personal letters, etc., to such extent and in such manner as he deemed necessary. Plaintiff further agreed to furnish on the day of sale all necessary prizes, guessing cards, contracts, ground workers, auctioneers and clerks; also a band of music if he deemed same necessary, and all other help necessary in order to conduct the sale in a rapid and business-like manner.

Defendant, in consideration of the services to be performed by plaintiff, in making a sale of said land, agreed to pay plaintiff, at the close of the sale, 10 per cent of the gross receipts of said sale, as evidenced by contracts signed by purchasers of the different tracts or lots sold at said sale. All commissions or overage due plaintiff were to be payable, in cash, at the close of the sale. Defendant agreed to confirm the sale or sales of the said lots or tracts, provided the land brought a total sum of $3,600. If the land did not bring a total of $3,600 at said sale, defendant was to be under no obligation to confirm the same. If the land was not sold at the sale provided for in the contract, plaintiff should have 30 days thereafter in which to effect a sale, privately or otherwise, on the same terms and conditions as those set out in the contract.

The fifth and eleventh paragraphs of the contract are as follows: "5th. It is understood and agreed that the party of the first part (defendant) is to pay to the party of the second part (plaintiff), in addition to the commission or overage heretofore mentioned, $600 in cash, to help pay the expenses of said sale."

"11th. Party of first part (defendant) is to pay to party of second part (plaintiff) $600, in addition to the 10 per cent commission on said sale, and party of second part is to subdivide the tract into as many lots as is necessary and do necessary road work to get to place."

Summons in this action was duly issued on 6 June and served on defendant on 9 June, 1923. On 8 June, 1923, plaintiff filed a duly verified complaint, in which the execution of the contract dated 11 May, 1923, by plaintiff and defendant is alleged. Plaintiff then alleges, as follows:

"That this plaintiff, complying with said contract, did have said land and premises described in said contract, at his own cost and expense, subdivided, platted, advertised and offered for sale at public auction; that he failed to get purchasers and bidders at said sale satisfactory to defendant, and defendant failed and refused to confirm any sales as made or to accept any offers received; that plaintiff was present in person on day of said sale, and tried in all ways within his power to make the sale a success; and that his services were worth much more than a minimum of $600; that because the said land did not sell as defendant hoped and expected, the said defendant failed and refused and still fails, neglects and refuses to pay to plaintiff the contract price of $600 on account of services and expenses, and which said sum is due the plaintiff."

Plaintiff demands judgment that he recover of defendant the sum of $600 and interest from 1 June, 1923; the costs of the action and such other relief, etc.

On 12 June, 1923, defendant filed answer to the complaint; this answer was not verified at time of filing, or at time when the case was called for trial at February Term, 1925. This answer was prepared and filed by defendant, *in propria persona sua.* Judgment was rendered that plaintiff recover of defendant, by default, the sum of six hundred dollars, with interest from 6 June, 1923, and the costs. This judgment was signed on 12 February, 1925.

On 16 February, 1925, defendant by his attorneys of record, caused notice to be served on plaintiff that he excepted to said judgment for that same was contrary to law, and that he appealed therefrom to the Supreme Court of North Carolina.

Eugene C. Ward for plaintiff.
Carter, Shuford, Hartshorn & Hughes for defendant.

CONNOR, J. Plaintiff seeks to recover, in this action, upon a contract, in writing, executed by plaintiff and defendant, dated 11 May, 1923. Summons was issued on 6 June, 1923. Plaintiff filed his duly verified complaint on 8 June, 1923. The summons, together with a copy of the verified complaint was duly served on defendant, on 9 June, 1923. Defendant filed his answer to the complaint on 12 June, 1923, in which he denied each and all the material allegations of the complaint. This answer was not verified.

At February Term, 1925, plaintiff moved for judgment upon his verified complaint. The answer had not been verified; no motion was made by defendant for leave to verify the same. The Court being of opinion that, upon the verified complaint, no verified answer thereto having been filed by defendant, plaintiff was entitled to recover of defendant, rendered judgment in accordance with the prayer of the complaint. No exception was taken by defendant to the judgment at time same was rendered. It does not appear that defendant was present or represented by attorneys when judgment was rendered. Within ten days after its rendition, defendant, through his attorneys, caused his appeal from the judgment to be entered by the clerk on the judgment docket, and notice thereof to be served on plaintiff; C. S., 641 and 642.

Upon his appeal, in this Court, defendant contends that there was error in rendering judgment upon the complaint (1) for that no cause of action is alleged therein and (2) for that a delay in moving for judgment by default for want of verified answer from the date of filing the answer, 12 June, 1923, to the date of the motion for judgment, February Term, 1925, was, as a matter of law, a waiver of the right to have the answer stricken out, because same was not verified when filed, and also of the right to have judgment entered by default.

Defendant's first contention is, in effect, a demurrer *ore tenus* to the complaint, for that same does not state facts sufficient to constitute a cause of action. This contention is made for the first time, upon appeal, in this Court, and must be considered under C. S., 518. It has not been waived by failure of defendant to take the objection either by demurrer or answer. If an objection to a complaint, other than that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, is not made by demurrer, or by answer, it is waived. Objections upon either of these grounds are not waived, even by the filing of an answer denying the allegations of the complaint. "When a complaint does not state a cause of action, the defect is not

waived by answering, and defendant may demur *ore tenus,* and the Supreme Court may take notice of the insufficiency, *ex mero motu." Garrison v. Williams,* 150 N. C., 674. Upon this contention it is immaterial whether the answer filed is sufficient or not.

The demurrer *ore tenus,* however, admits the truth of the facts alleged in the complaint. *Hayman v. Davis,* 182 N. C., 563. If the facts alleged in the complaint, admitted to be true, upon consideration of the demurrer, and construed liberally, with every reasonable intendment and presumption in favor of plaintiff, constitute a cause of action, in favor of plaintiff and against defendant, the demurrer must be overruled; otherwise the demurrer must be sustained.

The contract upon which this action is brought is referred to and made a part of the complaint. It is in writing, signed by the parties, and a copy thereof is attached to the complaint. The rights and duties of the parties thereto must be determined by a construction of the contract. This is a matter of law for the court, and the court, in determining the mutual rights and duties of plaintiff and defendant, under the contract, is not bound by the construction of the contract, adopted by plaintiff and set out in his complaint, as a basis for a cause of action against defendant. Only facts alleged in the complaint are to be taken as true in considering the question presented by defendant as to whether or not these facts are sufficient to constitute a cause of action in favor of plaintiff and against defendant, arising out of the contract. Plaintiff's conclusions of law upon the facts admitted by the demurrer *ore tenus* are not admitted by defendant or binding upon the court; *Carpenter v. Hanes,* 167 N. C., 552.

Plaintiff's construction of the contract as providing not only for the sale of the land by plaintiff for defendant, but also for its subdivision, etc., into lots by plaintiff, and for the payment by defendant to plaintiff of commissions for the sale and also of $600 for the subdivision, etc., upon an examination of the contract in its entirety is not sustained. The primary purpose of the contract, as disclosed by such examination, is the sale of the land by plaintiff for defendant and compensation by defendant to plaintiff for the full and final performance of the contract. Commissions are due and payable only at the close of the sale. It appears from the complaint that no sale was made, and, therefore, no commissions were due by defendant to plaintiff. The sum of $600 was to be paid in addition to commissions to help pay the expenses of the sale and the preparation of the land for the sale. Under the terms of the contract, this sum was due and payable only in the event that the land was sold.

Plaintiff alleges generally that he complied with said contract, but this is a conclusion of law. It appears by express allegations in the

complaint that plaintiff failed to get purchasers and bidders satisfactory to defendant. It is not alleged that the land brought at the sale $3,600. It is expressly provided in the contract that if the land failed to bring a total of $3,600, defendant should be under no obligation to confirm the sale.

Defendant's contention that the facts alleged in the complaint are not sufficient to constitute a cause of action must be sustained.

We cannot, however, sustain defendant's second contention that plaintiff, by delaying to move for judgment by default for want of a verified answer from the date of the filing of the answer to the date of the hearing of the motion, waived his rights. When a complaint, duly verified, is filed, the answer thereto must also be verified. C. S., 528. An unverified answer to a complaint, duly verified, is not sufficient to raise issues for trial by jury. Plaintiff, who has filed his complaint, is entitled to judgment, in accordance with the facts alleged, if no answer denying the allegations is filed by defendant within the time allowed by statute, and if the complaint is duly verified, an unverified answer is, under the statute, no answer. Delay in moving for judgment upon the complaint for want of an answer does not, as a matter of law, waive plaintiff's rights. Such delay may properly be considered by the court in passing upon defendant's motion for leave to file an answer or to verify an answer previously filed, such motion being addressed to the discretion of the court, the exercise of which is not reviewable by this Court; *Wilmington v. McDonald,* 133 N. C., 548; *Church v. Church,* 158 N. C., 564. C. S., 536.

For the reason stated in this opinion, the judgment must be

Reversed.

E. N. HAHN v. J. C. FLETCHER.

(Filed 3 June, 1925.)

Courts — Jurisdiction — Street Improvements — Assessments—Constitutional Law—Statutes.

An assessment on land made for street improvements created a lien by statute involves the title and comes within the intent and meaning of a covenant against encumbrances in a later deed conveying the lands upon which this lien exists; and where the grantee in the deed has paid off this lien to clear his title, the amount involved, though less than the sum of two hundred dollars, carries it within the jurisdiction of the Superior Court, exclusive of that of the justice of the peace. North Carolina Constitution, Art. IV, sec. 27; C. S., 1473.

HAHN *v.* FLETCHER.

APPEAL by defendant from *Harding, J.*, Fall Term, 1924, WATAUGA.

Plaintiff, on 4 September, 1923, procured the issuance of a summons by a justice of the peace against the defendant "to answer the complaint of E. N. Hahn for the nonpayment of $118.70, with interest due thereon, by account and demanded by said plaintiff." On the hearing defendant moved to dismiss the action on the ground that the justice of the peace had no jurisdiction. The written motion is as follows:

"This action is brought for the recovery of a sum of money alleged by the plaintiff to have been expended by him to discharge certain encumbrances on lands conveyed by defendant to plaintiff by a warranty deed, and, therefore, the title to real estate is in controversy. *Shankle v. Ingram,* 133 N. C., 254; *Brown v. Southerland,* 142 N. C., 225; Consolidated Statutes, sec. 1473, etc. The action should, therefore, be dismissed at the cost of the plaintiff."

On the trial, judgment was rendered for plaintiff, and defendant appealed to the Superior Court. On appeal to the Superior Court, the following facts were found by the court below:

"That the plaintiff purchased a certain lot of land in Watauga from the defendant; that at the time of the purchase there was an assessment amounting to $118.70, for which the said lot was liable for certain improvements, and that said amount was a lien on the property.

That after plaintiff had purchased and received deed from the defendant, plaintiff was called upon to pay the assessment, and that plaintiff paid it in order to recover the lien of such assessment, and brings this action to recover the money that he paid out.

The court being of the opinion that a question of warranty does not arise in this case, nor a question of the title between the plaintiff and defendant, overrules the motion to dismiss for want of jurisdiction on the part of the justice of the peace, and defendant excepts.

Counsel for the parties tell the court that the foregoing facts are the facts in this case, and counsel for the defendant telling the court they are the facts in the case, and it is agreed that the court may render judgment upon such findings of fact;

Whereupon, it is ordered and adjudged that the plaintiff recover of the defendant the sum of $118.70, with interest from 15 September, 1923, the date of the judgment before the justice of the peace, and the costs of this action."

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

F. A. Linney for plaintiff.

Brown & Bingham and Squires & Whisnant for defendant.

CLARKSON, J. Constitution of North Carolina, Art. IV, sec. 27, in part, is as follows: "The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions founded on contract, wherein the sum demanded shall not exceed two hundred dollars, *and wherein the title to real estate shall not be in controversy,*" etc. C. S., 1473.

The sole question involved in this appeal is whether under the facts found the "title to real estate" is in controversy. If the title is in controversy, the justice of the peace had no jurisdiction and the action should have been dismissed. The facts found indicate that the plaintiff purchased a piece of land from the defendant. The title was in defendant and he transferred the title by deed to plaintiff. At the time the title passed from defendant to plaintiff an assessment for $118.70 was on the lot for improvements—this was a lien on the property.

In *Bank v. Watson,* 187 N. C., p. 111, we said: "Under the statute (chapter 56, sec. 9, Public Laws 1915) the street assessment, 'from the time of such confirmation, the assessment embraced in the assignment roll *shall be a lien on the real property against which the same are assessed, superior to all other liens and encumbrances.' Kinston v. R. R.,* 183 N. C., 14." C. S., 2713. C. S., 2717, makes provision how payment enforced. In *Kinston v. R. R., supra,* it is termed a "statutory mortgage."

Plaintiff paid the lien and now sues to recover it from defendant, who made the title to him with warranty. To get a good title to the land, plaintiff had to pay the lien on the land. If the land was sold, as it could be under the lien, plaintiff would have no title unless he purchased at the sale.

"Title is the means whereby the owner of lands has the just possession of his property." *Horney v. Price, post,* 820.

Title in the present case may not be the means whereby plaintiff may have the "just possession of his property" with a lien on it. If sold to pay the lien, he may have no title. Plaintiff brings this action before a justice of the peace to recover the amount paid; defendant sets up the defense that the title to real estate is involved in the controversy and the question of warranty arises, and contends that the action should have been brought in the Superior Court. Plaintiff, in his action before the justice of the peace, would introduce the deed made by defendant—from the facts found, this was admitted. Then by the deed would arise the warranty and covenants in the deed. This would automatically involve the title to the real estate. If the owner of the "statutory mortgage," instead of selling under the statute, desired to foreclose the lien, suit could not be brought before a justice of the peace, but in another forum. *Murphy v. McNeill,* 82 N. C., 221.

In *Barrett v. Barnes,* 186 N. C., 158, we said: "*Clark, C. J.,* in *Gammon v. Johnson,* 126 N. C., 64, says: 'In general, all encumbrances, whether prior or subsequent encumbrances, as well as the mortgagor, should be parties to a proceeding for foreclosure, and judgment creditors as well as mortgagees.' *Jones v. Williams,* 155 N. C., 179, is not in conflict under the facts in this case."

If defendant had agreed to pay plaintiff $118.70 after he had paid the assessment lien, and suit was brought by plaintiff on this agreement, the justice of the peace would have jurisdiction. *Hooks v. Houston,* 109 N. C., p. 626.

In *Shankle v. Ingram,* 133 N. C., p. 254, the action was for damages for breach of covenant of seizin in the deed. The allegation was that defendant conveyed to plaintiff 245 acres of land. The deed contained covenants of warranty, but defendant was not the owner of 41.8 acres, having sold it off before, and plaintiff had never been able to get possession of same. The value of this 41.8 acres was $170. The case was decided on the statute of limitation, but the Court considered the question of jurisdiction and said (*supra,* p. 259): "We do not see how a justice of the peace could have taken cognizance of the questions involved in this case and administered the rights of the parties, and we presume this view was taken by counsel, as no objection was made to the jurisdiction either below or in this Court." It is clear, in that case, a part of the title to real estate was in controversy.

Brown v. Southerland, 142 N. C., p. 225, decides: Headnote 1. "Where the complaint alleges that the defendants conveyed to the plaintiffs certain lands by deed, 'with full covenants of seizin'; that the defendants were not seized of a portion of said lands, and that by reason thereof there was a breach of said covenant whereby they sustained damages to the amount of $57, the Superior Court had jurisdiction of the action under Art. IV, sec. 27, of the Constitution, the title to real estate being in controversy."

In the warranty clause of the ordinary modern deed, the various covenants are (1) covenant of seizin, (2) of right to convey, (3) against encumbrances (these three do not run with the land), (4) warranty which may be either general or special, (5) quiet enjoyment, (6) and further assurance (these latter three do run with the land). Mordecai's Law Lectures, Vol. 2, p. 851; *Lockhart v. Parker, ante,* 138.

From the facts found, the covenant in plaintiff's deed was "against encumbrances." When defendant delivered the deed to plaintiff, this covenant was broken with the street assessment—a lien or a statutory mortgage on the land. Plaintiff could have at once sued for the breach. As the breach brought into controversy the title to real estate, the

justice of the peace had no jurisdiction. Grave consideration of this question of jurisdiction was given by the Court in *Sewing Machine Co. v. Burger,* 181 N. C., p. 241.

Mere allegation of defendant that title is in controversy will not oust justices' jurisdiction. The matter must appear from the evidence or admission of the parties. *Jerome v. Setzer,* 175 N. C., p. 391. This question does not arise here, as the agreed facts present the question.

For the reasons given, there is

Error.

HATTIE CRISP, ADMINISTRATRIX OF WILBURN CRISP, v. MONTVALE LUMBER COMPANY AND NANNIE McGUIRE, ADMINISTRATRIX OF F. L. McGUIRE.

(Filed 3 June, 1925.)

1. Removal of Causes—Federal Courts—Wrongful Joinder—Joint Torts—Pleadings.

Where the complaint alleges a joint tort against a resident and nonresident defendant, a motion to remove the cause from the State to the Federal Court for misjoinder of the resident defendant, will be denied in the absence of allegation or evidence that the misjoinder was fraudulent.

2. Same—Election of Remedies.

Upon defendant's motion to remove a cause from the State to the Federal Court for diversity of citizenship, for the reason that the cause was severable against the nonresident defendant, the question of whether the cause was removable for wrongful joinder of parties defendant depends upon the allegations of the complaint, and under the facts of this case: *Held,* the allegations of negligence against both of the defendants, one as a principal and the other as a vice-principal, in failing to provide plaintiff's intestate a safe place to work in blasting, and proper tools and materials, alleged a joint tort against both defendants, and plaintiff's election to sue them both for the joint tort will control without regard to his motive in pursuing his legal remedy.

3. Same—Extraneous Matters of Defense.

Where the defendant on his motion to remove a cause from the State to the Federal Court for diversity of citizenship alleges or offers matter extraneous to the complaint, such matter is in the nature of a speaking demurrer, and will not be considered.

APPEAL by Montvale Lumber Company from an order of *Finley, J.,* made at March Term, 1925, of GRAHAM, denying its motion to remove the cause to the United States District Court for the Western District of North Carolina.

A. Hall Johnston, T. M. Jenkins, and R. L. Phillips for plaintiff.
S. W. Black for the Montvale Lumber Co., defendant.

ADAMS, J. The plaintiff brought this action to recover damages for personal injury resulting in death. She alleges that her intestate died in July, 1924; that prior to this time he had been employed by the Montvale Lumber Company and placed under the immediate supervision and control of F. L. McGuire, its general manager and vice-principal, to assist in blasting rock with dynamite, giant powder, and other high explosives; that the work required of him was inherently dangerous to life and limb; that the defendant company and its vice-principal failed to exercise due care for his safety, and that as a proximate result of this negligence a number of the holes or blasts exploded and thereby inflicted injuries which caused the intestate's death.

The plaintiff specifically alleges that the death of her intestate was proximately caused by the negligence of the defendant company and F. L. McGuire, its vice-principal, and each of them jointly and concurrently in the following particulars: (1) They negligently loaded the holes or blasts with high explosives and negligently failed to provide a reasonably safe place for the intestate to work in; (2) they negligently failed to furnish him with reasonably safe and suitable tools and appliances; (3) they negligently failed to adopt reasonably safe ways and methods and to give the intestate proper instruction concerning the dangers of his work; (4) they negligently furnished him with a defective blow-pipe or torch and with defective fuses attached to the charges and blasts; (5) they negligently caused the blasts to explode. She alleges further that her intestate was a young man of high character and good habits, industrious, sober, frugal; and that by reason of his death she has been damaged in the sum of $50,000.

In the complaint appears also the following paragraph: "That the defendant, Montvale Lumber Company, negligently failed to comply with the mining laws of the State of North Carolina—to wit, C. S., 6903, which requires the examination of mines with a safety lamp and prohibits the use of matches in any mine. That if the defendants had furnished a safety lamp for the use of the plaintiff and had furnished other material for the purpose of lighting the fuses, the deceased would not have been killed."

In apt time the Montvale Lumber Company filed its petition for removal to the United States District Court for the Western District of North Carolina, alleging that it is a corporation organized in and chartered by the State of South Carolina, and was not at the commencement of the action and is not now a citizen or resident of North Carolina, and that the plaintiff is such resident and citizen. It alleges

that at the time of the intestate's injury and death no joint contractual relation existed between the company and F. L. McGuire; that McGuire was engaged in performing work for it as an independent contractor; and that a final determination of the controversy between the plaintiff and the company may be had without the presence of the other defendants as parties in the cause. The usual bond and notice accompanied the petition.

The petitioner rests its right of removal on two grounds: (1) The complaint states against it a severable cause of action in which McGuire, its codefendant, has no interest; (2) no cause of action is alleged against the resident defendant. The petition contains no allegation of a fraudulent joinder of the defendants.

To warrant a removal the case must be separable into parts, so that in one of them a controversy will be presented wholly between citizens of different States, which can be fully determined without the presence of the other parties. 3 Foster's Fed. Pr. (6 ed.), 2934. In *Staton v. R. R.*, 144 N. C., 134, 140, the Court said: "To constitute a separable controversy 'the action must be one in which the whole subject-matter of the suit can be determined between the parties to the separable controversy without the presence of the other parties to the suit.' Moon on Removal of Causes, sec. 140. The question in respect to the separability of the controversy must be determined upon an examination of the plaintiff's complaint. Allegations in the petition respecting the defenses of the several defendants are not to be considered." And in *Hollifield v. Telephone Co.*, 172 N. C., 714, 720: "The plaintiff is entitled to have his cause of action considered as stated in his complaint. If there has been a joint tort committed, he may sue the wrongdoers jointly or separately, at his election, as they are liable to him in either form of action. *Hough v. R. R., supra; Smith v. Quarries Co.*, 164 N. C., 338; *R. R. v. Miller*, 217 U. S., 209; *R. R. v. Thompson*, 200 U. S., 206. When a party is in the lawful assertion of a right in bringing his action, the law attaches no importance to his motives in pursuing a course which he has a right to take. *Hough v. R. R., supra.* It was said in *R. R. v. Dixon*, 179 U. S., at p. 135: 'The question to be determined is whether the Court of Appeals erred in affirming the action of the (State) Circuit Court in denying the application to remove; and that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkley and Sidles was immaterial. The petition for removal did not charge fraud in that regard or set up any facts and circumstances indicative thereof, and plaintiff's motive in

the performance of a lawful act was not open to inquiry.'" *Fore v. Tanning Co.*, 175 N. C., 583; *Pruitt v. Power Co.*, 165 N. C., 416; *Smith v. Quarries Co.*, 164 N. C., 338; *Hough v. R. R.*, 144 N. C., 692; 3 Foster's Fed. Pr. (6 ed.), 2935.

The principle that the plaintiff's election determines the character of the tort, whether joint or several, is thus stated in *Torrence v. Shedd*, 144 U. S., 527, 36 Law Ed., 528: "As this Court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Louisville & M. R. Co. v. Ide*, 114 U. S., 52, 56 (29: 63, 54); *Pirie v. Tvedt*, 115 U. S., 41, 43 (29: 331, 332); *Sloane v. Anderson*, 117 U. S., 275 (29: 899); *Little v. Giles*, 118 U. S., 596, 601, 602 (30: 269, 271); *Thorn Wire Hedge Co. v. Fuller*, 122 U. S., 535 (30: 1235)." Also in *Powers v. R. R.*, 169 U. S., 92, 42 Law. Ed., 673: "It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one, for, as this Court has often said, 'a defendant has no right to say that an action shall be several which a plaintiff elects to make joint.'"

The corporate defendant, not denying that the complaint states a joint cause of action, says that it sets up also a severable cause against it in which its codefendant has no interest. We do not think the complaint is susceptible of this interpretation. True, it is alleged that the defendant company failed to comply with the requirements of section 6903 of the Consolidated Statutes, but it is further alleged in substance that the defendants were negligent in this respect; and, considering the complaint as a whole, we apprehend that the draftsman referred the word 'defendants' to the company and its vice-principal, F. L. McGuire, and not to his administratrix, upon whom rested no duty to comply

with the statutory provision. Upon the defendant's interpretation, the allegation, if not meaningless, would be without definite significance. Our conclusion is that the complaint by fair intendment states a joint cause of action against the defendants and not a severable cause against the corporate defendant.

The second alleged ground of removal is without merit. In its brief the lumber company refers to the death of the defendant's intestate and to the time and manner of its occurrence; but this reference is in the nature of a "speaking demurrer," which invokes the aid of matters not appearing in the complaint and, therefore, not requiring consideration. *Staton v. R. R., supra.* For the same reason it is not necessary to consider the petitioner's allegation that McGuire was engaged in the performance of work as an independent contractor. *Thomas v. Lumber Co.*, 153 N. C., 351.

The judgment is

Affirmed.

DIXIE POSTER ADVERTISING CO., INC., V. CITY OF ASHEVILLE ET AL.

(Filed 3 June, 1925.)

1. Taxation—Confiscation—Injunction—Burden of Proof.

While ordinarily a restraining order for the collection of an unlawful tax will not be granted, it is an exception which the plaintiff must show, when the imposition of this tax will cause the irreparable loss of property rights, or amount to an unlawful confiscation of his property.

2. Same—Appeal and Error—Findings of Fact—Review.

Whether the license tax imposed in this case by city ordinance will amount to a confiscation of plaintiff's property or cause him to operate his business at a loss, being a matter of calculation, the Supreme Court remands the case for the ascertainment of the expenditures, so as to show in comparison with the profits stated the status of plaintiff's business as affected by the tax imposed by the ordinance.

CLARKSON and VARSER, JJ., concur in result only.

APPEAL by defendants from an order of *Stack, J.*, made at Chambers in Asheville, 18 April, 1925, continuing a restraining order to the final hearing.

Marcus Erwin and Carter, Shuford, Hartshorn & Hughes for plaintiff.

Jones, Williams & Jones for defendants.

ADAMS, J. The object of this action is to restrain the collection of a tax levied by the city of Asheville for the privilege of advertising by

the use of billboards. At the hearing the judge found certain facts, among which are these: (1) The plaintiff in the exercise of its corporate powers conducts a business known as "Outdoor Advertising," and for this purpose maintains a large number of billboards and posterboards situated on private property; (2) when the suit was instituted the plaintiff owned, leased and used about 150 boards, erected at a cost of more than $10,000, the total posting surface of which was more than 3,825 lineal feet; (3) the plaintiff has made numerous contracts with its customers for the display of advertising matter upon these boards and derives its sole income from payments made by its customers; (4) the gross income received by the plaintiff from its business in the city of Asheville for the fiscal year 1923-24 was approximately $12,000 and the net income $873.07; (5) under an ordinance of the city, the defendants are attempting to impose and collect an annual license tax of one dollar on each lineal foot of the plaintiff's total lineal footage in the city, which is 3,825 feet, the tax amounting to $3,825; (6) for several years prior to the passage of this ordinance the city levied and imposed on the plaintiff a license tax of $300, which the plaintiff has tendered to the defendant in payment of the tax for the current year.

Upon the facts found and set out in the judgment, the order restraining the collection of any tax in excess of the $300 tendered by the plaintiff was continued to the final hearing.

The plaintiff contends that the defendants, while purporting to exercise the power of taxation for municipal purposes, have levied and are attempting to collect from the plaintiff a license and privilege tax which is oppressive, prohibitive, confiscatory, and, therefore, invalid, while the defendants contend that injunction is not available to restrain the enforcement of an invalid municipal ordinance, and, moreover, if it is, that the evidence is not sufficient to warrant such remedy.

In a number of our decisions it has been held that, as a general rule, an injunction will not be granted to prevent the enforcement of an invalid or unlawful municipal ordinance. *Cohen v. Comrs.*, 77 N. C., 2; *Wardens v. Washington*, 109 N. C., 21; *Scott v. Smith*, 121 N. C., 94; *Paul v. Washington*, 134 N. C., 363; *Hargett v. Bell, ibid.*, 394; *S. v. R. R.*, 145 N. C., 495, 521; *Thompson v. Lumberton*, 182 N. C., 260; *Turner v. New Bern*, 187 N. C., 541. But this general rule is not universal in its application; on the contrary, it is subject to recognized exceptions. If it appear that an ordinance is unlawful or in conflict with the organic law and that an injunction against its enforcement is necessary for the protection of property rights or the rights of persons, otherwise irremediable, the writ is available in the exercise of the equitable powers of the court. See the concurring opinion of *Mr. Justice Hoke* in *Turner v. New Bern, supra,* and the concurring opinion of *Mr. Justice Brown* in *R. R. v. Goldsboro,* 155 N. C., 365. The

principle is clearly and forcefully enunciated in recent opinions of the Supreme Court of the United States. In *Hygrade Provision Co. v. Sherman,* Advance Opinions, Nos. 6, 7, p. 169 (decided 5 January, 1925), *Mr. Justice Sutherland* said: "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute, even though unconstitutional. . . . But appellants seek to bring themselves within an exception to this general rule—namely, that a court of equity will interfere to prevent criminal prosecutions under an unconstitutional statute when that is necessary to effectually protect property rights." And in *Terrace v. Thompson,* 263 U. S., 197, 214, 68 Law. Ed., 255, 274, *Mr. Justice Butler* used this language: "The unconstitutionality of a State law is not of itself ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate, and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical, and efficient as that which equity could afford. *Boise Artesian Hot & Cold Water Co. v. Boise City,* 213 U. S., 276, 281, 53 Law Ed., 796, 798, 29 Sup. Ct. Rep., 426; *Walla Walla v. Walla Walla Water Co.,* 172 U. S., 1, 11, 12, 43 Law. Ed., 341, 346, 347, 19 Sup. Ct. Rep., 77. Equity jurisdiction will be exercised to enjoin the threatened enforcement of a State law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the State, is clothed with the duty of enforcing its law, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity." See, also, *Packard v. Banton,* 264 U. S., 140, 143, 68 Law Ed., 596, 607.

In the instant case it is incumbent upon the plaintiff, who seeks relief by injunction, to bring itself within the exception to the general rule. Whether it has done so does not definitely or sufficiently appear. The trial judge, it is true, finds the plaintiff's gross income for the fiscal year to be approximately $12,000 and its net income $873.07; but in a suit of this character the appellate court may examine the evidence and reach its own conclusion as to the facts. *Sanders v. Ins. Co.,* 183 N. C., 66, 68; *Woolen Mills v. Land Co., ibid.,* 511, 513. The amount of the income, gross or net, is a mathematical deduction. The gross income is set out *in solido,* but there is no statement of facts in the record and no sufficient evidence to explain the great disparity between the gross and the net income. In considering the question whether the tax is confiscatory or prohibitive, this Court may determine for itself whether this disparity, stated as a conclusion, is justified

by the facts. In other words, there should be evidence to show for what purpose the expenditures were made which, it is claimed, reduce the gross income to a net income of $873.07; for it is the province of the law, not of the plaintiff, to determine to what extent the gross income is legitimately to be diminished by the expenditures. Further information is necessary to an adequate consideration of the alleged prohibitive feature of the ordinance. The cause is, therefore, reversed and remanded for additional facts, to the end that the court may adjudge whether the plaintiff has brought itself within the exception.

Reversed and remanded.

CLARKSON and VARSER, J.J., concurring in result only.

JOHN MIDIMIS v. J. C. MURRELL.

(Filed 3 June, 1925.)

Loans—Contracts—Ejectment—Possession.

Where the landlord and tenant have entered into a written agreement for the payment of arrearages of rent, that it should be in a certain weekly amount in addition to the usual rental, giving the lessor the right at his option to declare the lease void, after five days from the tenant's failure to pay as in case of tenancy at will, a demand for the possession of the leased premises is not a prerequisite to proceedings in ejectment brought after demand for the rental price had been made and not complied with.

APPEAL by defendant from *Webb, J.*, January Term, 1925, of BUNCOMBE.

Action by plaintiff, lessor, against defendant, lessee, in summary ejectment. Judgment for plaintiff, and defendant appeals.

This action was begun before a justice of the peace and carried by defendant's appeal to the Superior Court. The jury rendered a verdict for plaintiff for the leased premises and fixed the debt at $119, and judgment was rendered accordingly.

The admitted lease in evidence contained these provisions:

"No. 1. An option or privilege of extension of this lease for a term of none years (months) upon the following terms: Whereas, the lessee is indebted to the lessor in the sum of $150 for accrued past rent due, contracted prior to this written lease, it is understood and agreed as a part of the consideration hereto the said lessee may pay said sum at the rate of five dollars per week, in addition to the sums above set forth, and that upon failure to pay the said $5 per week, then the lessor at his option may declare this lease null and void.

"No. 2. It is agreed between the parties hereto that should this rent at any time remain unpaid for a period of five days after the same shall be due and payable, and the said lessor may at his option consider said lessee tenant at will, reënter and repossess himself of the said premises."

The evidence of plaintiff tended to show that plaintiff demanded the rents, under the terms of the lease, more than five days before the institution of this action before the justice of the peace, and that defendant had neglected to pay the same. Plaintiff admitted that the only demand made upon the defendant was for the payment of rents under the terms of the lease; that he made demand when the first month's rent was due for the payment of rent, and never demanded the leased premises, and demand for rent payment was five days before this action was instituted.

There is no controversy as to the amount due plaintiff for failure to pay on account of both quoted provisions in the lease.

The court charged the jury as follows:

"The court charges the jury that if the jury should find from the evidence in this case that the plaintiff and defendant entered into a contract of lease, as introduced in evidence, and should further find that the plaintiff demanded the rents five days before the institution of the action before the justice of the peace, then it would be the duty of the jury to answer the first issue 'Yes.'"

The defendant excepted to the refusal to nonsuit and to the charge, and appealed.

Fortune & Roberts for plaintiff.
Wells, Blackstock & Taylor for defendant.

VARSER, J. We are of the opinion that the ruling of the court below is sustained by a proper construction of the stipulation, quoted as No. 1 above. This stipulation relates to rent past due at the date of the execution of the lease, whereby the defendant agreed to pay this sum at the rate of $5 per week, in addition to the rental provided in the lease, with the provision "that upon failure to pay the said $5 per week, then the lessor, at his option, may declare this lease null and void." This provision authorized the plaintiff to treat the lease as absolutely void when the default occurred in the payment of these weekly installments on the past-due rent account. Therefore, a time was fixed, or an event selected, by which the lease terminated, and upon default, under the stipulation, no notice to quit was necessary.

When the parties have by agreement fixed the time for the agreement to terminate, notice to quit is unnecessary, because the reason for it ceases. *Stedman v. McIntosh,* 26 N. C., 291; Mordecai's Law Lectures,

541; 16 R. C. L., 1173; *Faylor v. Brice,* 7 Ind. App. Ct., 551; *Fifty Associates v. Howland,* 59 Mass., 214; *Treat v. Gasmire,* 176 Ill. App., 91; *Gunning v. Sorg,* 113 Ill. App., 332.

In an elaborate note *Judge Freeman,* in reporting *Stedman v. McIntosh, supra,* in 42 American Decisions, on page 130, says: "It is a universal rule, both at the common law and by statute, that where the demise is for a fixed term and is to end on a day certain, no notice to quit is necessary. The reason for this rule is obvious. The object of notice is to terminate the tenancy, and when the lease itself fixes the time at which it is to expire, the necessity for any other notice by either party to terminate it is done away with. Each party is apprised from the contract when the lease ends; further action by either to end it would be unnecessary and superfluous. If a tenant holds over after the expiration of a fixed demise without the lessor's consent, he becomes a mere tenant by sufferance, liable to be ejected without notice."

The same learned author in applying the same rule to leases depending upon a contingency says:

"Where a lease is to be terminated on the happening of a contingency, the happening of the contingent event determines the tenancy, and ejectment will lie without further notice to quit."

This note contains a wealth of authority supporting this doctrine and showing its universality.

Hence, the default in the payment of the weekly installment gave the plaintiff the right to invoke the aid of the court in summary ejectment. The plain stipulations of the parties fixed this default as the event, upon the happening of which the tenancy terminated. Both parties to the lease had full notice of its terms.

On account of this stipulation in the lease and the ruling by the court below, which is fully supported by it, there is no need, on the instant record, to discuss the interesting question, which was ably and earnestly argued by defendant's counsel, as to notice when the defendant is a tenant at will. There is

No error.

TINA HOLLAND v. M. TURNER HENSON ET AL.

(Filed 3 June, 1925.)

Husband and Wife—Widow's Yearly Allowance—Statutes—Limitation as to Income of Deceased Husband.

Under the provisions of C. S., 4125, the limit of the widow's yearly allowance, that it shall not exceed one-half the annual net income of her deceased husband upon a basis of three years preceding his death, is the

average yearly net income or the income for every twelve months, and not one-half of the sum total of the annual net income for three years next preceding his death. *Drewry v. Bank*, 173 N. C., 664.

APPEAL by plaintiff from *Schenck, J.*, at November-December Term, 1924, of HAYWOOD.

Special proceeding for the allotment of a widow's year's allowance under C. S., 4108 *et seq.*, instituted before the clerk of the Superior Court of Haywood County and heard on appeal by the judge at term.

The clerk found as a fact that the value of the net annual income of plaintiff's husband, W. J. Holland, for three years next immediately preceding his death was $2,500; that his widow in the usual proceeding for allotment of a year's support had been awarded the sum of $300, and that she had consumed in addition $200, making a total of $500; that the amount annually necessary for her use was $2,350; that the one-half of the annual net income for one year was $1,250, and after deducting the $500, the amount previously allotted and consumed, rendered judgment for the petitioner and against the administratrix for $750. On appeal to the judge, the judgment of the clerk was, in all respects, confirmed. Plaintiff appeals.

William J. Hannah and William T. Hannah for plaintiff.
Smathers & Robinson for defendants.

STACY, C. J. The only question presented by the appeal is whether the limit of the widow's year's allowance, under C. S., 4125, is the one-half of one year's net income, based on the annual income for three years next preceding the husband's death, as held by the court below, or the one-half of the sum total of the annual net incomes for three years next preceding the husband's death, as contended for by the plaintiff. The statute is as follows:

"The said commissioners shall be sworn by the justice and shall proceed as prescribed in this chapter, except that they may assign to the widow a value sufficient for the support of herself and her family, according to the estate and condition of her husband and without regard to the limitation aforesaid in this chapter; but the value allowed shall not in any case exceed the one-half of the annual net income of the deceased for three years next preceding his death. This report shall be returned by the justice to the court."

We think the court below has correctly interpreted the statute in the present case. *Drewry v. Bank*, 173 N. C., 664.

Annual net income means yearly net income, or the net income for every twelve months.

Affirmed.

W. J. CASADA v. D. P. FORD.

(Filed 3 June, 1925.)

Negligence — Evidence — Questions for Jury—Instructions—Proximate Cause.

Upon motion for nonsuit in an action for negligent injury to plaintiff's team of horses by defendant's driving his automobile into them on the street of a town: *Held*, evidence that the defendant negligently drove his automobile into the team and injured one of the horses, though lessened on cross-examination of the witness by his evidence tending to show he could not have seen the occurrence from his position on the wagon to which the team was hitched; and that the weight and credibility of the evidence are for the determination of the jury, with instructions upon the principles of proximate cause, and the motion was improperly allowed.

APPEAL by plaintiff from *McElroy, J.*, March Term, 1925, of BUNCOMBE.

The plaintiff alleges, in part: "That on or about the 28th day of July, 1923, while the plaintiff's wagon and team, composed of two horses, were standing on the side of the public highway in the village of Leicester, N. C., in said county, and in front of the store of one John Davis, the defendant, the said D. P. Ford, who was driving a heavy truck loaded with acid wood, came down said highway facing said team, driving in a negligent and unlawful manner, and unlawfully and negligently, without any fault on the part of the plaintiff, drove said truck into the team of the plaintiff, thereby injuring and damaging one of the horses to such an extent that said horse was rendered absolutely worthless, and it was necessary for him to be killed on said date."

The material allegations were denied by defendant. The defendant sets up contributory negligence as a defense, and for a further answer alleges: "That on or about the 28th day of July, 1923, the plaintiff negligently placed his team in the public thoroughfare leading through the town of Leicester, and on the wrong side of said thoroughfare, in close proximity to the center of said thoroughfare, without any proper driver or person to look after the said team, and without any caution on his part to take care of his said team, and while this defendant was passing over said highway, at a point where plaintiff's team was standing, which said team at said time showed no signs of being frightened or indication that it would shy at an approaching car or truck, and while this defendant was driving his truck at an exceedingly slow rate of speed, one of said horses, negligently left unattended by the plaintiff and standing in the said highway, for some unknown cause, without any notice to this defendant, whirled, twisted, or kicked his right leg, and the same became caught or came in contact with defendant's

loaded truck, and if the said horse was injured, it was no fault upon the part of this defendant, but was due to the reckless, wrongful, and negligent conduct of the plaintiff. That if the said horse was injured, the same was of very little, if any, value, as this defendant is advised and believes. That this defendant avers that if the plaintiff has been injured, the same was due to the wrongful and negligent conduct of the plaintiff, and due to the contributory negligence of the plaintiff, as herein set out."

Arvill King, witness for plaintiff, testified on direct examination: "My name is Arvill King, and I am 16 years of age. I was at Leicester at the time Mr. Casada had his wagon there and Mr. Ford was there in his truck. I was holding to Mr. Casada's wagon *when the truck ran into the horse.* Mr. Ford ran his truck within about a foot or fifteen inches of Mr. Casada's wagon—that is, the truck wheels were in about a foot or fifteen inches of the wagon wheels. I did not see the horse fall. I do not know the value of horses. The truck was running about twelve miles an hour down grade. It was loaded with acid wood and looked to have about two cords. *The horse moved his head before the truck struck him, but he did not move his back part.*"

This testimony was weakened on cross-examination as to the position in which King was sitting, indicating that he could not see the collision. There was no evidence introduced by the defendant and none that the injury was caused by the horse kicking.

At the close of plaintiff's evidence, defendant moved for judgment as of nonsuit. The court entered judgment as of nonsuit as appears in the record. Plaintiff excepted and assigned the following error and appealed to the Supreme Court:

"1. The ruling of the court in sustaining the motion of defendant for judgment as of nonsuit.

"2. The judgment of the court nonsuiting the case as appears of record."

Bourne, Parker & Jones for plaintiff.
Wells, Blackstock & Taylor for defendant.

CLARKSON, J. This was a judgment as of nonsuit. The evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Davis v. Long, ante,* 131, and cases cited.

Plaintiff left his wagon and team of two horses in front of Davis' store in the village of Leicester. One of the horses and two wheels of the wagon, front and rear, were off the pavement. On direct examination, Arvill King, witness for plaintiff, testified: "I was holding to

Mr. Casada's wagon *when the truck ran into the horse.* . . . The horse moved his head before the truck struck him, *but he did not move his back part.*" Defendant, who was driving the truck, approached facing the team. King's testimony on cross-examination was weakened as to whether he could see the collision from where he was sitting. This did not have the effect of withdrawing the case from the jury. *In re Fuller et al., ante,* 512, and cases cited. We think that the evidence was sufficient to be submitted to the jury. The facts can be shown by circumstantial as well as direct evidence. The probative force was for the jury and not the court. The jury must determine the facts when the case comes on again for trial, under proper instructions from the court below. From the complaint, the actionable negligence charged is in many respects similar to the famous *Donkey case,* known in every jurisdiction subject to Anglo-American jurisprudence.

In *Davies v. Mann,* Vol. 10, M. & W. Reports, p. 546, it was said: "At the trial before *Erskine, J.* (son of the Lord Chancellor), it appeared that the plaintiff, having fettered the forefeet of an ass belonging to him, turned it into a public highway, and at the time in question the ass was grazing on the off-side of a road about eight yards wide, when the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and, the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses. The learned judge told the jury that, though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff." Lord Erskine's position was held to be "perfectly correct" by *Parke, B.,* all the judges concurring. This case has been approved in *Gunter v. Wicker,* 85 N. C., p. 310; cited in 55 L. R. A., 454. See *Norman v. R. R.,* 167 N. C., p. 533; *Moore v. R. R.,* 185 N. C., 189.

In *Hinnant v. Power Co.,* 187 N. C., p. 297, it was said: "The principle of *Davies v. Mann,* 10 M. & W., 546, and that line of cases cited by defendant's counsel, cannot be applied to this case. The common law as to 'common carriers' has been changed by statute."

We think there was error in the judgment as of nonsuit.

Reversed.

HAMBY v. CALLAHAN CONSTRUCTION COMPANY.

(Filed 3 June, 1925.)

Appeal and Error—Rules of Court—Dismissal—Reinstatement—Laches.

It is imperative that appellants observe the rules of court regulating appeals in order to preserve this right, and where the appellant and appellee have agreed as to the time for serving case and countercase or exceptions, the mere fact that the appellant afterwards thought he had a longer time for the purpose than that agreed upon is no ground for his motion to reinstate his case after its dismissal under the rules.

Motions to reinstate defendant's appeal and for *certiorari*.

W. R. Bauguess for defendant, petitioner.
T. C. Bowie for plaintiff, respondent.

STACY, C. J. This case was tried at the July Term, 1924, ASHE Superior Court. From a verdict and judgment in favor of plaintiff for $500, the defendant gave notice of appeal to the Supreme Court.

The defendant was allowed thirty days to prepare and serve its statement of case on appeal, and the plaintiff was allowed thirty days thereafter to serve his exceptions or countercase. Appellant failed to serve its case within the time allowed, because it was under the impression that the extension was for forty-five days instead of thirty days; no appeal bond was filed as required by law; the case was not brought to the next succeeding term of this Court; motion to dismiss for failure to comply with Rules 24 and 28 was allowed 31 March, 1925; motion to reinstate was denied 12 May, 1925. This is the second motion to reinstate and for *certiorari*. No valid excuse is given for failure to comply with the rules.

It is patent from a bare recital of the facts that the motion and application must be denied. *S. v. Farmer,* 188 N. C., 243; *Byrd v. Southerland,* 186 N. C., 384. To discuss the case would only be to elaborate the obvious. *Cui bono?* When litigants resort to the judiciary for the settlement of their disputes 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. We are not permitted to abandon the rules of practice nor will they be construed so as to favor the negligent and penalize the diligent party. *Battle v. Mercer,* 188 N. C., 116.

Motions denied.

C. E. ADERHOLT ET ALS. v. C. A. CONDON ET ALS.

(Filed 3 June, 1925.)

1. Contracts—Independent Contractor—Employer and Employee—Principal and Agent—Evidence—Roads—Highways.

Whether the relation of contractor and independent contractor exists for the construction of a State highway to be built under contract with the State Highway Commission, depends upon whether the concern signing the contract exercises the right of control over the other concern in the latter's doing the work, and evidence tending to show that the latter was supervised by the former therein, sent money to pay off the laborers thereon, etc., is competent upon the question, under the facts of this case.

2. Same—Principal and Surety—Laborer—Material Furnishers.

Where the contractors for the building of a State highway have employed another concern to fulfill their contract under the former's control, the latter is regarded as the agent or employee of the former, and with the surety on the construction bond, is liable to laborers or material men upon default of the agent, whose claims are sufficiently covered by the contract and the surety bond given for its performance.

3. Same—Liens.

Held, under the facts of this case, that lumber necessary for the preparation of the concrete, etc., used on a State highway constructed under contract with the State Highway Commission, are materials, etc., within the intent and meaning of our statute giving a lien therefor. *Town of Cornelius v. Lampton, ante*, 714 cited and applied.

4. Appeal and Error—Courts—Agreement as to Findings of Fact—Evidence—Verdict.

Where the parties to the action have agreed in writing that the trial judge should find the facts and draw his conclusions of law therefrom, the findings so made, supported by competent evidence, are as conclusive, on appeal, as those otherwise found by the jury.

APPEAL by defendants from *Finley, J.*, at March Term, 1925, of SWAIN.

This was an action originally brought by C. E. Aderholt and others against S. J. and C. A. Condon, partners trading under the firm name of Condon & Condon, and National Surety Co. (hereafter called Surety Company). No summons was served on Condon & Condon, they are insolvent and in bankruptcy and abandoned the work. On motion of the plaintiffs and defendant Surety Company, an order was regularly obtained before the clerk making M. Costello and R. Costello, doing business under the firm name of Costello Brothers, parties defendants to the action. Summons was duly served on M. Costello. The original complaint of the plaintiffs against Condon & Condon and Surety Company was adopted as the complaint against Costello Brothers. The action

is for work and labor done and materials furnished by plaintiffs to Condon & Condon and Costello Brothers in the construction of State Highway Commission Project No. 980. Defendants, contractors, made a contract with the State Highway Commission for the improvement of a certain highway in Macon-Swain counties, between Topton and Almond 17.89 miles long and estimated to cost $285,120. Plaintiffs allege:

"1. That in the year 1922 the defendants, Costello Brothers and Condon & Condon, were engaged as contractors in the construction of a highway in Swain County, North Carolina, under a contract made and entered into with the State Highway Commission, and known as Project No. 980.

"2. That at the time said contract was made for the construction of said highway, the said State Highway Commission required said defendants, Costello Brothers and Condon & Condon to give a bond to secure the payment by said contractors of all amounts due by them for work and labor performed in and about the construction of said highway and for material furnished for the construction thereof; that said defendants, Costello Brothers and Condon & Condon, duly executed said bond and the defendants, National Surety Company, through its duly authorized officers and agents executed said bond as surety. . . .

"(8) That said bond executed by the defendant, National Surety Company, is on file with the State Highway Commission, and under the terms thereof said defendant is obligated to pay the aforesaid amounts due for work and labor done on said highway and for material furnished and used in the construction thereof; that the said defendants, Condon & Condon, are insolvent and have departed from the State of North Carolina and after due diligence cannot be found therein and have no property within the said State.

"(9) That the aforesaid plaintiffs presented their claims against said Costello Brothers and Condon & Condon and the National Surety Company in writing to the State Highway Commission at Raleigh, N. C., within the time required by law."

The defendant Surety Company in its answer admits the allegations in paragraph 1 of complaint, and says:

"2. That the allegations contained in paragraph two are denied, except that it is true that this defendant became surety for Costello Brothers and Condon & Condon on a bond made to the State Highway Commission of North Carolina, which said bond is expressly referred to and made a part of this answer, and the production thereof is demanded for the purpose of disclosing the liability assumed thereon by this defendant. . . .

"8. That the allegations contained in paragraph eight are denied, in so far as they relate to this defendant, except that it is true that this

defendant became surety on the bond made by said Costello Brothers and Condon & Condon to the State Highway Commission, the production of which is demanded as aforesaid, and that this defendant assumed no liability except as by reference to said bond will better appear."

The Surety Company, as a further defense alleges:

"That on or about 1 February, 1922, this defendant became surety on a bond made by Costello Brothers and Condon & Condon to the State Highway Commission of North Carolina, conditioned as therein will better appear, and the sole liability, if any, to plaintiffs in this action is on account of the execution of said bond as surety for said Costello Brothers and Condon & Condon." . . .

The above substantially sets forth the controversy without setting forth the amended complaint and answer of Surety Company.

M. Costello admits allegations 1 and 2 of the complaint and denies the others.

When the case was called for trial it was stipulated and agreed that all matters in controversy, including questions of fact and questions of law, should be heard and passed upon by the court, and that trial by jury be waived, in accordance with the provisions of C. S., 568-571.

The court below, under the agreement before mentioned, rendered the following judgment: "That a contract was duly entered into by the State Highway Commission on 3 February, 1922, with the defendants, Costello Brothers and Condon & Condon, a partnership, for the construction of a highway between Topton and Almond, North Carolina, known as Project No. 980; that thereupon a bond was executed by said defendants as set out in the record duly signed and executed by the defendant, National Surety Company as surety; that after the execution of said contract and bond, the defendants, C. A. Condon and S. J. Condon, under contract with a partnership of Costello Brothers-Condon & Condon began work in the construction of said highway referred to in said contract and bond and that the defendant, M. Costello, representing Costello Brothers, was present during the construction thereof from time to time directing and supervising said work, but the actual construction of said highway was being carried on by said S. J. Condon and C. A. Condon, who had signed the contract and bond with the State Highway Commission, as aforesaid. That said Condon & Condon failed to finish the construction of said highway and after doing certain work in the construction thereof were adjudged bankrupts and are now insolvent. That while the said S. J. Condon and C. A. Condon were engaged in the construction of said highway in the year 1922 they employed the plaintiffs, C. E. Aderholt, W. L. Swanson, Horace Ragsdale and George

Ragsdale, to work in the construction thereof and are due and owing said plaintiffs for work so done in the construction of said highway and labor performed in and about the construction of said roadway, the following sums: . . . That during the year 1922 the plaintiff, J. Z. Wright, sold and delivered to said S. J. Condon and C. A. Condon lumber which was used by said Condon & Condon in the construction of said roadway and for which they are due and owing said plaintiff the sum of," etc. . . . "That claims in writing were duly filed by said plaintiffs with the State Highway Commission for the aforesaid amounts as required by law on 22 August, 1923. That only M. Costello and National Surety Company were served with process. That the defendants, National Surety Company and Costello Brothers, are liable for the aforesaid amounts due said plaintiffs, on said bond filed with the State Highway Commission and said plaintiffs are entitled to judgment for said amounts due them against said National Surety Company and Costello Brothers."

Upon the foregoing findings of fact, judgment was rendered by the court below for amounts demanded by plaintiffs against M. Costello, a member of the partnership of Costello Brothers and National Surety Company.

The agreement between the State Highway Commission and Costello Brothers and Condon & Condon (latter called contractor) was, in part, as follows: (The work, etc., approximately estimated to cost $285,120).

"That the contractor, for and in consideration of the payment herein specified and agreed to by the party of the first part, hereby covenants and agrees to furnish and deliver all the materials and to do and perform all the work and labor in the improvement of a certain section of highway known as road between Topton and Almond, beginning at station 409-78 and ending at station 135a-39.4, situated in Macon-Swain counties of North Carolina, being approximately 17.89 miles long, at the unit price bid by the said contractor in his proposal, according to the specifications and plans. . . . The contractor further covenants and agrees that all and every of the said materials shall be furnished and delivered, and all and every of the said labor shall be done and performed in every respect to the satisfaction and approval of the engineer aforesaid, or his duly authorized assistant, on or before the expiration of four hundred working days. . . . The contractor hereby further agrees to receive the prices bid in proposal for furnishing all the materials and labor which may be required in the prosecution and completion of the whole of the work to be done under this contract, or agreement, and in all respects to complete said contract to the satisfaction of the said State Highway Engineer, or his duly authorized assistant."

The contract bond signed by Costello Brothers, Condon & Condon and National Surety Co. (amount of bond $142,560.00) contains the following: *"And shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway all and every sum or sums of money due him, them, or any of them, for all such labor and materials for which the contractor is liable."*

The following questions and answers on the part of plaintiff were duly excepted to and assignments of error made by defendants M. Costello and Surety Company:

"Q. State what Mr. Costello did. A. He would come down by the shovel and instruct me how to keep the ditches cleaned and ask me why I didn't get some teeth for the shovel, and tell me how to slope the banks.

"Q. State whether or not Costello Brothers had any equipment. A. Yes.

"Q. You know it of your own knowledge? A. Their names were on the equipment.

"Q. What names were on the equipment? A. Costello Brothers.

"Q. On what? A. On the wagons. All the wagons that were there.

"Q. Did you ever have any talk with Costello in which you stated they had paid you off? A. No. I went to Costello's office in Knoxville, and he said he had sent the money down there for them to pay, and he supposed they had.

"Q. Who was that? A. M. Costello.

"Q. What did he say? A. He said he had sent the money to pay us boys off and didn't know what they had done with it.

"Q. Had sent it to who? A. Condon & Condon, I suppose.

"By the Court: Costello said he sent the money to whom? A. Condon & Condon.

"Q. Who did Costello say he sent the money to? A. He said he sent the money down there to them to pay us off.

"Q. Who? A. Condon & Condon.

"Q. Where did he state that to you? A. In his office in Knoxville.

"Q. What boys did he have reference to? A. To my fireman and night-watchman, Ragsdale brothers."

M. Costello in his testimony stated: "In making this contract, Charles A. Condon was acting for the partnership of Condon & Condon, composed of himself and S. J. Condon, and they actually did the work as subcontractors without any supervision or assistance from the partnership of Costello Brothers and Condon & Condon. The original contract was let to Costello Brothers and the two Condon brothers as general contractors, and thereafter Condon & Condon, as a partnership, took

over the work as subcontractors. As matters stood, Condon & Condon were the owners of a one-half interest in the general contract and the entire interest in the subcontract. The contract appearing as defendant's Exhibit 'I' is the only one that was ever entered into between Condon & Condon and Costello Brothers, and is the contract under which all the work was done." . . . His testimony further substantially was: The subcontract (Exhibit "I") was for part of Project 980, being section known as No. 2, beginning at the Nantahala River and extending to Wesser Creek. It was originally made by Condon & Condon with Major E. A. Wilson, who had the contract for the entire Project No. 980. Major Wilson could not make the bond and, by agreement with the State Highway Commission, same was taken over by the partnership known as Costello Brothers and Condon & Condon. The partnership then adopted the subcontract made by Major Wilson with Condon & Condon, who had started the work and carried it on. They did the work as subcontractors, without any supervision or assistance from the partnership of Costello Brothers and Condon & Condon. "At the time the partnership of Condon & Condon went into bankruptcy, the general contractors, Costello Brothers and Condon & Condon, owed them nothing, but they owed us and still owe us. Costello Brothers and Condon & Condon lost money by reason of the failure of Condon & Condon to complete this contract."

At the close of plaintiff's evidence, and at the close of all the evidence, defendants made motions for judgment as of nonsuit. Both were refused, and defendant excepted and assigned error.

The defendants object and except and assign as error the finding and conclusion of the court as follows: "That the defendants, National Surety Company and Costello Brothers, are liable for the aforesaid amounts due said plaintiffs on said bond filed with the State Highway Commission, and said plaintiffs are entitled to judgment for said amounts due them against said National Surety Company and Costello Brothers. The defendants object, except and assign as error the conclusion of the judge that the defendants, M. Costello and National Surety Company, are liable to the plaintiffs in the amounts stated in said judgment and for interest thereon and in entering judgment accordingly. The defendants object and except and assign as error the findings of fact and conclusions of law and judgment as signed and entered," and appealed to the Supreme Court.

Thurman Leatherwood and Alley & Alley for plaintiffs.
S. W. Black for M. Costello.
Mark W. Brown for National Surety Company.

CLARKSON, J. Defendants, M. Costello and National Surety Company, in their brief, say:

"We discuss all the exceptions together, as the real question involved is whether the defendant, National Surety Company, is liable on its bond for debts owing by a subcontractor and not covered by the bond. Nothing was due by the contractor to the subcontractor at the time these liabilities were incurred by the subcontractor or subsequent thereto when the subcontractor stopped work. There were never any contractual relations between the State Highway Commission and the subcontractor, or between the contractor and plaintiffs, and the bond does not cover plaintiffs' claims. If at the time the subcontractor abandoned the work the contractor had been indebted to the subcontractor for 'furnishing material or performing labor in and about the construction of said roadway,' then the bond would have covered such indebtedness and the amount thereof would have been prorated between plaintiffs. Plaintiffs can have no more rights against the contractor and the surety company than the subcontractor, and if the subcontractor has already been paid in full, as the uncontradicted evidence discloses, the plaintiffs have no cause of action against the contractor and the surety company. Should plaintiffs collect from the contractor and the surety company on the facts in the instant case, then a double liability will be placed on a contractor, and settlement with a subcontractor will be no protection whatever against claims incurred by the subcontractor and of which the contractor had no notice. This case goes a bow-shot further than any rights accorded laborers and material men under our lien laws, which do not apply to public buildings and highways. Even under those statutes there must be a contractual relation or the right is conferred by statute after notice."

We do not think the position taken by the learned and able counsel for defendants is borne out by the evidence in the case or the findings of the court below, supported by competent evidence. We think that what is termed subcontractor by defendants was nothing more than an agency.

The facts succinctly are: the State Highway Commission made a contract with Costello Brothers and Condon & Condon to furnish the labor and material and improve the road between Topton and Almond—approximately 17.89 miles long, according to certain plans and specifications. For the faithful performance of the contract, they and the surety company gave the State Highway Commission a bond in the sum of $142,560, and in the bond agreed: "And shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway all and every sum or sums of money due him, them or any of them, for all such labor and materials

for which the contractor is liable." The bond is to pay for work and material for which the contractor—Costello Brothers-Condon & Condon —are liable.

The plaintiffs contend that section known as No. 2, beginning at the Nantahala River and extending to Wesser Creek, was part of Project 980, for which the bond was given by the entire partnership composed of Costello Brothers and Condon & Condon, and under contract to improve. That Condon & Condon were agents of the original firm who made the contract and gave the bond and not independent or subcontractors. That the failure of Condon & Condon on section No. 2, and their becoming insolvent and going into bankruptcy, in no way affected the rights of plaintiffs, who worked and furnished material on section No. 2. That they had a cause of action against all—Costello Brothers and Condon & Condon and their bondsmen, the surety company—and the bond was to pay for labor and material for which all the contractors were liable. Plaintiff, to sustain this contention, introduced evidence to the effect that M. Costello came over to the project every two weeks or once a month. He would give instructions. Costello Brothers had equipment on the project; their names were on all the wagons. He went over the job with Condon & Condon whenever he came. That Costello told the plaintiff, Aderholt, that he had sent the money to Condon & Condon to pay the boys off. The direct and circumstantial evidence was abundant for the court below to find "that after the execution of said contract and bond, the defendants, C. A. Condon and S. J. Condon, under contract with the partnership of Costello Brothers-Condon & Condon, began work in the construction of said highway referred to in said contract and bond, and that the defendant, M. Costello, representing Costello Brothers, was present during the construction thereof from time to time, directing the supervising said work, but the actual construction of said highway was being carried on by said S. J. Condon and C. A. Condon, who had signed the contract and bond with the State Highway Commission, as aforesaid." They were not independent or subcontractors, but mere agents or servants.

The test of independence and agency or servant is laid down in 14 R. C. L., pp. 67-8, as follows: "The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor. So, where the contractor lets a portion of the work to another contractor, the latter's independence is to be determined by the same criterion of the control of the work. In this connection, the ultimate question is not whether the employer actually

exercises control over the doing of the work, but whether he has the right to control. The employer may, in fact, leave to the contractor the details of the work, but if the former has the absolute power to control the work, the contractor is not independent. But whether or not the employer exercises control may, however, be a fact to be considered in determining the precise relations of the parties. The circumstance that an employer has actually exercised certain control over the performance of the work may not only render him responsible for the acts done under his direction, but may be considered as a factor tending to show the subserviency of the contractor. In other words, the fact that the employer has actually exercised control is properly considered as tending to show that he has a right to control. And, on the other hand, the fact that during the performance of the work the employer has exercised no control may be considered as tending to show that he has no right to control. But the mere fact that the employer was present and made suggestions or requested the contractor to hurry the work has no probative force in determining that question." 3 Page on the Law of Contracts (2 ed.), sec. 1728; *Embler v. Lumber Co.*, 167 N. C., p. 463; *Gadsden v. Craft*, 173 N. C., 420.

The defendants contend: "The claim of plaintiff, Wright, for 'lumber and supplies' should not have been allowed for the additional reason that it was not material used in and about the construction of the road. The only testimony on which to base the finding and conclusion of the court is the testimony of Wright himself, as follows: 'I live at Wesser and know the firm of Condon & Condon; the members of the firm are Charley Condon and Sam Condon; they were contractors, building roads, highways; that is, Project 980; I sold them lumber or other supplies; the Condons got it from me, their men that was working for them, Condon & Condon's teams; the lumber was used to put up a rock crusher and in dump forms and one thing and another; the rock crusher was used for the construction of the road; they used some lumber for boxes and dump carts and anything they wanted it for.' If the 'other supplies' be eliminated from the account, and we do not see how that could be done, still the lumber so furnished and used was not covered by the bond."

This matter has been fully discussed in *Town of Cornelius v. Lampton et als., ante*, 714. Other supplies are *ejusdem generis*. Defendants' contention is untenable.

"An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified." *Gay v. R. R.*, 148 N. C.,

336, 62 S. E., 436; *Young v. Lumber Co.*, 147 N. C., 26, 60 S. E., 654; 16 L. R. A., N. S., 255.

Justice Walker, in a well-considered opinion in *Embler v. Lumber Co., supra,* p. 463, says: "The accepted doctrine is that in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed. The proprietor may make himself liable by retaining the right to direct and control the time and manner of executing the work or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference."

In the consent agreement, as in the present case, the findings of fact by the court below, if there is any evidence to support such findings, are as conclusive as when found by the jury. *Matthews v. Fry,* 143 N. C., 384; *Tyer v. Lumber Co.,* 188 N. C., 268.

By consent, the court below found the facts. There was sufficient competent evidence to base the findings that "the defendant, M. Costello, representing Costello Brothers, was present during the construction thereof, from time to time, directing the supervising said work." Under the facts and circumstances of this case, and finding of facts, we think, under the law, Condon & Condon are agents or servants, and the principle of agency applies, and M. Costello and the surety company liable to plaintiff.

In the judgment of the court below, we can find

No error.

T. A. PRICE, IN BEHALF OF HIMSELF AND HIS COTENANT, JOHN BONNER, v. C. W. SLAGLE.

(Filed 3 June, 1925.)

1. Title — Common Source — Evidence — Deeds and Conveyances—Tax Deeds.

Where the plaintiff claiming title to the land in controversy under a chain of title from a State's grant of the land for the purpose of attack introduces a tax deed of the same land under which the defendant claims, and the defendant has also introduced this tax deed, with the sheriff's affidavit, together with a deed without warranty from the original owner: *Held,* this evidence is competent to show that both parties were claiming title under a common source.

2. Deeds and Conveyances—Constructive Possession.

Where the lands in controversy have not been in the possession of defendant claiming under a tax deed, or his predecessor in title, at any time for a longer period than three years, and then only by placing a fence enclosing a small portion thereof, and relies upon constructive possession, the constructive possession follows the better title shown by the plaintiff under a chain of title originating under a State grant of the *locus in quo*.

3. Taxation — Sales — Deeds and Conveyances—Tax Deeds—Statutes—Constitutional Law—Due Process.

The acquisition of title under a tax deed is in derogation of the common-law right of the owner, C. S., 970, and the statutory requirement must be strictly followed; and while the Legislature may prescribe the method in such instances, its power is limited by the organic law, and due notice to the owner of the proposed sale is a part of the due-process clause, and may not be dispensed with, and for the purchaser at the sale and claimant under the sheriff's deed to acquire title as against the owner under the paper title, he must show a compliance with the prescribed statutory procedure and the organic law.

4. Same—Notice to Owner.

It is mandatory under the provisions of C. S., 8028, that the notice of sale for taxes shall state in whose name the lands are taxed, though the listing in the wrong name, C. S., 8019, does not necessarily make the sale void.

5. Same—Purchasers.

The purchaser of lands under a tax deed must show a compliance with C. S., 8028, by showing the sufficiency of the sheriff's affidavit and notice of sale as to "when the time of redemption would expire."

6. Same—Equity—Cloud on Title—Limitation of Actions.

Where the owner of the paper title to lands seeks to remove the defendant's claim to the land in dispute under a tax title, as a cloud upon his own title, the three-year statute of limitations does not apply to his suit.

7. Same—Payment.

Where the owner of the paper title to lands seeks to remove the defendant's claim under a void tax deed as a cloud upon his title, it is not required that plaintiff, or some one for him, must have paid the taxes thereon, but the plaintiff is required as a requisite of a judgment in his favor to pay all taxes properly assessed against the land.

8. Taxation—Deeds and Conveyances — Actions—Foreclosure—Statutes.

A purchaser of land at a sale for taxes may at his election pursue his remedy to have a judicial foreclosure instead of the remedy provided by C. S., 8028, 8029, 8030, to demand from the sheriff a tax deed.

APPEAL by plaintiff from *Schenck, J.*, at November Term, 1924, of MACON.

Action by plaintiffs against the defendant and from a judgment rendered in favor of the defendant upon a jury verdict, the plaintiff appeals.

The plaintiffs contend that they are the owners of the lands covered by State Grant No. 3276, described as "wild mountain land," not in cultivation.

Upon the trial plaintiff offered a registered chain of title connecting with grant No. 3276, through one E. L. P. Ector. Ector's conveyance to plaintiffs is dated 23 June, 1905.

For the purpose of attack plaintiff offered in evidence deed from H. D. Dean, tax collector, to F. L. Siler, dated 25 June, 1910, registered 27 June, 1910, and a deed from F. L. Siler and wife to the defendant, C. W. Slagle, dated 30 November, 1910, registered 1 December, 1910.

T. A. Price, plaintiff, testified that he claims the lands in controversy; that he and his coplaintiff purchased the lands from Ector 23 June, 1905; that an error was discovered in one of the courses in the original deed and that Dr. E. L. P. Ector made the second deed, a quit-claim, to correct the description; that the taxes each year were paid, but that he is unable to find his receipts for 1906, 1908 and 1912, and that he paid the taxes for 1908; that he always received a receipt and there has been no controversy as to the payment of his taxes; that he does not have his 1908 tax receipt, and that he does not know where this receipt or his quit-claim deed from Dr. Ector, or his deed from John Bonner, to himself, can be; that he still claims the land.

W. B. McGuire testified that he knows where the lands described in Grant 3276 are supposed to be; that it is "wild mountain land" and he knows where Slagle claims it is; that within the last three years the defendant put a wire fence on a small corner of it; that he has known the land for about ten years. "The fence, above mentioned, is the only act of possession in the last few years that I have seen on this land, outside of the markings. *No one is in actual possession of it now.* There was a wire fence built on a corner of two tracts of land and reached over into the inside of a third tract. Two tracts belonging to Mr. Slagle and supposed Price tract was the other, and this fence covered from a quarter to half an acre. On the part covered by 3276 the fence did not cover over an eighth of an acre." This witness further said that he took down the fence, as Price's agent and also on his own behalf, as owner of the Price land; that he entered the Price land to cure the defects and not against Price, and that he took the fence down because he did not think that Slagle had any right.

W. T. Scott testified that he was chain-bearer within the last year or two on a survey supposed to be for Slagle, and they cut into a log and found some markings—this was a forked chestnut corner, and that Slagle took the bark and kept it and had it sawed out so it could be preserved, and that Slagle had him to mark the block so he would know it.

E. G. Cruise testified that he knew the land, and that it was "wild mountain land," and that there was just one fence there.

It was admitted that the defendant built a barbed-wire fence, which is the fence referred to by all the plaintiff's witnesses.

The defendant offered summons in this action, dated 14 May, 1924; the deed from Dean, tax collector, to Siler, dated 25 June, 1910, registered 27 June, 1910; affidavit of F. L. Siler, dated 27 June, 1910. The plaintiff objected to the introduction of the Dean tax deed and the Siler affidavit, for that "all taxes due had been paid and that there were no taxes due and unpaid on said land by which said deed could have been executed; that the lands purported to be covered by said conveyance and mentioned in said affidavit were not duly listed, assessed and taxed, nor was any notice or publication made thereof, and that the affidavit is a condition precedent to the deed and does not set forth the facts particularly, but only in such general way that said affidavit is insufficient and did not warrant the deed to have been made thereon, and that said deed is spurious and void." To the overruling of this objection, plaintiffs excepted.

H. D. Dean testified that he was sheriff and tax collector in 1907 and 1908, and that in 1909 he collected taxes after he went out of office as sheriff, and that he executed the deed for the Ector lands to Dr. Siler; that Ector was a nonresident.

The defendant offered in evidence deed without warranty from F. L. Siler to C. W. Slagle, dated 30 November, 1910, describing the land in controversy. Witness, Dean, further stated the consideration of his making the deed to Dr. Siler was "$3.00 and something" on the Ector land, and that he advertised and sold the land because the taxes for 1908 on this land had not been paid; that he kept the tax sale book as sheriff, and after he sold the land it was never redeemed, either before or after the deed to Dr. Siler; that no one, except Siler, ever paid the witness taxes on land for 1908. Witness stated on cross-examination that he did not remember any conversation with Dr. Ector or any one else about this land, and that his books showed *the name Price after the name Ector in parenthesis,* and *that this was as he took it off the tax list,* and *that he did not know of any other Ector or Price land outside of this in controversy.*

Defendant offered in evidence record of tax sale book for 1909, covering sales for taxes due for 1908 and showing a sale to Dr. F. L. Siler. Defendant introduced duplicate tax list identified by witness, to which the defendant objected and excepted. Witness testified that he made the entries in the tax sale book about the time the sale was made, and had not made any in it since, and that he made the entries in the duplicate tax list whenever he delivered the certificate of sale to Dr. Siler.

Defendant Slagle testified that he is a cousin to Dr. Siler, who is now dead, and that he purchased the land from Siler, and had nothing whatever to do with Siler's purchasing it at the tax sale; that he paid Dr. Siler $100.00 for the land in 1910, and had paid the taxes on it from then up to the present time. "This land lies in Cartoogechaye Township."

The tax deed is in usual form. The affidavit of F. L. Siler is as follows:

"North Carolina—Macon County:

"F. L. Siler, being duly sworn, deposes and says: That at a sale of lands for the nonpayment of taxes due for the year 1908, made by H. D. Dean, tax collector of Macon County, at the courthouse door in Franklin on 3 May, 1909, affiant purchased the following portion of the lands covered by State Grant 3276, to wit: (description same as in deed).

"The said lands were taxed in the name of E. Ector for the year 1908; that upon diligent inquiry the said E. Ector could not be found in the county, and that no one was in actual possession or in the occupancy of the lands above described; that affiant caused to be published in the 'Franklin Press,' a weekly newspaper published in the town of Franklin, county of Macon, North Carolina, notice stating when he purchased the lands aforesaid, a description of the same, in whose name they were taxed, for what year taxed, and when the time of redemption would expire; that said notice was inserted in said newspaper three times, the first not more than five months and the last not less than three months before the time of redemption expired; that affiant has complied with the conditions of chapter 72 of the Revisal of 1905, and acts amendatory thereto as to giving notice of such purchase, and that neither the said E. Ector nor any other person has redeemed or offered to redeem said land.

"F. L. SILER."

The jury returned the following verdict:

"1. Did the plaintiffs pay the taxes for 1908 on the land in controversy in this action at any time on or before the date of the deed from H. D. Dean, sheriff, to F. L. Siler, as alleged? Answer: No.

"2. Is the plaintiffs' cause of action for the recovery of the property sold by H. D. Dean, tax collector, for the nonpayment of taxes barred by the three years statute of limitations? Answer: Yes.

"3. Is the plaintiffs' cause of action for the removal of the cloud upon their title, as alleged, barred by the ten years statute of limitations? Answer: Yes.

"4. Is the defendant's, C. W. Slagle's, title to the land in controversy spurious and void? Answer: No.

"5. Are the plaintiffs the owners of the lands described in the complaint, as alleged? Answer: ——.

"6. Has the defendant trespassed upon the lands described in the complaint, as alleged? Answer: ——.

"7. What damage, if any, are the plaintiffs entitled to recover on account of said trespass? Answer: ——."

The court charged the jury that upon the first issue the burden of proof was upon the plaintiff to establish, by the greater weight of the evidence, that he had paid the taxes on the land in controversy for the year 1908 on or before the date of the deed from Dean, tax collector, to Siler—that is, during the time allowed for the redemption of land sold for taxes. The court below made the answers to the remaining issues depend on the answer to the first issue. The whole case depended on the fact of the payment of the 1908 taxes by plaintiffs. The court rendered judgment for the defendant upon the verdict. The plaintiff, having excepted, appealed.

A. W. Horn and H. G. Robertson for plaintiff.
G. L. Jones and Gilmer A. Jones for defendant.

VARSER, J. The plaintiffs are the owners of the lands in controversy under a chain of title connecting with State Grant No. 3276, unless the defendant has acquired title to the *locus in quo* under the tax sale to Siler. It is a fair interpretation of the record that the introduction by the plaintiff of the tax deed from Dean, tax collector, to Siler, and the affidavit appearing of record and the deed without warranty from Siler to the defendant were treated as a method of showing that the defendant claimed the title under a common source. The defendant introduced this tax deed, the Siler affidavit and the Siler deed, to him for the purpose of showing his title.

The evidence in the record discloses no actual possession on the part of the defendant and his predecessor in title at any time for as long a period as three years, but only the placing of a fence on a small portion thereof within three years before the institution of this action, and that no person was in actual possession of the premises when the action was instituted.

It is elementary learning that the constructive possession follows the better title under such circumstances. This brings us to a consideration of the validity of the defendant's tax title which he claims under the purchaser at the tax sale—F. L. Siler.

The Legislature has the power to prescribe the details for statutory foreclosure of the taxpayer's equity of redemption in other ways than by judicial process, and may regulate and declare directory, and not

vital, the administrative duties therein, which are to be performed by public officers. It has the power to change or abolish these duties, in so far as they are not basic or jurisdictional. The requirement of notice to the defaulting taxpayer, who is the landowner, may be prescribed and regulated within reasonable limits by the Legislature, but cannot be dispensed with. Such a requirement is subject to the test of "due process of law." The duty of the purchaser who elects to pursue the statutory method of foreclosure, as distinguished from foreclosure by judicial process in the courts, as required at the time of the instant tax sale, is absolute to follow, in strict compliance all mandatory and essential requisites to the validity of his title. This notice to the delinquent land-owner is one of these mandatory and essential requisites. 37 Cyc., 1423, 1425. *Rexford v. Phillips,* 159 N. C., 213. The purchaser is then proceeding in derogation of the common law and in derogation of the common right of the citizen to own his land. *Doe v. Chunn,* 1 Blackf. (Ind.), 336; *Sibley v. Smith,* 2 Mich., 486; *Warren v. Williford,* 148 N. C., 474; *Mfg. Co. v. Rosey,* 144 N. C., 370; Black on Interpretation of Laws (2 ed.), 570. Unless these provisions as to notice, which are required to be performed by the tax-sale purchaser, are liberally construed in favor of the land-owner, and strictly construed against divesting him of his estate, injustice may often result, and, in some cases, this may amount to oppression.

Ministerial officers who conduct proceedings in tax sales, and especially purchasers thereat, are required to comply with these provisions which bring notice to the citizen that his land is about to be lost; and if the title to the citizen's land is divested from him, it must be upon a strict and clear compliance with the express limitations and provisions fixed by the law itself. *Lumber Co. v. Price,* 144 N. C., 50; *Hays v. Hunt,* 85 N. C., 303; *McNair v. Boyd,* 163 N. C., 478.

The trial court made the whole case turn upon the question of the payment of taxes for the year 1908 by the plaintiff, or some one for him. This view was evidently based on C. S., 8034, which provides, among other things, as follows: "No person shall be permitted to question the title acquired by a sheriff's deed made pursuant to this chapter without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title." This statute, Revisal, 2909, was considered by this Court in *Rexford v. Phillips, supra.* In that case, the Court, speaking through *Walker, J.,* in a well-considered opinion, says: "The defendant, having obtained his deed in violation of the express terms of the statute, acquired no title." This is but a construction of the language of the statute which invokes its prohibitive terms

only when the title has been acquired "by a sheriff's deed made pursuant to this chapter." If the deed has not been made pursuant to—that is, according to, or in conformity with—the statutory provisions, then this provision in the statute does not apply. Both the provision as to the authoritative listing of property for taxes and the notice to the purchaser required under C. S., 8028, and his affidavit required by C. S., 8029, are material, basic acts. Both of these are necessary and prerequisite to bring the purchaser within the protection of this provision. *Rexford v. Phillips, supra; King v. Cooper,* 128 N. C., 347; *Matthews v. Fry,* 141 N. C., 582; *Warren v. Williford, supra; Jones v. Schull,* 153 N. C., 521.

Omitting from the instant case the question as to whether there has been any authoritative listing of the property in controversy for taxation, in either of the two ways pointed out in *Rexford v. Phillips, supra,* and, assuming that the tax deed is presumptive evidence thereof, and observing the clear decision in this latter case, reaffirmed in *Stone v. Phillips,* 176 N. C., 457, we hold that no presumption arises from the sheriff's deed that proper notice was given to the landowner by the purchaser, as required by the statute, C. S., 8028. The affidavit required by C. S., 8029, is a necessary prerequisite to the validity of the tax deed. *Sanders v. Covington,* 176 N. C., 454; *Rexford v. Phillips, supra.*

The affidavit in the instant record states that the lands were taxed in the name of E. Ector for the year 1908, and that the notice published in the "Franklin Press" stated "in whose name they were taxed." It is, therefore, apparent that the affidavit is *prima facie* and the only evidence of the published notice. The tax book showed the name "Price" after the name "Ector" in parenthesis. The affidavit, therefore, does not comply with the express mandatory provision in C. S., 8028, that the notice shall state "in whose name it was taxed." Of course, the listing in the wrong name (C. S., 8019) does not make the sale void. *Peebles v. Taylor,* 118 N. C., 165; *Stone v. Phillips, supra; Headman v. Comrs.,* 177 N. C., 261. This, however, does not make less mandatory the requirement (C. S., 8028) that the notice shall state "in whose name it was taxed."

It is necessary for the purchaser to follow the legislative requirements strictly in order to obtain a valid deed by this statutory method. The evidence in the instant case shows that no other lands in that community were known as the "Ector-Price lands." *Non constat* that other lands were not known as Ector lands. The absent land-owner was entitled to have all the information that the statute required and in the exact form required by the statute. This is the purchaser's plain duty in order to divest the taxpayer of the title to his land by a method

which is in derogation of common right and the common law. C. S., 970, declaring the common law to be in force, first enacted in North Carolina in 1715, reënacted in 1778, and successively with each complete reënactment of our statute law, and finally in 1919, must be construed as a part of the same act as C. S., 8028.

We are further of the opinion that C. S., 8029, which requires that the affidavit of the purchaser shall state "particularly the facts relied on as such compliance" with C. S., 8028, is not met by the instant affidavit in regard to stating "when the time of redemption would expire." When a copy of the published notice does not appear as a part of the affidavit, we are constrained to hold that the mandatory character of this statute requires the affidavit to state the time of the expiration of the period for redemption by giving the date at which it expires.

On account of the foregoing defects in the affidavit of the purchaser, we hold that the plaintiff is not precluded from prosecuting this action to remove a cloud on his title by his failure to pay the taxes or to tender them in his complaint. *Rexford v. Phillips, supra.*

The court below held that if the plaintiff, or some one for him, had not paid the taxes for the year 1908, the plaintiff was barred by the three years statute of limitations. This three years statute has been held not to apply when the suit is to remove a cloud, as distinguished from a suit to recover the land sold for taxes from the tax-sale purchaser, or his assigns, who are in possession of the lands so sold. *McNair v. Boyd, supra; Cauley v. Sutton,* 150 N. C., 330; *Beck v. Meroney,* 135 N. C., 532.

In the instant case the defendant is not in the actual possession, if the evidence appearing in the record is found to be true, and has never been in the actual possession of the lands in controversy, except such as may have resulted from the putting of the fence on the small portion adjoining his other lands, within three years just before this action was instituted. Therefore, it is apparent that the constructive possession of this "wild mountain land" has been in the plaintiff's constructive possession under their paper title. Upon these facts, if found by the jury to be true, the three years statute of limitations could not avail the defendant. *Jordan v. Simmons,* 169 N. C., 142; *Oldham v. Rieger,* 145 N. C., 254; *Guthrie v. Bacon,* 107 N. C., 337.

The tax deed, under which the defendant claims, not being sufficient to draw unto the defendant the constructive possession, left the plaintiffs in the constructive possession of the land and avoided the bar of the statutes of limitations pleaded by the defendants.

Of course, the owner must pay, or offer to pay, the taxes and all other incidental cost with interest as prescribed by statute, if the jury shall finally decide that he has not paid the taxes properly assessed

against him. The record in the instant case is silent as to the authority of the listing of the land in controversy, other than the inferences to be drawn from the affidavit and the tax deed, and, since the affidavit of the purchaser falls short of the statutory requirements as to notice, this question is now open.

C. S., 8035, 8036, 8037, provide another remedy for the purchaser at a tax sale, whereby he may have foreclosure by judicial process, in addition to his rights under C. S., 8028, 8029, 8030, to demand from the sheriff the tax deed. *Wilcox v. Leach,* 123 N. C., 74; *Townsend v. Drainage Comrs.,* 174 N. C., 556; *Headman v. Comrs.,* 177 N. C., 261.

The exceptions to the rejection of evidence may not occur again and are, therefore, not discussed.

There must be a

New trial.

STATE v. GEORGE LOVE.

(Filed 3 June, 1925.)

1. **Appeal and Error — Evidence — Prejudice — Harmless Error—Homicide—Murder.**

   Where the prisoner has been convicted of murder in the first degree with plenary evidence that he has committed the offense, tending, among other things, to show motive in the ill-will of the prisoner toward the deceased in the latter's attack upon the prisoner's father, with previous threats of the prisoner to take the life of the deceased on that account, and the prisoner has taken the stand in his own behalf and testified to the absence of malice or ill-will, the exclusion of the testimony of another of the defendant's witnesses of a conversation he had had with the deceased, tending to corroborate him in this respect, is: *Held,* if erroneous, not to be reversible under the other evidence brought out on the trial.

2. **Criminal Law—Evidence—Character—Corroborative Evidence—Substantive Evidence.**

   While the good character of the defendant upon trial for a homicide is put in issue by his taking the stand as a witness in his own behalf, evidence of statements made to and testified by another of defendant's witnesses tending to corroborate the defendant's testimony can only bear upon the credibility of defendant's testimony, and is incompetent as substantive evidence.

APPEAL from *Webb, J.,* and a jury, verdict of murder in the first degree, September-October Criminal Term, 1924, HENDERSON.

Defendant was indicted for the murder of William Brock, deceased, and on a plea of not guilty—on the issue joined and evidence offered—there was a verdict of murder in the first degree, and judgment was accordingly rendered.

The evidence for the State subsfantially is: That the prisoner, Love, shot and killed one William Brock on 13 January, 1923, about 11 o'clock at night. Brock was going along Pigeon Street in Waynesville on his way home. Love followed him along Pigeon Street beyond the path leading to Love's home. Brock was shot with a pistol, the ball entering near the left nipple and passing through the body, lodging in the skin in the back.

R. A. Teague testified that he had a grocery store, and Brock, the night he was killed, was in the store, near the stove. Love came in and bought some different articles. Brock got up and said he had better go to see how his sick folks were, and passed Love and left the store, and in a few seconds Love went out behind Brock. Teague went to the door. Brock was in front and Love behind him, about 15 or 20 feet apart, walking a little fast. He watched them out of sight. Just as they got out of sight, in about 8 or 10 seconds, he heard two pistol shots, and a man hollered "Oh!" twice. Brock came running back and got into the light and fell. When Teague got there he was dead. Brock was going toward his home. Where the body fell is beyond where the road to Love's house turned off from Pigeon Street.

Paul Gilliland, a relative of Brock, testified to being with Brock that night shortly before he was killed.

Will Whitner, a policeman, who got to the body immediately after the shooting, picked up a knife and rule. "The rule was folded and the knife closed." A little boy picked up a dime. Teague told him about Love following Brock, and he went to the house where defendant lived, and with about 25 men searched for him all night. Defendant surrendered next morning to chief of police. They found no weapon in Brock's pocket.

Joe F. Davis testified that early in the fall of 1922 he was at Bob Love's, father of defendant, and he was in bed, sick. "Bob had a fit, and I stepped to the door and called George (defendant) from the barn, and I remember George saying that ever since he had had that lick in the head by Bill Brock he had had these fits, and that it made him so damn mad, and if it was not for his baby and wife he would go and kill him. I cautioned him, and he said, 'It is not over yet.' He said that this man Brock had slipped up behind his father and had nearly killed him because his father had reported him for living in adultery with a negro school teacher."

Dillard Teague testified: "At the time mentioned (June, 1922), me and George Love were riding horseback up Main Street, in Waynesville, and when we got to the postoffice we passed his father, Bob Love. Some man was with Bob, I don't know who, and Brock was walking up the sidewalk. At that time George Love said: 'There is that damn son of

a bitch that caused the old man to be like he is, and I would kill him if it was not for my wife and baby, and I may do it yet.' He kind of pointed over toward Brock—throwed his hand over. Defendant was drinking at the time I heard him say that Brock had struck his father over a negro woman. Brock was tried and convicted for the assault on Bob Love and sentenced to 18 months on the chain-gang."

Braxton Mull testified: "I know the defendant, Love, and knew Brock. In July, 1921 or 1922, Mr. George Love and another colored fellow was standing on a sidewalk. Bill Brock passed and George said: 'There goes that damn son of a bitch that me or the old man will get one of these days.'"

Will Gaddy testified he was standing with Brock, several months before he was killed, in front of Sloan's Hardware Store, in Waynesville, and saw defendant going down on the other side of the street. He came and walked up even with us, looked at us, and "stood there and eyed Bill like he would jump through him; he turned and walked up the street. We started up the street, Brock was in front . . . and just as we went to the corner, George Love and another fellow, a colored fellow, was standing on the corner of East Street, and Bill (the deceased) walked on the inside of them where they were standing, and just as he stepped up on the other side of East Street, I walked up behind George Love. The width of that street is, maybe, forty feet. Just as he stepped up on the other side I was right behind George and this other fellow, and George said, 'Yes, I will get the God damn son of a bitch sooner or later.' When he said that he was looking right toward Bill Brock." *State rested.*

The defendant introduced Mrs. Willie May Howell, who contradicted, in some respects, the testimony of R. A. Teague.

The defendant introduced Claud Burnett, who testified: "I heard Will Brock (the deceased) make a statement concerning George Love on Saturday night before the killing. It was on the Main Street in Waynesville. Love and Brock met on the street. Brock said, 'George Samanth (it was in evidence that the defendant, George Love, was also known and spoken of as George Samanth), this night I am going to kill you,' and the darkey backed off and said, 'I don't want to have any trouble with you.' He (Brock) said, 'I will kill you before Sunday morning'; and the darkey begged him again and he stepped around in the street and went on. That was some time between nine and ten o'clock, and it was right in front of the upper drug store on Main Street, in Waynesville."

W. H. Creson corroborated substantially the evidence of Claud Burnett.

Ed Love, a kinsman of defendant, testified: "One night, about two months before Brock was killed, we were coming down Pigeon Street above the hospital. He (Brock) was talking to me about this school case, that woman. He asked me if I could fix it so she could get back there. He said he would get George and Bob; that he would get up there in the case and they would not hear George and Bob, and that he was going to get George." On cross-examination, he said defendant and himself had hunted and drank liquor together.

George Love, the defendant, testified: "I was in Waynesville that evening. I had some business to attend to, buying some groceries and things to do up town. I saw Bill Brock on Main Street that evening between eight and nine o'clock. I was going down the street and he was coming up the street, and he met me and he said: 'God damn you, this is the night I am going to kill you,' and I said: 'Go on, Mr. Brock, I don't want to have any trouble with you; I am not able to fight you.' I was not able to fight him. I had been down with the 'flu' all during the holidays and was just getting able to stir about. And there were two other white gentlemen standing on the sidewalk, and I stepped off the street and went around him, and he said: 'God damn you, I will get you before sunrise.'" He testified about the same as Teague as to what occurred in the store. Brock went out and then afterwards he went out. He was going to Brown's store to get groceries; the store was beyond where he turned off to go home from Pigeon Street. "When I got to the bridge I did not see any one. This man I had seen had gone out of sight in the darkness. I went on up the street, on up Pigeon Street, until I got up there in front of Mr. Shelton's house where Tom Parker lives, and a man stopped me and he said: 'Oh, yes, God damn you, I have got you now,' and I said, 'Stop, I don't want to have any trouble with you,' and this man had his arm up and was advancing on me."

"Q. Did he have anything in his hand? A. He had his knife in his hand, and I was running backwards, trying to get away from him, and he was reaching for me, trying to get hold of me, and I had a pistol, and I got it out and fired, and he staggered by me and hollered 'Oh!' He staggered on by me and off down the street hollering 'Oh!'

"Q. Then what did you do? A. I went on up the steps and across the field and went home.

"Q. Where did you go to spend the night? A. I went out to Claud Gibbs'.

"Q. What did you do the next day? A. I sent William Gibbs, Claud Gibbs' son, to go down to my father's and tell the chief of police and the sheriff that I was up town and to protect me, and so Chief String-

field and my father came out on some horses and I came to town with them, and they locked me up, and I have been locked up since."

As regards to threats, his testimony varies some from the State's witness, George Davis. He did not remember statements made by the State witnesses, Dillard Teague and Will Gaddy. He denied statements made by Braxton Mull. In regard to the pistol, he testified: "It had been at my father's five or six weeks. I took it out from down at the shop where I had it repaired and left it at my father's. I got the pistol that afternoon and was carrying it home that night, expecting to kill a hog on Monday, as I had been using it for killing hogs."

He testified that Brock's character as a dangerous and violent man was bad. Bigger man than he was. He had two drinks that afternoon.

Joe Sentelle testified he knew Brock's character as a dangerous and violent man, and it was bad.

Tom Brown corroborated defendant as to groceries that defendant was to get from him that night by arrangement made with defendant's father.

G. W. Ferguson, a witness for the State, also testified that the general character of the prisoner was bad and that the general character of several of the State's witnesses was good. He also testified that the deceased did not have the general character of being a dangerous and violent man. The witness admitted on cross-examination that the deceased did have a general reputation of having slipped up behind Bob Love and braining him with an axe handle because Love had exposed his relations with the negro school teacher.

Defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court. The necessary facts and assignments of error will be considered in the opinion.

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

Frank Carter, J. W. Ferguson, and J. E. Shipman for defendant.

CLARKSON, J. The defendant heretofore was convicted of murder in the first degree, and from the verdict and judgment appealed to this Court, and was granted a new trial. 187 N. C., p. 32. It appears in the record, "And upon the defendant's application thereafter duly made to said Superior Court of Haywood County, and for good cause found by said court, the said cause was duly removed to the Superior Court of Henderson County for the trial of said issue *de novo* conformably to the mandate of the Supreme Court."

The most serious assignment of error by defendant is to the exclusion of the testimony of W. M. Tate, a witness for defendant. The defendant

offered this witness to corroborate a previous statement made by him. Defendant, upon his examination as a witness in his own behalf, gave a slightly different version of the incident and conversation testified to by the witness Davis, and denied any recollection of the conversation testified to by the witnesses Dillard Teague and Will Gaddy. He also denied having made any threat against the deceased in the presence of the witness Mull. And the prisoner further testified by questions and answers as follows:

"Q. Your father got all right did he? A. Yes.

"Q. What was your attitude in regard to Brock—how did you feel toward Brock after your father got well? A. I did not think any more about it."

Tate would have testified as follows: "I know George Love and had a conversation with Love in regard to Bill Brock. It was sometime after Mr. Brock and George's father had had the trouble, and his father had gotten well, and I met George at the post office and was talking to him, and I said they had better bury this thing, it was not enough to get in trouble with Mr. Brock about, and George said: 'No, Mr. Tate, I am satisfied that my father has gotten well, and I have no more feeling against him.' "

This evidence was excluded by the court below. The defendant complains that the exclusion of this evidence was very prejudicial and reversible error.

The statement made by defendant to Tate was not under oath. If defendant had not gone on the stand, this was hearsay evidence and clearly incompetent. As a general rule, when a prisoner goes upon the stand as a witness in his own behalf, he puts his character in evidence, and is subject to impeachment. *S. v. Dickerson, ante,* 332, and cases cited. "It is competent to show previous consistent statements of a witness to strengthen his credibility." *Belk v. Belk,* 175 N. C., p. 75, and cases cited. It will be noted that these authorities limit the testimony to the credibility of the witness, in no sense can this be considered as substantive evidence of the truth of the facts any more than any other hearsay evidence.

The testimony of the defendant himself is substantive evidence upon the question of his guilt or innocence. The testimony of Tate would only be evidence bearing on the credibility of the defendant as a witness. *S. v. Traylor,* 121 N. C., 674; *S. v. Cloninger,* 149 N. C., 567; *S. v. Atwood,* 176 N. C., 708; *In re McKay,* 183 N. C., 228; *S. v. Moore,* 185 N. C., 640.

In *S. v. Moore, supra,* 639, it was held: "It is fully recognized in this jurisdiction that in an indictment for crime, a defendant may offer evidence of his good character and have same considered as substantive

testimony on the issue of his guilt or innocence. And where in such case a defendant has testified in his own behalf and evidence of his good character is received from him, it may be considered both as affecting the credibility of his own testimony and as substantive evidence on the issue."

In *S. v. Parish,* 79 N. C., p. 614, *Reade, J.,* clearly states it thus: "The rule is, that when the witness is impeached—observe, when the *witness* is impeached—it is competent to support the *witness* by proving consistent statements at other times, just as a witness is supported by proving his character, but it must not be considered as substantive evidence of the truth of the *facts* any more than any other hearsay evidence. The fact that supporting a witness who testifies, does indirectly support the facts to which he testifies, does not alter the case. That is incidental. He is supported not by putting a prop under him, but by removing a burden from him, if any has been put upon him. How far proving consistent statements will do that, must depend upon the circumstances of the case. It may amount to much or very little."

The statements made to Tate were not substantive evidence. It only had a bearing on the credibility of the defendant as a witness. From a careful reading of Tate's testimony, no time is fixed when the conversation took place. From what Tate would have said if the evidence had been admitted, it must have been some considerable time before the killing, and sometime before the threats, testified to by the State's witnesses, were made. The statement, if consistent, was brought about by Tate with the idea of mollifying the defendant. We cannot hold the exclusion of this kind of testimony when not shown to have any probative force, too remote under the facts and circumstances of this case, prejudicial or reversible.

The next exception and assignment of error is set forth in defendant's brief, as follows: "Captain R. A. L. Hyatt was examined as a witness for the prisoner for the purpose of corroborating the testimony of certain of the prisoner's witnesses by showing prior statements by said witnesses to the said Hyatt of the same purport as their testimony upon the witness stand. The cross-examination of this witness was conducted by the solicitor for the Twentieth Judicial District, who, by the courtesy of the solicitor of the Eighteenth District, had the responsible control and direction of the prosecution. In the conduct of said cross-examination said solicitor first emphasized the assistance which this witness had given to counsel for the prisoner in the preparation of the defense, attention being particularly directed to the fact that he had, under the direction of counsel for the prisoner, visited and interviewed several of the defendant's witnesses. The solicitor then asked the witness if he had not sent a dozen different people to the solicitor to urge him

to allow the prisoner to plead guilty of murder in the second degree. Counsel for the prisoner instantly protested to the court that the suggestions and implications of this question were calculated to be ruinously prejudicial to the prisoner and requested the court to take appropriate measures to remove the prejudice as far as it might be possible to do so. The court thereupon directed the stenographer to strike out the question and instructed the jury not to consider it. Upon the coming in of the verdict, the prisoner moved to set aside said verdict and for a new trial, upon the particular ground that the prisoner had suffered prejudice in the matter above set out, which was not removed by the court's direction to the stenographer to strike out the question and his instruction to the jury not to consider it; that the prejudice so suffered by the prisoner was irremediable by anything that the court had said or done, or could have said or done, and persisted throughout the trial to the final undoing of the prisoner." This assignment of error cannot be sustained.

It is well settled by a long line of authorities that matters of this kind are left to the sound discretion of the court below. *Hallman v. R. R.*, 169 N. C., 132; *Massey v. Alston*, 173 N. C., 225; *Holt v. Mfg. Co.*, 177 N. C., 170; *Maney v. Greenwood*, 182 N. C., 579; *Brown v. Hillsboro*, 185 N. C., 374.

The court below has the sound discretion to withdraw or strike out improper evidence or grant a new trial. The authorities are fully cited in *S. v. Stewart, ante*, 345; 11 Enc. Dig. of N. C. Reports, 961, "Withdrawal of Evidence." We think by analogy this principle applicable here. The motion to set aside the verdict was a matter in the sound discretion of the court below.

It may be noted that Capt. Hyatt testified: "I was born and reared within three miles of Waynesville. I have served on the board of education, as county treasurer, as clerk of the Superior Court and as captain in the National Guard. I was with the board of education two years; county treasurer sixteen or eighteen years and clerk of the court for one term, and was in charge of the military affairs of Haywood County during the World War." He further said he was interested in the prisoner's cause "Purely as a matter of justice, as I looked upon it as a matter of justice to the prisoner. I thought he ought to have a fair trial, ought to have justice in the courts." The fact that so prominent a man was taking an interest in the prisoner, would have a favorable effect on the jury.

If the able and efficient solicitor, in his zeal and loyalty to the State, went further than he should, it was corrected by the court.

We have examined the charge of the court in its entirety, and can find no error in law.

It may be noted that this cause was first tried in Haywood County, and the defendant was convicted of murder in the first degree, on appeal to this Court defendant was granted a new trial. It was then tried in Henderson County, and the jury "for their verdict say that they find the defendant guilty of murder in the first degree, that is, they find him guilty of the unlawful, malicious and premeditated killing of one Wm. Brock." The able and humane judge who tried this case gave a careful charge, setting forth fairly the contentions of the parties and the law bearing on the facts. Defendant has been defended by eminent counsel of skill and ability. It has been held by this Court that the exclusion of evidence that was admissible, which would not change the result is harmless error. Verdicts and judgments are presumed to be right and according to law and justice. Ordinarily the burden is on the defendant to show prejudicial or reversible error. 1 Enc. Dig. of N. C. Reports, p. 701 "Exclusion of Evidence"; *In re Ross,* 182 N. C., 478; 2 Bishop's New Criminal Procedure (1913) sec. 1276.

The above doctrine of presumption is well recognized in civil cases and enforced in minor criminal cases, but in capital cases the courts should be slow to observe it on account of the sacredness of human life.

The defendant has twice been tried and convicted by a jury, carefully selected under the law. The theory of the State, which the jury found true beyond a reasonable doubt (eliminating threats on either side), was that the prisoner with deliberation and premeditation, while drinking, about eleven o'clock at night, armed, followed the deceased, who was on his way home, unarmed, beyond the path where the defendant turned out to go to his home, beyond the light and in the darkness of the night shot twice and killed him. The conduct of the deceased toward the defendant's father, from the record, was inexcusable and reprehensible, but no one in a civilized commonwealth can appeal to the law of the jungle. We base this on the view taken from the facts found by the jury. This finding, under our system of jurisprudence, we are bound by.

The just judge, in commencing his charge to the jury, made these commendable remarks: "You must give no consideration, so far as the facts of the case are concerned, to anything except the testimony given here in this trial; here is the temple of justice, at the threshold of that door, public opinion stands back abashed, it has no part or portion in these proceedings; here pure, simple justice is dispensed freely and alike to all, to the white as well as to the colored, and to the colored as well as to the white, the poor are bereft of no protection. In the eyes of the law they are all equal, standing upon the same plane, punishable by the same law and protected by the same law."

On the entire record we can find no prejudicial or reversible error.

No error.

J. FRANK McCALL v. TEXTILE INDUSTRIAL INSTITUTE AND J. R. HOOVER.

(Filed 3 June, 1925.)

1. Principal and Agent—Implied Powers—Secret Limitations—Notice—Corporations—Officers.

The president of a corporation ordinarily has implied authority to authorize a real estate agent to sell its lands and evidence that he informed a proposed purchaser making inquiry that the sale of the property was in the hands of a real estate agent, and referred such purchaser to him without informing such purchaser that the agency was only for the purpose of securing offers for the board of directors or trustees to approve: *Held*, sufficient for the jury to determine whether the agent had sufficient power to bind the corporation to the sale of the land by a proper writing.

2. Same.

A purchaser of land from an agent to sell is not bound by secret limitations upon the agent's general power not disclosed to him.

3. Appeal and Error—New Trials—Stare Decisis.

Where upon the new trial granted on appeal by the Supreme Court the evidence is materially different from that on the former trial, the former adjudication is not conclusive and another appeal will lie.

4. Same—Evidence—Nonsuit—Contracts—Specific Performance.

Where the only question involved in a determinative issue is whether the duly authorized agent to sell land had signed the required writing for his principal as such agent, or simply as an attesting witness, and the place for the signature of the seller is left blank, and there is no other evidence except that the proposed purchaser was informed that the agent had authority only to submit to the owner offer for the property, in the purchaser's suit for specific performance the defendant is entitled to a judgment as of nonsuit upon his motion therefor.

APPEAL by defendant from *Webb, J.*, at November Term, 1924, of TRANSYLVANIA.

Action for specific performance of contract for conveyance of land. Plaintiff alleges that on 26 February, 1923, defendants "by and through their duly constituted agent, J. W. Alexander, contracted and agreed with plaintiff, J. F. McCall and one R. R. Fisher, to sell and convey to them" certain lands situate in Transylvania County, N. C., described in the complaint, at the price of ten thousand dollars, five hundred dollars of which was payable upon the execution of the contract, balance as stated therein; that he paid the five hundred dollars in cash, and had tendered the balance to defendants as full performance by him of the contract, and demanded performance by defendants; that, notwithstanding such tender and demand by him, defendants had refused and still refuse to convey said lands to plaintiff, as they had contracted to do.

Defendants deny the allegations of the complaint, except that plaintiff had demanded of them a deed conveying the lands to him. Defendants deny that J. W. Alexander was authorized by them or either of them, as agent or otherwise, to sell or enter into a contract, binding them or either of them to sell and convey said lands to plaintiff, and further deny that J. W. Alexander made or undertook to make a contract on their behalf as alleged in the complaint; defendants say that they "did allow said Alexander and other real estate dealers to try and sell said lands, and to present any offer or offers they or any of them may have received for the purchase of said lands, but the said defendants at all times retained the full right and power to refuse to accept any and all such offers, if they so desired."

It is alleged further that R. R. Fisher had duly assigned and transferred to the plaintiff all of his right and interest under said contract.

Plaintiff offered in evidence a paper-writing as follows:

"AGREEMENT TO SELL AND BUY

"In consideration of the sum of five hundred dollars this day received from J. F. McCall and R. R. Fisher, of Transylvania County, purchasers of the following described property. All those seven tracts of land in Transylvania County, N. C., now owned by Textile Industrial Institute and J. R. Hoover, containing 1018 acres more or less.....

.....

the purchase price being $10,000.....Seller to pay Commissions. And upon payment of the further sum of $3,000.....dollars within thirty .....days from this date and execution of note and mortgage for $6,500 on the above-described property.....payable as follows: $3,250 in six months from date and $3,250 in twelve months from date, bearing interest from date at the rate of six per cent per annum .....sellers covenant and agree and bind themselves and their heirs or executors, administrators, successors and assigns, to convey the above-described property to the said J. F. McCall and R. R. Fisher, their heirs, executors, administrators or assigns, in fee by quit-claim deed, with dowers duly renounced, free from encumbrance except such as are herein agreed to be assumed. And upon tender of such deed the purchaser agrees to fully comply with the terms of this contract of sale. All taxes for 1923 to be paid by purchasers; interest, rents and insurance to be prorated to date of consummation of sale.

Upon failure of the purchaser to comply with the terms hereof within the stipulated time, the seller to have the right to retain the amount this day paid, or to enforce the performance of this contract according to law.

In witness whereof, we have hereunto set our hands and affixed our seals this 26 February, A.D. 1923.

Signed, Sealed and Delivered
in the Presence of

.....L. S.
Seller

.....L. S.
Seller

J. W. ALEXANDER
MARY SOMAINI

J. F. McCALL, L. S.
Purchaser

R. R. FISHER, L. S.
Purchaser."

Plaintiff then offered in evidence a check, dated 26 February, 1923, payable to the order of "J. W. Alexander, agent of the Textile Industrial Institute," for five hundred dollars, drawn on Pisgah Bank, Brevard, N. C., and signed by J. F. McCall. This check, endorsed by payee, was paid on 3 March, 1923, by Pisgah Bank.

There was evidence offered by plaintiff, tending to show that J. W. Alexander was engaged in the business of a real estate agent, at Spartanburg, S. C., and that he was the agent of defendants, and was authorized to sell the lands described in the complaint. Evidence offered by defendant tended to show that J. W. Alexander had authority only to negotiate for offers from prospective purchasers for said lands, and had no authority from defendants or either of them to make a contract for the sale and conveyance of the lands by defendants.

W. C. Cook, witness for plaintiff, testified that on 26 February, 1923, J. F. McCall and R. R. Fisher came to his office in Spartanburg, S. C., and told him that they wished to purchase the lands in Gloucester Township, Transylvania County, N. C., owned by the Textile Industrial Institute, and asked if he could put them in touch with some one who had authority to sell the lands; that he phoned to Dr. C. E. Camack, president of the institute, informing him of the presence of plaintiff and Fisher in his office and of their desire with respect to these lands, and that Dr. Camack replied, "I am not the man they want to see; they want to see J. W. Alexander, who has the matter in charge." Witness thereupon made an engagement with Mr. Alexander for McCall and Fisher to see him that day at his office in regard to the purchase of the land.

J. F. McCall testified that, as a result of negotiations between J. W. Alexander, as agent of defendants, and himself and R. R. Fisher, the

terms of a contract for the sale of said lands were agreed upon and that "two contracts were drawn up, and the first was signed by himself and Fisher and by Mr. Alexander and his stenographer; that the paper-writing offered in evidence was the original memorandum of agreement, and that same was filed for registration in Transylvania County on 29 March, 1923." He also testified that he signed and delivered to Alexander the check for five hundred dollars offered in evidence. He said, "I did not take this contract back with me; Alexander said, 'Do you men have to go back tonight?' and we said 'No,' and he said, 'I believe I can get the papers ready for you,' and we got to talking and we walked off and left the papers there; I was talking to Mr. Fisher, coming up the mountain, and I said, 'Have you got the papers?' and he said, 'No.' Immediately after I got my check back, which was about a week afterward, I called Alexander over the telephone and asked him to send me the papers; on the contract the sellers' seals are left blank, and Mr. Alexander and Miss Somaini signed their names under the name witnesses and the Textile Industrial Institute never signed the papers. Alexander sent my check for $500 back. I have it yet; I have never cashed it."

C. P. Hammond, witness for defendants, testified that he was, on 26 February, 1923, and had been since the organization of the institute, chairman of the board of trustees; that he knew that the institute owned the Robinson lands in Transylvania County, N. C. "We never authorized Dr. C. E. Camack to make any contract for the sale of said lands at any time during his connection with the institute; all the sales of real estate or other property were brought before the board of trustees and passed upon by them. It had to come before us, before the trustees or the executive committee, which was appointed by the board of trustees to act for the board; neither the board of trustees nor the executive committee ever authorized J. W. Alexander or Dr. Camack to make any contract for the sale of the lands in Transylvania County prior to 26 February, 1923. We put the sale of this land in Mr. Alexander's hands to get offers and submit to our board, but we never gave him, or any one else, authority to sell the land without submitting the offer to us and be closed and acted upon by us." Witness testified that the institute never received any of the proceeds of the check for $500 delivered to J. W. Alexander, agent for the Textile Industrial Institute.

D. E. Camack, witness for defendant, testified that he was president of the Textile Industrial Institute and secretary of the board of trustees on 26 February, 1923; that on said day, in reply to question of Mr. Cook over the telephone, he told him to see J. W. Alexander in regard to negotiations for the purchase of the lands in Transylvania

County; that he did not tell Mr. Cook that Alexander had authority only to secure bids or offers to be submitted to the board of trustees. Mr. Alexander had been requested by witness to secure bids on the land to be submitted to the board for their approval.

J. W. Alexander, witness for defendant, testified that, in consequence of engagement made through Mr. Cook, he met plaintiff and R. R. Fisher in his office at Spartanburg, S. C., on 26 February, 1923. That he told them that he had no right to sell the land, but would be glad to submit an offer. As a result of negotiations, witness agreed to submit to the board of trustees of the institute an offer by plaintiff and Fisher of $10,000 for the lands. "I told them I would submit an offer of ten thousand dollars if they would put up a check, and they agreed to do that. I had my stenographer to draw up this agreement to sell and buy and had them to sign it, and my stenographer and I witnessed it. I signed two papers. I told them that it was possible that I would be able to submit it and reach them before they left the city. I found that it would be impossible to get the members of the board together immediately, and so informed plaintiff and Fisher at their hotel, over the telephone. I told them that I would submit their offer, and that if there was a counter-proposition I would give them the first show at the counter-proposition. They told me to keep the check for $500 and submit the offer. I deposited the check, because I wanted to be sure that the offer, when submitted, was bona fide."

Witness testified that he used the form of agreement to buy and sell in his business as real estate dealer, and that under the law of South Carolina, two witnesses are required to the signatures. That he had met defendant, J. R. Hoover, but that Hoover had never authorized or empowered him to sell the lands or make a contract to sell the lands with J. F. McCall and R. R. Fisher.

Mrs. M. L. Manini, witness for defendants, testified that she was before her marriage Miss Mary Somaini; that on 26 February, 1923, she was employed as stenographer in the office of J. W. Alexander; that she remembered the transaction between Mr. Alexander and Mr. McCall and Mr. Fisher. "I prepared the paper which was handed me and signed my name as witness. I made one original and one copy. Mr. Alexander told Mr. McCall and Mr. Fisher to make him an offer for the land and he would submit it to the board of trustees of the Textile Industrial Institute. They made the offer and I prepared the papers. The instrument was executed in duplicate, and Mr. Alexander kept both. He had to submit them to the trustees, and if they accepted the offer they were to sign them and Mr. Alexander was to return the copy to Mr. McCall and Mr. Fisher. I heard Mr. Alexander tell Mr. McCall and Mr. Fisher this."

R. R. Fisher, witness for defendants, testified that he was present in Mr. Alexander's office at time of negotiation with respect to the lands. "Mr. McCall offered Mr. Alexander $9,000 for the land, and he said he would not take that. After deliberation, we made an offer of $10,000. Mr. Alexander then had his stenographer to draw the contract. He had two of them made, and we signed both. I know we signed them and then turned them over and he signed. As to why we did not get one, I don't know, other than he said, 'Where are you gentlemen stopping?' We said, 'At the Gresham,' and he said, 'Maybe I can get hold of the trustees, and if I can I may be able to get the deed for you this evening.' We were to wait at the hotel until he could see the trustees and get the deal made for us that day. He later called us at the hotel and said the trustees were scattered and he could not get them together. He said he would have to wait a few days until he could get them together. We then left for our homes."

There was other evidence offered by both plaintiff and defendants. The issues submitted to the jury, with answers, are as follows:

1. On 26 February, 1923, was J. W. Alexander the agent of the defendants to sell the land in controversy? Answer: Yes.

2. If so, was the memorandum of sale, marked "Plaintiff's Exhibit 1," introduced in this cause, signed by the said J. W. Alexander, as agent of the said defendants? Answer: Yes.

3. Did the defendants, through their duly constituted agent, J. W. Alexander, contract and agree with the plaintiff, J. Frank McCall and one R. R. Fisher, to sell and convey to them the land described in paragraph one of the complaint, at the price of ten thousand dollars, as set out in the memorandum of agreement marked "Plaintiff's Exhibit 1"? Answer: Yes.

4. Has the plaintiff at all times been ready, able and willing to pay the price for said land set out in the said memorandum of agreement, according to the terms therein? Answer: Yes.

From the judgment and decree rendered upon this verdict, defendants appealed, assigning errors, based upon exceptions duly noted.

D. L. English and C. B. Deaver for plaintiff.

W. E. Breese and Mark W. Brown for defendants.

CONNOR, J. This action was first tried at December Term, 1923, of Superior Court of Transylvania County. From a judgment of nonsuit, at the close of all the evidence (C. S., 567), plaintiff appealed. This Court held that, upon the evidence offered at that trial, there was error in nonsuiting plaintiff. The opinion, in accordance with the decision of the Court, was written by the late *Chief Justice Clark* and was filed after his death, by order of the Court. 187 N. C., 757.

Upon the former appeal it was held that there was sufficient evidence to be submitted to the jury upon plaintiff's allegation and contention that J. W. Alexander was the agent of defendants, with authority to sell and contract for the conveyance of the lands in controversy by defendants. There is no substantial difference in the evidence offered at the former trial and that offered at the trial resulting in the judgment which we are now asked to review, upon appeal, with respect to this phase of the case. We have held in *O'Donnell v. Carr, ante,* 77, that an agent's authority from his principal to sell real estate is not to be readily inferred, but exists only where the intention of the principal to give such authority is plainly manifest. In the absence of special authority, the agent who is authorized by his principal to negotiate for the sale of real estate has no power to bind his principal by contract to convey; *Combes v. Adams,* 150 N. C., 64. In the instant case the relationship of principal and agent between defendants and J. W. Alexander, with respect to the sale of the lands of defendants, is admitted. It is denied, however, that because of such relationship the authority of the agent to make a contract for the sale and conveyance of the lands is to be presumed. Both principal and agent contend that the agent was authorized only to negotiate for the sale with a prospective purchaser and to submit offers to his principals for their approval or rejection. Conceding that this may be true as to the express authority conferred upon the agent, plaintiff contends that, upon the facts which the evidence tends to establish, the authority not only to sell, but also to make a contract for the conveyance of the lands to the purchaser, binding on his principals, was within the apparent scope of the agent's authority. There is evidence that the president of the Textile Industrial Institute, in reply to plaintiff's inquiry as to who had authority to sell the lands owned by defendants, stated that he was not the man; that J. W. Alexander had the matter of the sale of the lands in charge. Plaintiff, relying upon this statement, sought Alexander and dealt with him as agent of defendants for the sale of the land, without notice of any limitations upon his authority. The extent of the agent's authority was a matter of fact for the jury, and there is evidence sufficient to be submitted to them upon the contention of plaintiff; *Wynn v. Grant,* 166 N. C., 39; *Cardwell v. Garrison,* 179 N. C., 476; 21 R. L. C., 54, and cases cited. There was also sufficient evidence for the consideration of the jury upon plaintiff's contention that Dr. Camack, president of Textile Industrial Institute, had authority to enter into contract with J. W. Alexander to sell the lands. There was no error in declining to nonsuit the plaintiff upon either of these grounds.

Conceding that there was evidence from which the jury could answer the first issue in the affirmative, a serious question is presented by

defendant's contention that there is no evidence sufficient to be submitted to the jury upon the second issue. If this contention is sustained, there was error in declining the motion for judgment of nonsuit at the close of all the evidence. If the paper-writing offered as a memorandum of the contract for the sale and conveyance of the lands was not signed by the party sought to be charged, or by some other person by him thereto lawfully authorized, the action cannot be maintained. C. S., 988. A parol contract to sell or convey land may be enforced, unless the party to be charged takes advantage of the statute by pleading the same. But a denial of the contract, as alleged, is equivalent to a plea of the statute; *Miller v. Monazite Co.,* 152 N. C., 609; *Henry v. Hilliard,* 155 N. C., 373; *Arps v. Davenport,* 183 N. C., 72.

The memorandum in writing required by the statute must be signed by the party to be charged or by some other person by him thereto lawfully authorized. It is not sufficient that the other person who, it is alleged, signed his name upon the memorandum was lawfully authorized to do so by the party to be charged. The signing of a paper-writing or instrument is the affixing of one's name thereto, with the purpose or intent to identify the paper or instrument, or to give it effect as one's act. Black's Law Dictionary, p. 1088; Words and Phrases, vol. 7, 6508.

Upon the former appeal this Court held that there was error in allowing the motion to nonsuit. This decision is the law of this case and may not be reviewed upon appeal from a new trial; *Ray v. Veneer Co.,* 188 N. C., 414; *Strunks v. R. R.,* 188 N. C., 567, unless the evidence upon the second trial is substantially different from that in the former trial; *Armstrong v. Spruill,* 186 N. C., 18.

The name of J. W. Alexander, admittedly written by him, appears on the paper-writing offered in evidence as the memorandum required by the statute. The second issue, therefore, involves only the intent or purpose with which he wrote his name upon the paper. This must, as *Chief Justice Clark* says, be ascertained by the jury. The burden is on the plaintiff. Whether there is evidence from which the jury could answer the issue in the affirmative is a question of law and is presented to the court for decision by the motion for judgment of nonsuit. C. S., 567.

The evidence chiefly relied upon by plaintiff on both the former appeal and on this appeal is the paper-writing itself. Plaintiff contended on the former appeal that the location of the signature on the paper-writing was evidence that J. W. Alexander signed his name as agent of his principals, with intent thereby to bind them and not as witness to the signatures of J. F. McCall and R. R. Fisher. The record upon this appeal shows a different location of the signature; it is written under words indicating the place for the signature of a witness

and is immediately opposite the names of the purchasers. In the record of the "agreement to sell and buy," on this appeal, there are blanks in the body of the paper indicating that it was not completed by the insertion of the names of the sellers. In this respect it differs materially from the record on the former appeal. The names of defendants appear nowhere on the paper-writing, except in the general description of the lands, which are the subject-matter of the contract. The dotted lines at the end of the paper-writing, above the word "seller," are blank in both records. The law in South Carolina requires two witnesses; the paper shows two names written thereon in the space indicated for the signatures of witnesses. One of these names is J. W. Alexander.

There was no evidence upon either appeal of the intent with which J. W. Alexander signed his name except the paper-writing itself. This appears from the opinion in the former appeal. The testimony of the plaintiff, the only witness offered by him, who was present when the paper was signed, is to the effect only that J. W. Alexander signed his name after he and Fisher had signed their names, and that both the original and the copy were left with Alexander. The testimony of Alexander and Miss Somaini, offered by defendants, corroborated the paper-writing itself that J. W. Alexander signed, as did Miss Somaini, as witness to the signatures of McCall and Fisher.

We are of the opinion that upon the record in this appeal there is no evidence sufficient to be submitted to the jury upon the second issue. The substantial difference between the evidence at the second trial and the evidence as it appeared in the record upon appeal from the former trial was apparently not called to the attention of the learned judge from whose judgment this appeal was taken. Plaintiff's action should have been dismissed; in denying defendant's motion for judgment of nonsuit, there was

Error.

KENNETH GILLAND, BY HIS NEXT FRIEND, L. R. GILLAND v. CAROLINA CRUSHED STONE COMPANY.

(Filed 3 June, 1925.)

1. Evidence—Hearsay—Negligence—Appeal and Error—Objections and Exceptions—Harmless Error—Motions—Instructions.

Where there is pleading and evidence tending to show and *per contra* that the plaintiff sustained the injury in suit by the negligence of defendant's driver in unexpectedly swerving his truck loaded with granite so as to catch the plaintiff between the truck and the sidewalk, causing the personal injury in suit, upon objection of the defendant to plaintiff's evidence that some one "hollered" at the time that some one "ought to shoot that driver," the court said, "Yes, do not tell that": *Held*, the

statement of the court was equivalent to sustaining the defendant's objection and, should defendant have desired, it should have moved to strike out the unsolicited evidence with instructions that the jury must not consider it, and otherwise the conduct of the court will not be held for error on appeal.

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

Where in the cross-examination of defendant's witness in an action to recover damages for a personal injury alleged to have been negligently inflicted there is reference to the agent of an indemnity company securing the presence of the witness at the trial from another State, etc., a motion of defendant to withdraw a juror and mistrial ordered is properly denied, when on plaintiff's motion all the evidence as to the indemnity company defending the action is withdrawn by the court from the consideration of the jury and becomes but an immaterial incident of the trial. The comments made thereon by plaintiff's counsel in this case is not approved, though not held for reversible error upon the record in defendant's appeal.

3. Evidence—Nonsuit—Appeal and Error.

Where the defendant introduces evidence after its motion as of nonsuit upon the plaintiff's evidence has been denied, it waives its right to a nonsuit thereon, and when renewed at the close of all the evidence it will be denied if, when viewed in the light most favorable to the plaintiff, it is sufficient to sustain a judgment in his favor.

4. Negligence — Contributory Negligence — Burden of Proof—Instructions—Appeal and Error.

Where there is evidence and *per contra* that the defendant's driver caused injury to the plaintiff by swerving his truck against him as he was riding his bicycle with his hand on the truck along a city street, upon the issue of contributory negligence: *Held*, an instruction was correct that if the defendant had so satisfied the jury by the greater weight of the evidence, it would be negligence as a matter of law, and if the proximate cause would bar recovery, and unrelated to the issue as to the defendant's negligence.

APPEAL by defendant from judgment of *Shaw, J.*, at October Term, 1924, of MECKLENBURG.

Civil action to recover damages for personal injuries. Plaintiff, on 5 November, 1923, was riding a bicycle on Tryon Street, in the city of Charlotte. At the same time a heavy motor truck, owned and operated by defendant, and loaded with crushed stone, was being driven in the same direction as that in which the bicycle was going. The bicycle was between the moving truck and the curb of the sidewalk. As the result of a collision between the truck and the bicycle, plaintiff was thrown from the bicycle under the wheels of the truck, thus sustaining injuries which resulted in the amputation of his arm.

Plaintiff alleges that "the truck, while being so driven along South Tryon Street in said city, was, without warning, suddenly, wilfully, recklessly, negligently, and carelessly turned and driven against and

over the person and against the bicycle upon which plaintiff was riding; that at the time the said truck was so turned and driven against him and over him and against his bicycle, plaintiff was riding his bicycle along the street in a careful and prudent manner; that he was keeping near the curb at the right-hand side of said street as required by law and by the traffic regulations of the city of Charlotte; that the driver of defendant's truck, well knowing the danger to the plaintiff, his attention having been called to such danger, or by the exercise of due diligence and by proper attention, should have known the danger to the said plaintiff, suddenly and without warning to said plaintiff, and without keeping any proper lookout, drove defendant's truck in a reckless and negligent manner toward the right side of the street and against and over the plaintiff's person and against his bicycle, as aforesaid, striking plaintiff's left leg and striking the front wheel of plaintiff's bicycle, causing plaintiff to fall under defendant's truck and crushing his left arm under the wheel of said truck, and otherwise bruising, lacerating, and permanently injuring his body in numerous places."

Defendant, in its answer, denies that the cause of plaintiff's injury was as alleged, and says "that the defendant was operating a motor truck loaded with stone, and the said truck was running north on South Tryon Street, on the right-hand side of the street, when, as defendant is informed and believes and, therefore, alleges, plaintiff, riding a bicycle, rode up alongside of the truck and grasped with one hand the side of said truck, operating his bicycle with the other hand; that while so situated his bicycle skidded out from under him and he was thrown to the ground, his left arm being run over by the rear wheel of the truck, crushing same and necessitating the amputation of said arm; that the presence of plaintiff at rear of the truck was unknown to the driver of said truck, plaintiff being in such position as to make it impossible for the said driver to see him." Defendant expressly denies that plaintiff's injury was the result of its negligence, and pleads the contributory negligence of plaintiff as a defense to his action against it.

Upon the verdict of the jury, judgment was rendered that plaintiff recover of defendant the sum of $15,000 and the costs of the action. From this judgment defendant appealed to the Supreme Court.

Wade H. Williams and Preston & Ross for plaintiff.
J. Lawrence Jones and James A. Lockhart for defendant.

CONNOR, J. Plaintiff, while testifying as a witness in his own behalf, in response to the direction of his counsel to tell the court and jury how he was injured, said, in part: "Well, when the truck swerved in on me quickly, I slowed up, and when he did that he hit my front wheel and threw it out from under me; this threw me back under the truck and

mashed my left arm. My head was lying toward Williams-Shelton and my feet toward the curbing. Just as I got run over somebody hollered, 'They ought to shoot that driver!'" Defendant objected to the statement contained in the last sentence of the foregoing quotation and noted an exception. The court said, "Yes, don't tell that." This is made the basis of defendant's first assignment of error.

Defendant did not move to strike from the record the statement objected to nor request the court to instruct the jury that this statement should not be considered by them as evidence. Conceding that the objection to the statement was well taken, the assignment of error cannot be sustained. The court, in effect, sustained defendant's objection and the jury must have so understood. If defendant desired a more explicit ruling upon its objection or a more explicit instruction to the jury, it should have moved the court to strike the objectionable statement from the record and requested an instruction to the jury that the statement of the witness as to what somebody said at the time he was thrown under the wheels of the truck should not be considered as evidence. Defendant did neither. The exception is not directed to any action of the court, and is not sufficient to support an assignment of error to be considered in this Court upon appeal.

If defendant deemed the statement of the witness, which was not in response to the question directed to him by his counsel, but voluntarily made, incompetent and prejudicial, it should have directed its objection to the court, accompanied by a motion to strike the objectionable statement from the record, and by a request for an instruction, if desired, to the jury that the statement had been stricken from the record and should not be considered as evidence. To a ruling upon this motion an exception would lie as basis for an assignment of error upon appeal to this Court; *Huffman v. Lumber Co.*, 169 N. C., 259; *Wooten v. Order of Odd Fellows*, 176 N. C., 52; *S. v. Green*, 187 N. C., 466.

I. O. Eason, witness for defendant, testified that he was the driver of defendant's truck on the occasion of the collision when plaintiff was injured. His testimony on his direct examination tended to contradict the testimony of witnesses for plaintiff and to show the facts to be as contended by defendant. On cross-examination he testified that he lived in Charlotte at time plaintiff was injured, but at Nicholsville, Kentucky, at time of trial. He further testified that he owed some bills in Charlotte which he had not paid, because he had not had the money with which to pay them. Thereupon the cross-examination proceeded as follows:

Q. Well, who furnished you the money to come all that long distance, from Nicholsville, Kentucky, back here, if you did not have money enough to pay any of your grocery bills? A. The company.

Q. Which company? A. The insurance company, I suppose.

Q. How much did they give you to come back and testify? A. They were just going to pay my railroad fare back.

Q. And how much per day were they going to pay you? A. I don't know; necessary expenses, I suppose.

Q. I will ask you if at one or two other terms of court here if you did not refuse to come back because they had not made arrangements satisfactory to you? A. No, sir.

Q. Well, you did not come? A. No, sir.

Q. I will ask you if the insurance company had not notified you that the case was on for trial? A. Yes, sir.

Q. And I will ask you if you did not refuse to come back? A. No, sir; I have not.

Q. Why did you not come back? A. I had no way to come.

Q. In other words, you and they had not agreed on the money? A. No, sir.

Q. And as soon as you did agree on the money, then you came back? A. No; there has been no agreement on the money.

Q. You got the money, did you? A. They just paid my way from there here.

Q. And you haven't got anything else? A. No, sir.

Q. Did they send you a railroad ticket or send you cash? A. The fellow come from Cincinnati down there, an insurance man, and got me a ticket.

Q. I will put you on your guard and ask you if you did not tell Colonel Lockhart this morning, one of the insurance company's lawyers——

By Mr. Jones: If your Honor please, I make a motion that a juror be withdrawn and a mistrial ordered in this case.

Motion denied; defendant excepts.

Mr. Preston: I ask permission of the court to withdraw the word "insurance." Permission granted.

No objection was made by defendant to questions or answers in this cross-examination until the question was asked involving an implication that Colonel Lockhart, one of defendant's attorneys appearing at the trial was "one of the insurance company's lawyers." Upon objection made to this question, because of the implication, counsel for plaintiff immediately disclaimed the implication and proceeded with the cross-examination without further objection.

The learned and conscientious judge presiding at this trial declined to order a mistrial upon defendant's motion. The motion was addressed to his legal discretion; no facts appear upon which we are called upon to review his denial of the motion. We do not, however, approve the

reference by counsel for plaintiff conducting the cross-examination to one of the attorneys of record for defendant as "an attorney for the insurance company." Counsel himself at once recognized his error and, with the permission of the court, withdrew the question. The effect of the cross-examination was not to show that defendant had liability insurance. The purpose was to show that the attendance of this witness at the trial was procured by a promise or agreement to pay him money other than the amount allowed by law to witnesses.

In *Allen v. Garibaldi,* 187 N. C., 798, it was held that a motion for a new trial, after verdict, upon the ground that questions asked defendant and his son on cross-examination by plaintiff assumed that defendant had a contract with an indemnity company relative to plaintiff's claim for damages was properly overruled. *Justice Stacy,* writing the opinion for the Court, says: "The court sustained the defendant's objection to the questions, and this was all he was asked to do at the time. There was no motion for a mistrial or *venire de novo* because of these alleged improper questions. Defendant elected to proceed with the trial and to take his chances with the jury as then impaneled." Objections to the questions were sustained upon the authority of *Starr v. Oil Co.,* 165 N. C., 587; *Lytton v. Mfg. Co.,* 157 N. C., 333. In the instant case the question containing the objectionable implication followed a series of questions, unobjected to, all of which were for the purpose of impeaching the witness. The motion for mistrial in this case was made in apt time, but these questions are easily distinguishable from those in *Allen v. Garibaldi, supra.*

In *Bryant v. Furniture Co.,* 186 N. C., 441, *Chief Justice Hoke* states the rule applicable to this exception and says that where the fact that defendant charged with negligent injury held a policy of indemnity insurance against liability for such injury is brought out merely as an incident on cross-examination or otherwise, it will not always or necessarily constitute reversible error. See *Davis v. Shipbuilding Co.,* 180 N. C., 74. Assignment of error based upon defendant's fourth exception is not sustained.

The third and fifth exceptions are to the refusal of the court to sustain defendant's motions for judgment of nonsuit, the first made at the close of plaintiff's evidence and the second at the close of all the evidence. The first exception was waived by the introduction of evidence by defendant, C. S., 567. There was evidence tending to support the allegations of the complaint. This evidence construed in accordance with the well-settled rule applicable on consideration of motion for nonsuit is sufficient to be submitted to the jury as sustaining the contention of plaintiff, and the assignments of error based upon these exceptions are not sustained.

There was evidence tending to show that plaintiff, at the time he was injured, was just past 14 years of age. He was going to school and was in the seventh grade. He had been riding a bicycle about a year and had owned the bicycle on which he was riding at time he was injured about 6 or 8 months. He rode the bicycle on the streets of Charlotte while at work, carrying packages for the New Efird Department Store and selling newspapers, and also for pleasure. He had lived in Charlotte 11 years. He is the oldest boy in a family of seven children, was industrious, and earned while at work, during hours when not at school, eight to twelve dollars per week. His mother testified that he had never given her a bit of trouble. She said, "He has been a good boy, made good marks at school, attends church regularly, is a member of the church, and is what I call a straight-out boy."

His Honor charged the jury as follows: "It was the duty of plaintiff to use reasonable care for his own safety in driving or riding his bicycle along the street; that is, he is required, gentlemen, to use the same care that a boy of his age and experience and knowledge would have used under the same or similar circumstances." "If you find from the greater weight of the evidence, gentlemen of the jury, that the plaintiff was riding along at the time of the accident by this truck and holding on to the truck with only one hand on the handlebars of his bicycle, the court instructs you that it would be negligence upon the part of the plaintiff, and if you find that he was injured, either as a direct result of the manner in which he was riding or if the manner in which he was riding and holding to the rod of the truck with only one hand on his bicycle, provided he was doing that way, if that contributed proximately in producing his injury, then in either event it would be your duty to answer the second issue 'Yes,' provided defendant has shown this by the greater weight of the evidence. Or if he was not in the exercise of care which an ordinarily prudent person of his age and experience and observation would exercise, and in consequence of that he was injured, or such failure upon his part contributed proximately in producing his injury, in either event it would be your duty to answer the second issue 'Yes,' and defendant contends that this is what you ought to find."

We find no error in these instructions. His Honor did not instruct the jury here or elsewhere in his charge that plaintiff, a boy of 14 years of age, as a matter of law, was not responsible for his conduct or that he could not be held, on account of his age, guilty of contributory negligence. These instructions are supported by *Baker v. R. R.*, 150 N. C., 563; *Burnett v. Mills*, 152 N. C., 37; *Alexander v. Statesville*, 165 N. C., 527; *Fry v. Utilities Co.*, 183 N. C., 281, and cases cited in the opinions in these cases.

The age, experience and observation of plaintiff were not material in the consideration of the first issue involving negligence of defendant as the proximate cause of plaintiff's injury; defendant in support of its contention that plaintiff by his own negligence contributed to his injury alleged that at the time he was thrown from the bicycle he was riding along beside the truck with one hand on the truck and only one hand on the handlebar of the bicycle. This was denied by plaintiff, and the evidence was conflicting and was properly submitted to the jury under instructions from the court upon the issue as to contributory negligence.

We have considered the other assignments of error and do not find that they are sustained. There was evidence to sustain the verdict of the jury. We find no error. The amount assessed as damages is large. His Honor did not think it excessive, and the judgment upon the verdict must be affirmed.

No error.

HEIRS AT LAW OF D. E. FREEMAN, DECEASED, CONSISTING OF VIRA PRICE ET AL., v. C. H. RAMSEY ET AL.

(Filed 3 June, 1925.)

1. Wills—Dower—Statutes.

Where the widow takes certain of her husband's lands under his will in lieu of dower, it is unnecessary as against the interests of the heirs at law that the statutory proceedings should have been followed to lay off her dower interest, C. S., 4099, 4100, 4104, 4105, and as against creditors it has the same effect. C. S., 4108.

2. Wills—Sufficiency of Designation—Parol Evidence.

A devise to the wife of a certain number of acres of land surrounding the testator's dwelling and located according to her desire, and "as near four-square as consistent, to be taken by her in lieu of dower," is a sufficient description of the lands, and will admit of parol evidence of identification.

3. Same—Deeds and Conveyances.

Where the grantees under the widow's deed to her dower interest in lands agree as to its location before or after the time of the transaction, the recitation in the deed that it was the dower interest of the wife in the lands of her deceased husband is evidence against the grantees and those claiming under them that the dower interest was properly allotted within the boundaries set out in the deed.

4. Same—Recitals in Deeds—Estoppel.

The recitals in a deed to lands that the *locus in quo* is the wife's dower interest in the lands of her deceased husband estops the grantees in the deed and those claiming under them from denying the truth thereof.

FREEMAN *v.* RAMSEY.

5. Deeds and Conveyances—Evidence—Possession—Presumption.

Where the grantee of a deed is in possession of the lands in dispute, according to the description therein, it is prima facie evidence that such possession was under the deed to the lands, nothing else appearing, and the deed itself may properly be introduced at the trial as evidence.

6. Evidence—Nonsuit—Estates — Homestead—Actions—Heirs at Law—Title—Appeal and Error—New Trials.

Upon a motion of nonsuit, the evidence tending to establish the defendant's rights are not considered; and, *Held*, on the record of this appeal, it appearing that the heirs at law of the deceased husband were parties plaintiff claiming title to the lands in controversy, being the life estate or dower interest of the widow, now living, there is no estoppel on them except as to the life estate as to which only an estoppel could be successfully set up and a judgment of nonsuit entered, and a new trial is ordered for the determination of this further question presented by the record.

7. Estates—Dower—Life Estate—Ownership—Fee Simple.

While a tenant for life or one having acquired a dower interest in lands may be entitled to the possession as owner, this ownership is limited to the purposes of the life estate and not to a complete ownership of the fee-simple title.

APPEAL by plaintiffs from *Ray, J.*, at May Term, 1924, of MADISON.

Action by plaintiffs, heirs at law of Daniel E. Freeman, deceased, designated as against the defendants, who claim under Garrett Ramsey, deceased, to recover lands designated as the dower of the widow of Daniel E. Freeman. Judgment for defendants on motion to nonsuit, and plaintiffs appealed. New trial.

This is an action in ejectment and for mesne profits in which the title to the lands in controversy is the chief question at issue. The evidence for plaintiffs shows that Daniel E. Freeman died 5 June, 1873, leaving him surviving his widow, Nancy Freeman. Nancy Freeman, before her marriage to Daniel E. Freeman, was the widow of one Patton, and after Freeman's death she married J. M. Revis, and after the death of Revis she married Jim Warren, and she died 26 September, 1923.

The provision for what is called dower for Nancy Freeman in the will of Daniel E. Freeman, deceased, is as follows:

"And to Nancy Freeman, let her have at least 75 acres of land to be left her in during her lifetime, and household and kitchen furniture as is common to be allotted by law in such cases, and other out property and such provisions as will last her at least one year from the time this will take effect, her land to include the dwelling-house and to be located as she may want it to be, and as near four-square as is consistent."

Plaintiffs introduced deeds to Daniel E. Freeman and evidence as to location tending to show that Daniel E. Freeman claimed, and was in possession of, 600 acres of land, used by him as one tract, prior to the date of the deed of trust from Daniel E. Freeman to Farnsworth, trustee, under which the defendants claim. This evidence further tends to show the location of the dower lands within this 600-acre tract at the place where Daniel E. Freeman lived and died.

Plaintiffs introduced in evidence a deed from the widow of Daniel E. Freeman (then Revis) and husband, Marion Revis, to D. D. Lunsford, dated 3 February, 1876, registered 9 March, 1893. This deed recites that it conveys "all their interest, right and title to a certain piece or parcel of land on which the parties of the first part now reside, and upon which the said Nancy C. Revis was assigned dower as the widow of Daniel E. Freeman, deceased. The said interest hereby conveyed being the life estate of said Nancy C. Revis as the widow aforesaid; the said tract of land is known as the Freeman land and adjoins the lands of Garrett Ramsey, George Ramsey, Daniel Payne and others. . . . Supposed to contain 62 acres, more or less." The habendum clause in this deed is "for the natural life of the said Nancy C. Revis." With a covenant of a "right to convey the same for the time specified."

The evidence further tends to show that Lunsford, grantee in the Revis deed, was the son in law of Garret Ramsey; that the agreement between Lunsford and Garrett Ramsey was that Garrett Ramsey, soon after the execution of the Revis-Lunsford deed, took possession of the lands described therein under Lunsford, and that the Revis-Lunsford deed was delivered by Lunsford to Garrett Ramsey, and that on 1 March, 1893, D. D. Lunsford executed to Garrett Ramsey a deed, drafted either at the instance of or by Garrett Ramsey, and its description is as follows:

"Beginning on Frank Davis division corner and runs with said division line north 25 west 240 poles more or less; thence west with the Kilgore tract line 30 poles more or less to said Kilgore corner; thence south with Kilgore line 240 poles more or less to a stake; then with Kilgore line to the beginning, containing 70 acres, more or less. The same being the lifetime dower bought from Nancy Freeman by said David Lunsford."

The habendum in this deed is "during the life of Nancy Freeman," and the warranty is "during the lifetime of Nancy Freeman, and no longer"; and that this deed was duly registered at the instance of Garrett Ramsey.

The evidence further tends to show that Garrett Ramsey and those claiming under him, including the defendants, have been in the pos-

session of the lands in controversy since about two years after Lunsford purchased from Nancy Freeman Revis.

The witness D. D. Lunsford testified that the lands described in the Revis-Lunsford deed is the land that he purchased from Nancy Revis and her husband, and that after he purchased it he took possession of it and moved right on it and stayed there a while. "I don't think I made any crops on it, but I rented it to George Freeman the first year; he cultivated it. After I bought the land I had a talk with Garrett Ramsey, my father in law, about it. After I bought the land from Nancy Freeman or Nancy Revis and her husband, I kept it something like two years. I rented it to George Freeman. I sold it then to Garrett Ramsey."

It was admitted by defendants that the land described in the Lunsford deed is the same land as described in paragraph one of defendants' further answer, which pleads the record in the case of Garrett Ramsey against G. W. Freeman and Benjamin Freeman.

The motion for judgment as upon nonsuit was allowed at the close of the evidence.

There was much evidence tending to locate the Freeman dower land as contended for by plaintiffs, and there was much evidence tending to show that it could not be so located, and that the lands claimed by plaintiffs as the dower lands, if located by them as contended, was included within defendants' chain of title from Daniel E. Freeman through a deed and bond for title from A. E. Baird to Garrett Ramsey under the Farnsworth deed of trust. There was evidence tending to show that the Baird deed did not cover the land in controversy and evidence tending to the contrary.

The defendants introduced, over exception, the record in a suit instituted by Garrett Ramsey against G. W. Freeman and Benjamin Freeman in Madison Superior Court. In this complaint Garrett Ramsey alleged "that he is the owner and entitled to the possession of two tracts of land, the first described as follows: "Beginning on Frank Davis division corner and runs with said division line 25 deg. west 240 poles more or less; then west with the Kilgore tract line 30 poles more or less to said Kilgore corner; thence south with Kilgore's line 240 poles more or less to a stake; then with Kilgore's line to the beginning, containing 70 acres, more or less"; and that the defendants were in the wrongful and unlawful possession thereof, to his damage, in the sum of $200. The answer denied each allegation of the complaint.

The verdict was as follows:

"1. Is the plaintiff the owner and entitled to possession of the lands in dispute? Answer: Yes.

"2. What damage is the plaintiff entitled to? Answer: $70."

The judgment rendered at July Term, 1895, after reciting the issues, omitting the formal parts, adjudged that plaintiffs recover of the defendants, Benjamin Freeman and George W. Freeman, "the possession of the land described in the complaint," excepting therefrom the conveyance to George W. Freeman by Daniel E. Freeman, and provided that the defendants be ejected and the plaintiffs put in possession of this land and for recovery of the damages assessed by the jury.

The court below, closing the evidence, held, and so decreed, that this record estopped the heirs at law of Benjamin Freeman and George W. Freeman to question the ownership of the lands in controversy. George W. Freeman and Benjamin Freeman were sons of Daniel E. Freeman, deceased, and their heirs at law included among the plaintiffs as heirs at law of Daniel E. Freeman, deceased. The trial court further held, upon defendants' motion for judgment of nonsuit, that, "in no view of the case were the plaintiffs entitled to recover, as there was no legal evidence to be submitted to the jury that any dower had been legally assigned or legally allotted to Nancy Freeman."

The plaintiffs assigned errors as follows:

1. To the exclusion of the evidence offered by the witness, Frank Patton, that he was present when his mother's dower was allotted, in the presence of George Freeman, executor of Daniel E. Freeman, and that Nancy Freeman, mother of the witness, lived on the dower until she sold it to David Lunsford.

2. The trial court sustained the defendants' objection to the question put to the witness, Goforth, asking whether the witness had examined the record of deeds to ascertain tracts that Garrett Ramsey held in the source of his title.

3. That the trial court admitted in evidence the record in the case of Garrett Ramsey v. Benjamin Freeman and George W. Freeman.

4. In rendering the judgment dismissing the action.

John A. Hendricks and G. M. Pritchard for plaintiffs.
Guy V. Roberts and Martin, Rollins & Wright for defendants.

VARSER, J. Plaintiffs' first exception is to the exclusion of the evidence of Patton, son of Nancy Freeman by her first marriage, as to the laying off by three men of what the witness calls his mother's dower; that George Freeman, an heir of Daniel E. Freeman, was there; that it was in 1873 and that the land was allotted to her "as her dower," and witness gave one of the lines of the dower as "the conditional line between Daniel E. Freeman and Garrett Ramsey," and said, "My mother lived on the dower until she sold it to David Lunsford."

We think this evidence is competent. It was not, strictly speaking, the laying off or admeasurements of dower, as in cases or when the widow dissents from her husband's will of intestacy. C. S., 4099, 4100, 4104, 4105.

The statutory method of allotment is exclusive. However, in the instant case, Nancy Freeman took under the will. The allotment need not have been made upon petition filed in Superior Court (C. S., 4105) in analogy to *quasi* dower under a will, but yet statutory as against creditors. C. S., 4108; *Trust Co. v. Stone,* 176 N. C., 270; *Simonton v. Houston,* 78 N. C., 408.

Dower has always been a favorite of the law. No mode of ascertaining and setting apart the substitute for dower as contemplated by C. S., 4098, is provided by statute, and none is expressly provided in the instant will, but such a beneficent provision for his widow cannot fail for want of a remedy. Hence, either the statutory method for allotting dower or an allotment or location of the same by the parties, as shown by the proffered evidence, is sufficient. Evidently the executor, George Freeman, treated this provision as mandatory, and the evidence shows that the widow accepted the allotment and continued in possession of the lands. *Ex parte Avery,* 64 N. C., 113; *Simonton v. Houston, supra.*

This evidence was also competent as tending to show and to locate the possession of Nancy Freeman, as widow, and to fix the limits of her possession, and to locate the land in the Revis-Lunsford deed, under which the defendants' predecessor in title, Garrett Ramsey, purchased and went into possession. A location by the parties at or before the time of the transaction is competent. *Allison v. Kenion,* 163 N. C., 582. Recitals in the deeds under which the defendants held or now claim, or in the deeds under which Garrett Ramsey held, are evidence against the defendants that the dower or life estate of Nancy Freeman was properly allotted and located as therein stated. *McMahon v. Stratford,* 83 Conn., 386; *Chandler v. Wilson,* 77 Maine, 76; *Norris v. Hall,* 124 Mich., 170; *Havens v. Sea Shore Land Co.,* 47 N. J. Eq., 365; *Garwood v. Dennis,* 4 Binn. (Pa.), 314. This rule also applies to recited sources of title. *Garbarino v. Noce,* 6 A. L. R., 1433, and cases cited in an elaborate note thereto; 18 C. J., 264.

It is the same in effect as conveying land by a name which has become attached to a certain piece of land. 8 R. C. L., 1081; *Smith v. Proctor,* 139 N. C., 314.

The intention of the parties to the deed, as expressed therein, is evidenced by the clear statement that it was the lifetime interest or dower of Nancy Freeman, widow, that was conveyed. The deed is the only written evidence thereof and is competent. *Dill v. Lumber Co.,* 183 N. C., 660.

Recitals in deeds are, as a rule, received in evidence against parties and privies. *Baggett v. Lanier,* 178 N. C., 129; *Jenkins v. Griffin,* 175 N. C., 184; *Hattan v. Dew,* 7 N. C., 260; Mordecai's Law Lectures, 808.

The defendants are not permitted to claim the lands covered by the widow's life estate adversely to the heirs of Daniel E. Freeman during the lifetime of Nancy Freeman Revis. The recital *quoad* the dower or life interest is an estoppel. *Green v. Bennett,* 120 N. C., 394.

We are further of the opinion that the defendants, who admittedly claim under Garrett Ramsey, cannot dispute the laying off or location of the boundaries of the life estate of Nancy Freeman under the will of Daniel E. Freeman. The Revis-Lunsford deed and Lunsford-Ramsey deed both refer to and convey the widow's interest which she took under the Daniel E. Freeman will; and having obtained and enjoyed the use thereof from 1878 until the death of Nancy Freeman, in 1923, a period of 45 years, the defendants are now estopped to dispute the allotment and location thereof.

When the facts recited in deeds are of the essence of the contract, and where the intent of the parties to place a fact beyond question or to make it the basis of the contract is clear, the recital is effectual and operates as an estoppel against parties and privies. 2 Herman on Estoppel, 636; Bigelow on Estoppel (5 ed.), 366; *Burns v. McGregor,* 90 N. C., 222; *Fort v. Allen,* 110 N. C., 183; *Walker v. Brooks,* 99 N. C., 207; *Brinegar v. Chaffin,* 14 N. C., 108; *Hill v. Hill,* 176 N. C., 197; *Drake v. Howell,* 133 N. C., 166. Having entered into the possession of the lands in controversy under the Revis-Lunsford deed and the parol agreement with Lunsford, which was later consummated in the Lunsford-Ramsey deed, the defendants are estopped to question the title of Nancy Freeman during her lifetime or now to assert their possession during her lifetime thereunder adversely to the plaintiffs, heirs at law of the deceased husband, under whom the widow claimed. *Farmer v. Pickens,* 83 N. C., 553; *Love v. Edmonston,* 23 N. C., 152; *Dowd v. Gilchrist,* 46 N. C., 353; *Springs v. Schenck,* 99 N. C., 551, 558.

Nancy Freeman was estopped to assert her possession as widow or tenant under the will against the heirs of *her* husband and, therefore, the defendants are likewise estopped. *Callendar v. Sherman,* 27 N. C., 711; *Melvin v. Waddell,* 75 N. C., 361; *Malloy v. Bruden,* 86 N. C., 251; *Love v. McClure,* 99 N. C., 295; *Springs v. Schenck, supra; Mobley v. Griffin,* 104 N. C., 112; *Ladd v. Byrd,* 113 N. C., 466; *Everett v. Newton,* 118 N. C., 919; *In re Gorham,* 177 N. C., 272; *Timber Co. v. Yarbrough,* 179 N. C., 335; *Forbes v. Long,* 184 N. C., 40; Malone on Real Property Trials, 205, 206; *Gintrat v. Western*

Railway of Alabama, 19 L. R. A., 839, with an elaborate note reviewing the authorities on the many phases of this question.

The defendants contend, and the court below so held, that the dower not having been allotted, as provided by statute in cases of intestacy or upon a dissent, that the will of Daniel E. Freeman was insufficient to give the widow any title to any part of the Freeman land for life. This view cannot be sustained. We hold that the will of Daniel E. Freeman vested in Nancy Freeman a life estate in so much of his land as included within the boundaries set out in his will, when properly located. *Broadhurst v. Mewborn,* 171 N. C., 400; *Boddie v. Bond,* 158 N. C., 204; *Sigmon v. Hawn,* 86 N. C., 310; *Boyd v. Redd,* 118 N. C., 680; *Blanton v. Boney,* 175 N. C., 211; *Warehouse Co. v. Warehouse Corp.,* 185 N. C., 518.

The description in the Freeman will is sufficient to be located by parol evidence. C. S., 992; *Farmer v. Batts,* 83 N. C., 387; *Johnson v. Mfg. Co.,* 165 N. C., 105; *Patton v. Sluder,* 167 N. C., 500; *Perry v. Scott,* 109 N. C., 374; *Bachelor v. Norris,* 166 N. C., 506; *Stockard v. Warren,* 175 N. C., p. 286; *Allen v. Sallinger,* 108 N. C., 161.

The defendants contend that there is no proof that Garrett Ramsey held under the widow of Daniel E. Freeman. We are of the opinion that the testimony of the witness Lunsford, if found to be true, shows that he did.

However, aside from this testimony, we hold that when a party is in the possession of land and a registered deed or deeds are produced by the opposite party, nothing else appearing, it will be taken, *prima facie,* that he entered or held under such deed or deeds. *Register v. Rowell,* 48 N. C., 312; *Bryan v. Spivey,* 109 N. C., 71.

The defendants are in privity with Garrett Ramsey upon the instant record. *Bryan v. Malloy,* 90 N. C., 508.

We do not consider evidence which makes for the defendant upon a motion for judgment as upon nonsuit. *Nash v. Royster, ante,* 408; *McAtee v. Mfg. Co.,* 166 N. C., 455; *Cashwell v. Bottling Works,* 174 N. C., 324; *Builders v. Gadd,* 183 N. C., 447; *Lamm v. R. R.,* 183 N. C., 74; *Brown v. R. R.,* 172 N. C., 604; *Williams v. May,* 173 N. C., 78.

Since it is admitted, however, that the description in the complaint in the instant case and the description of the first tract in the action between Garrett Ramsey and G. W. Freeman and Ben Freeman, pleaded by defendants on estoppel against the heirs at law of G. W. Freeman and Ben Freeman, who are also heirs at law of Daniel E. Freeman, deceased, is the same, we will now consider its effect.

The allegation by Garrett Ramsey is that "he is the owner and entitled to the possession." This is denied in the answer filed, and the jury

found for Garrett Ramsey and assessed damages for withholding possession. The judgment gave Garrett Ramsey only "the possession of the lands described in the complaint." The estoppel is only asserted against the heirs at law of G. W. Freeman and Ben Freeman. We are of the opinion that it cannot, in the instant action, operate as such against any of the plaintiffs. Garrett Ramsey was entitled, upon the Lunsford-Ramsey deed, to the possession of all the lands covered by the life estate of Nancy Freeman, who was then living, and was *pro tanto* the owner.

The heirs of Daniel E. Freeman had no right to the possession of the lands covered by her life estate during her life. The word "owner" is not sufficiently limited in scope to be determinative. Ownership may be complete or incomplete, special, reputed, legal or equitable. A tenant for life is the "owner" for many purposes.

Its use is too varied to constitute an estoppel in the instant case. Black's Law Dictionary (2 ed.), 865, 866.

A varied collection of the many uses of this term appears in 29 Cyc., 1549, and notes. See 6 Words and Phrases, 5134 *et seq.*

The claim now asserted by plaintiffs is not inconsistent with the rights of Garrett Ramsey as adjudged in the pleaded cause. He is presumed to have held at that time under Nancy Freeman Revis. While some of the plaintiffs, in the instant case, are privies to the defendant in the pleaded action, and would be estopped if that record was sufficient to constitute an estoppel (*Owen v. Needham,* 160 N. C., 381), we do not think it was necessary to determine any phase of the question now at issue in the trial thereof. *Jones v. Beamon,* 117 N. C., 263; *Allred v. Smith,* 135 N. C., 443. While ejectment was primarily possessory in character prior to 1868, it may, or may not, be determinative of the title since 1868; but in the pleaded record it appears only to have been possessory, and, therefore, not an estoppel on title. *Benton v. Benton,* 95 N. C., 559; *Wicker v. Jones,* 159 N. C., 102; *Poston v. Jones,* 19 N. C., 294; *Wagon Co. v. Byrd,* 119 N. C., 460; *Caudle v. Morris,* 160 N. C., 168; *Long v. Baugas,* 24 N. C., 290; *Clothing Co. v. Hay,* 163 N. C., 495; *Whitaker v. Garren,* 167 N. C., 658; *Ferebee v. Sawyer,* 167 N. C., 199; *Johnson v. Pate,* 90 N. C., 334; *Falls v. Gamble,* 66 N. C., 455; *Isler v. Harrison,* 71 N. C., 64; *Yates v. Yates,* 81 N. C., 396; *Turnage v. Joyner,* 145 N. C., 81; Bigelow on Estoppel, 397, 398.

Upon the instant record, and viewing the case in the light of the rule upon motion for judgment as upon nonsuit, now accepted by this Court, we are of the opinion that there is sufficient evidence upon which to submit this case to the jury, and, therefore, there must be a

New trial.

STATE v. HEBER HARDY.

(Filed 3 June, 1925.)

1. Criminal Law—Constitutional Law—Statutes.

The defendant in a criminal action may not be convicted under the provisions of our Constitution, Art. I, sec. 17, except by the law of the land or under a unanimous verdict of guilty by the jury, Art. I, sec. 13, and upon his denial of guilt he is presumed to be innocent, with the statutory right to request to go on the stand as a witness in his own behalf, in not exercising which no prejudice shall be created against him. C. S., 1799; and with further right to have counsel for his defense, C. S., 4515, who may argue the matters of law as well as of fact to the jury, C. S., 203; and the trial judge, in his instructions to the jury, shall not give his opinion whether a fact is fully or sufficiently proven. C. S., 564: and these are among the fundamental principles to which recurrence is directed by our Constitution, Art. I, sec. 29.

2. Same—Attorney and Client—Counsel—Argument—Instructions—Appeal and Error.

Upon the trial of a criminal case it is the duty of the defendant's counsel to argue his case to the jury upon the evidence introduced, and the remarks of the judge to the jury in effect that defendant's attorney notwithstanding he had informed them of his rulings of the law, had argued the law to the jury, is virtually an instruction that the jury should give no consideration thereto, and is a prejudicial invasion of the defendant's rights, and constitutes reversible error.

3. Same—Courts—Jury.

An instruction in a criminal case that defendant's counsel was under obligation to make his side the best side, and it was different with the court and jury who were to maintain a fair and impartial trial, is an erroneous conception of the law; and, *Held* erroneous.

4. Criminal Law—Instructions—Reasonable Doubt—Appeal and Error.

Where the accused on a criminal trial denies his guilt of the offense charged, he is presumed to be innocent, and for conviction the State must prove his guilt beyond a reasonable doubt; and an instruction is erroneous that the jury should return a verdict of guilty if they found the uncontradicted evidence in the case to be true.

5. Appeal and Error—Criminal Law—Instructions—Presumption of Innocence—Requested Instructions.

Defendant's counsel in a criminal action may presume that the trial judge will charge the jury upon the presumption of defendant's innocence, and a special request, with exception to its refusal, to this effect, is not necessary to present the question on appeal.

APPEAL by defendant from *Cranmer, J.*, at January Term, 1925, of BEAUFORT.

Indictment charging defendant with violation of statute prohibiting manufacture of intoxicating liquor, etc. Verdict guilty. From judgment

that defendant be confined in the jail of Beaufort County for 18 months, assigned to work on the roads of the county, defendant appealed.

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

H. C. Carter for defendant.

CONNOR, J. The State offered as evidence the testimony of Allen Whitley, who testified that he had been tried and convicted for making liquor, and had served a term of six months on the roads. He further testified as follows: "One Sunday in September last, I was on the hard-surface road, about four miles from Washington, when a car stopped near me. A man got out and approached me. I had not seen him in six years and hardly knew him. Said he wanted me to make some whiskey for him. I told him that I would let him know later. The next morning I rode my bicycle to his place, near Grimesland in Pitt County, and told him that I had decided to do the work for him; and that I would come back on the following Friday to go to work. I went back on Friday, and on Saturday morning he took me in his buggy to a place in the woods, about six miles from his home and showed me a still. He told me how to set up the still, and how to make the liquor. He then left. He furnished the still and appliances. The mash was already there. I built a fire after he left. This was the first time I had ever made liquor. In a little while the officers came and caught me. I told them that Mr. Hardy owned the still and that I was making liquor for him.

"I had not seen Heber Hardy for six years, and he had not seen me. He never knew me to be connected with the liquor business. I did not know how to make liquor. He didn't tell me what he was going to give me until I went over there. He was to give me two gallons. When I got caught, I tried to run, but fell down and then told the officers that it was Mr. Hardy's still."

J. J. Hodges testified that he arrested Allen Whitley at the still. He tried to run, but fell down. He said, "Don't shoot. I am not making whiskey for myself." He then told me for whom he was making whiskey. I saw tracks of a buggy and horse. That day Heber Hardy was in town with his brother. He lives 6 or 7 miles from the place where the still was found. Allen Whitley lives about 15 miles from the place. Allen Whitley's reputation is good.

This was all the evidence. The charge in full of the court to the jury was as follows:

"Heber Hardy is charged with the violation of the prohibition law. The State charges him in the bill of indictment on two counts: the

manufacture of intoxicating liquor; and having property designated for use in the manufacture of liquor or intended to be used in violation of law.

"(I sent you out of the room in order to intimate to counsel what I was going to charge you. Notwithstanding that intimation, counsel has seen fit to argue the case to the jury.)" To foregoing portion of charge in parentheses defendant excepts. This was defendant's first exception.

"(I instruct you, gentlemen of the jury, that these gentlemen are designated by the State and by the defendant to try this case; it is their business to make their side appear the best side; their reasons the best of reasons; but you and I are under different obligations. Yours is the obligation which the State has required you to take, to well and truly try this case and a true verdict render therein, according to the evidence; you have been admonished to sit together, hear the evidence and render your verdict accordingly. The evidence in this case is uncontradicted. I instruct you if you believe the facts to be as testified to, you will return your verdict of guilty. Take the case and see how you find it.)" To foregoing portion of charge in parentheses defendant excepts. This was defendant's second exception.

Defendant's assignments of error, on his appeal to this Court, are based upon these two exceptions. He complains that by these instructions he was prejudiced in his right to have the argument of his counsel considered by the jury, and that the judge gave an opinion as to whether the facts involved in the issue between him and the State had been fully or sufficiently proven, thus invading the true office and function of the jury.

Defendant, called to answer a criminal charge, ought not to be deprived of his liberty, as a punishment therefor, but by the law of the land. Const. of N. C., Art. I, sec. 17. He ought not to be convicted but by the unanimous verdict of a jury of good and lawful men in open court, sec. 13. Upon his trial he, as every man who is a defendant in a criminal prosecution, 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. Sec. 11. In his trial upon the indictment he is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. C. S., 1799. Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. C. S., 4515. In jury trials the whole case, as well of law as of fact, may be argued to the jury, C. S., 203. No judge, in giving a charge to a petit jury, either in a civil or a criminal action,

shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of a jury, but he shall state in a plain and correct manner the evidence given in a case and declare and explain the law arising therein. C. S., 564.

These are some of the fundamental principles, clearly asserted and firmly established in the organic law of North Carolina, to which we are admonished there should be a frequent recurrence, if we would preserve our liberties. Const. of N. C., Art. I, sec. 29. These principles are essential for the preservation of the blessings of liberty for the individual; a government of law and not of men can be maintained only by a constant recognition of and jealous adherence to these principles. They are embedded not only in our Constitution and statutes, but in the very life of our people. Criminal statutes enacted from time to time to meet new and changing conditions, however sound may be the policy which underlies them, or however necessary their enforcement may be to the good order of society and the happiness of individuals, will be weaved into the life of the people, becoming a part of the warp and woof thereof, only when enforced as to individuals charged with their violation, in strict obedience to these great fundamental principles.

(1) The right of every man, accused, prosecuted, or put on trial upon a criminal charge, to be heard, and to have counsel in all matters necessary for his defense, and the right of counsel to argue to the jury the whole case, as well of law as of fact, is too fundamental for discussion. It is not only the right, it is also the duty of counsel to argue to the jury the case for the defendant, when in their judgment there is evidence or law, applicable to the case, sustaining the contentions of defendant upon the issue to be determined by the jury, and when in their opinion such argument will aid the jury in determining the issue in accordance with these contentions. Neither the contrary opinion of a judge, nor the temporary criticisms of those who have no share in the responsibility of counsel, ought to deter them from exercising their rights or performing their duties. The primary purpose of a trial, in a court, is not to convict and punish the accused, but to guarantee him that he shall not be deprived of his right to life, liberty and the pursuit of happiness—inalienable rights with which he is endowed by his Creator—but by the law of the land. Governments are instituted among men to secure these rights, and it is peculiarly the function of a court to assure every man whose right to life, liberty or the pursuit of happiness is put in jeopardy, by an accusation of crime, the punishment for which is a deprivation of one of these rights, that he shall be heard, and shall not suffer, until his guilt has been established by the verdict of a jury in accordance with law. Respectful, but firm

insistence upon one's own rights, especially when enjoyment of those rights is essential to the performance of one's duty, precedes and is always a prerequisite to the recognition of and respect for the rights of others.

In *S. v. Collins,* 70 N. C., 242, *Justice Settle,* writing for the Court, said: "In this country every one has a constitutional right to have counsel for his defense, and if he is too poor to employ counsel it is the duty of the court to assign some one to defend him and it is the duty of counsel thus assigned to give to the accused the benefit of his best exertions." In that case, defendant, who was on trial upon indictment for murder, assigned as error a ruling of the judge, allowing his counsel only one hour and a half for the argument of the case to the jury. While the Court held that under the statute then in force, the ruling was within the discretion of the judge, it said, "We do not recommend the ruling of his Honor in the case before us as a precedent worthy of imitation." The vigorous dissenting opinion of *Bynum, J.,* concurred in by *Rodman, J.,* resulted in the enactment by the General Assembly of chapter 114, Laws 1874-5, which provided that an attorney appearing in any civil or criminal action shall be entitled to address the court or jury "for such space of time as in his opinion may be necessary for the proper development and presentation of his case." This is the law now, except as amended by chapter 433, Laws 1903, fixing the minimum number of counsel who may address the jury as matter of right, and the minimum time for limitation of arguments in all cases other than capital cases, by the judge. C. S., 203. The people of North Carolina have ever been jealous of their rights, under the law. The right of counsel to address the jury is not a privilege conferred upon lawyers; it is the right of every man, who seeks redress for his wrongs, or protection of his rights in the courts, to speak through his counsel to both judge and jury and to be heard.

It cannot be said that the constitutional right of defendant in this case to have counsel for his defense and the right of counsel to argue the case for the defendant to the jury was not impaired by the expression of the judge assigned as error. It is true that counsel argued the case to the jury. The remark, however, to which the first exception is addressed, was and must have been understood by the jury as a criticism by the judge of counsel for exercising his right, and performing his duty, as he saw it, and was virtually an instruction that the jury should give no consideration to the argument of counsel, upon the law or the evidence. We cannot, upon principle or under the authorities, approve this instruction, and must hold that it was prejudicial to the right of defendant to have counsel in all matters necessary for his defense. *S. v. Lee,* 166 N. C., 250.

(2) Nor can we approve the instruction that it is the "business of counsel to make their side appear the best side; their reasons the best reasons; but you and I are under different obligations." Judge, juror and counsel are all under the same obligation. Each in his sphere is independent, but it is the duty of all to aid in the ascertainment, in accordance with established principles of law and legal procedure, of the truth of the issue involved in the trial. They differ only in function. A trial by a jury of good and lawful men, under the supervision of a just and impartial judge, both aided by learned and zealous counsel for those whose rights are involved in the issue, has been found by experience the surest guarantee of the rights of individuals and the protection of society. It has been approved, not only by men learned in the law, but also by all men who seek truth and love justice.

(3) The court, having instructed the jury that their duty differed from that of counsel, who, heedless of the court's intimation, had seen fit to argue the case to them, and had urged them, upon the evidence and the law to return a verdict of "not guilty," further instructed the jury as follows: "The evidence in this case is uncontradicted. I instruct you if you believe the facts to be as testified, you will return your verdict of guilty. Take the case, and see how you find it." The assignment of error, based upon exception to this instruction must be sustained.

In *S. v. Murphrey,* 186 N. C., 113, although upon the record in that case, an instruction similar to that here assigned as error, was held not reversible error, this Court said: "Even in instances of this character it would be more satisfactory if the court's instruction to the jury had followed the usual formula on the question of 'reasonable doubt.'" In *S. v. Singleton,* 183 N. C., 738, an instruction that if the jury believed the evidence, they would find defendant guilty, was held error. While the instruction in the instant case, taken alone, may be distinguished from that in the *Singleton case,* and might be sustained by *S. v. Murphrey,* when considered as a part of the entire charge, it was in effect a directed verdict. In *S. v. Estes,* 185 N. C., 752, it is held that it is a recognized principle that a trial judge is not justified in directing a verdict of guilty in a criminal action, but where as an inference of law the uncontradicted evidence if accepted as true, establishes the defendant's guilt, it is permissible for the court to instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. The law in this State, as repeatedly declared by this Court, is that a plea of not guilty, to a criminal charge, at once calls to the defense of defendant the presumption of innocence, denies the credibility of evidence for the State; and casts upon the State the burden of establishing guilt beyond a reasonable doubt. *S. v. Singleton, supra.*

These words are not mere formalities, but express vital principles of our criminal jurisprudence and criminal procedure. These principles ought not to be readily abandoned, or worn away by invasion. As said by *Justice Hall, In re Spier,* 12 N. C., 492, nearly a century ago, "Although a prisoner, if unfortunately guilty, may escape punishment in consequence of the decision this day made in his favor, yet it should be remembered that the same decision may be a bulwark of safety to those who, more innocent, may become the subjects of persecution, and whose conviction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not."

(4) The charge to the jury in this case contains neither a "statement in a plain and correct manner of the evidence," nor "an explanation of the law arising thereon." C. S., 564. There were no requests for special instruction; counsel, however, were justified in assuming that the jury would be instructed as to the presumption of innocence of defendant; the rule as to burden of proof applicable; the tests to be applied in order to determine the credibility of the testimony of the State's witness, who, if believed by the jury, was an accomplice; the lack of presumption against defendant arising from his failure to exercise his right to testify in his own behalf, and that finally they were to pass upon and determine both the credibility of the testimony of the witnesses and the weight of the evidence.

Assignments of error are sustained. There must be a

New trial.

DANIEL CALDWELL v. LESSIE BERRY CALDWELL.

(Filed 3 June, 1925.)

1. Judgments—Clerks of Court—Jurisdiction—Statutes.

The clerks of the Superior Courts, under the provisions of chapter 92, Public Laws of 1921, Extra Session, are authorized to enter judgments final in proceedings for divorce, subject to appeal to the court in term, which have the same force and effect as judgments of the latter court regularly entered in term, the statute in this respect being an enabling one and not depriving the judge of his jurisdiction of rendering judgment also, the jurisdiction being concurrent in both courts.

2. Same—Divorce.

The clerk of the Superior Court, in instances prescribed by the statute, may not enter consent judgment in actions for divorce, and in other actions he may permit the plaintiff, in proper instances, to take a voluntary nonsuit.

3. Same—Notice.

It is not required that the plaintiff notify the defendant before taking a voluntary nonsuit before the clerk of the court when such may be taken under the statute.

4. Same—Appeal and Error.

Where the clerk of the Superior Court has exercised his statutory power to permit the plaintiff to take a voluntary nonsuit in his action against his wife for divorce, to whom alimony *pendente lite* has been allowed, the judge of the Superior Court in term may not set aside the judgment on motion of defendant originally made before him, the right to alimony ceasing at the time of the nonsuit, leaving defendant to pursue her further remedy by independent action should she be so advised.

5. Same—Constitutional Law.

From the judgment of the Superior Court reversing the clerk's order permitting the plaintiff to take a voluntary nonsuit in his action for divorce, an appeal to the Supreme Court will lie. Const. Art. IV, sec. 8.

6. Same—Objection and Exception.

The judgment entered by the clerk of the Superior Court under his statutory jurisdiction can only be reversed for error upon appeal to the Supreme Court from that of the Superior Court in term upon exceptions originally and duly taken before the clerk, except upon the ground of mistake, inadvertence or excusable neglect, C. S., 600; or from a motion made to remove the cause as a matter of right, C. S., 913(a); or from an order made upon a motion to remove the cause to the Federal Court, C. S., 913(b).

APPEAL by plaintiff from *Harding, J.*, at October Term, 1924, of BURKE.

Action for divorce. Defendant denied by her answer the allegations of the complaint upon which plaintiff prayed for judgment dissolving absolutely the bonds of matrimony existing between plaintiff and defendant. Defendant thereupon applied to the Superior Court of Burke County for alimony, *pendente lite*. This application was heard, after notice to plaintiff, at August Term, 1923, by his Honor, James L. Webb, judge presiding, at said term. Upon the facts found, it was ordered that plaintiff pay into the office of the clerk of the Superior Court of Burke County, on or before Saturday, 18 August, 1923, and on Saturday of each and every successive week thereafter during the pendency of the action, the sum of six dollars and seventy-five cents for the use and benefit of and to be paid to defendant, Lessie Berry Caldwell, for her support and expenses pending the trial of this action.

Plaintiff complied with this order and made the weekly payments as ordered and directed therein up to and including 9 February, 1924. He also paid $3.25 on the payment due on 16 February, 1924. No other or further payments have been made by plaintiff.

On 20 March, 1924, a judgment of nonsuit was entered in this action in the following words:

"North Carolina, Superior Court,
Burke County. Before the Clerk.

The plaintiff, Daniel Caldwell, having come into court, through his attorneys, Ervin & Ervin, and having submitted to a voluntary judgment of nonsuit:

It is considered, ordered, and adjudged that this action be, and the same is hereby, dismissed. It is further ordered that the plaintiff pay the costs hereof.

BUTLER GILES,
Clerk of the Superior Court of Burke County."

This 20 March, 1924.

Thereafter, after notice to plaintiff served on 28 July, 1924, and upon affidavit of defendant, defendant moved, before his Honor, W. F. Harding, judge presiding, at September Term, 1924, of the Superior Court of Burke County, that the judgment of voluntary nonsuit, rendered by the clerk of the court on 20 March, 1924, be vacated and set aside. Upon the hearing of this motion the court found that at the time said judgment was entered plaintiff was in arrears in the payment of the alimony due to defendant and that said judgment was rendered without notice to defendant, and upon these facts "ordered and adjudged that the judgment of nonsuit entered by the clerk in this action on 20 March, 1924, be, and the same is, set aside, and upon affidavit of the defendant filed herein and dated 17 May, 1924, it is ordered that the plaintiff be, and he is hereby, required to show cause before the judge of the Superior Court of Burke County on Monday, the first week of the December Term, 1924, of said court, why he should not be attached as for a contempt in failing to pay alimony to the defendant as directed by the judgment of Judge Webb."

Plaintiff excepted to the foregoing judgment, and appealed therefrom to the Supreme Court.

S. J. Ervin and S. J. Ervin, Jr., for plaintiff.
Avery & Ervin for defendant.

CONNOR, J. Plaintiff excepts to the judgment rendered by Judge Harding at October Term, 1924, setting aside the judgment dismissing the action upon a voluntary nonsuit entered by the clerk on 20 March, 1924, upon two grounds: First, that there was no exception to or appeal from the judgment of nonsuit entered by the clerk; second; that there

was no error or irregularity in the rendition of said judgment; defendant having set up no counterclaim in her answer, plaintiff contends that he had the right to take a voluntary nonsuit, and that by the express provisions of the statute the clerk was authorized to enter such judgment at any time.

Chapter 92, Public Laws 1921, Extra Session, is entitled An act to amend certain statutes theretofore enacted relating to civil procedure, in regard to process and pleadings, and "to expedite and reduce the cost of litigation." Subsection 12 of section 1, of said chapter, provides that "the clerks of the Superior Courts are authorized to enter the following judgments: (a) all judgments of voluntary nonsuit; (b) all consent judgments; (judgments coming within (a) and (b) may be entered at any time)." Clerks are further authorized to enter "(c) judgments in all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the Superior Court; (d) all judgments by default final and default and inquiry as are authorized by sections 595, 597 of the Consolidated Statutes and in this act provided." (e) In all cases where the clerks of the Superior Courts enter judgment by default final upon any debt, secured by mortgage, deed of trust, or other conveyance of any kind, or by pledge of property, "the said clerks are authorized to make orders of foreclosure, for sale, and distribution of proceeds of sale," etc. See Vol. 3, C. S., 593, 597 (a) (b) (c), 600. Judgments except those coming under (a) and (b) shall be entered only on a Monday of each month, and each Monday is a term of court for certain purposes.

Judgments entered by the clerk as authorized by this statute, under the express provisions thereof or by necessary implication, are judgments of the Superior Court, and are of the same force and effect, in all respects, as if rendered in term and before a judge of the Superior Court. In *Hill v. Hotel Co.*, 188 N. C., 586, we held that the statute as applicable to judgments by default final or by default and inquiry is an enabling act. We said, in the opinion filed by *Justice Adams* in that case, that we apprehend that the statute was never intended to deprive the Superior Court in term of its jurisdiction to render a judgment by default final or default and inquiry.

And so, we must hold that, as applicable to other judgments which the clerk is authorized therein to enter, the statute is an enabling act and does not deprive the Superior Court in term of its jurisdiction to render judgments, which by its provisions may also be entered by the clerk, either at any time or on any Monday of the month. The purpose and effect of the statute is to confer upon the clerk the same authority as that theretofore exercised by the judge in term with respect to judgments covered by the statute. The jurisdiction of a judge in term to

render judgments upon voluntary nonsuits, by consent of parties to the action, upon notes, bills, bonds, stated accounts, balances struck, or other evidences of debt, within the jurisdiction of the Superior Court, or by default final or default and inquiry, and to make orders and decrees in actions to foreclose mortgages, etc., is not affected by the provisions of this statute. The authority of the clerk is concurrent with and additional to that of the judge in term.

The authority of the clerk of the Superior Court of Burke County to enter a judgment dismissing upon voluntary nonsuit an action pending in said Superior Court in which such judgment could be rendered in term by the judge must be conceded. The fact that both complaint and answer had been filed and issues joined and the papers transmitted by the clerk to the court for the trial of the action upon the issues did not deprive him of this authority. A judgment upon voluntary nonsuit may be entered by the clerk at any time in any action in which the judge in term may render such judgment.

The judgment in the instant case which plaintiff seeks to have set aside is not void for want of jurisdiction by the clerk of the parties or of the motion. It is not alleged that the judgment should be set aside and vacated because of the mistake, inadvertence, surprise, or excusable neglect of the defendant. Nor are facts found which are sufficient to support an order setting aside the judgment on this ground. A motion to set aside and vacate a judgment entered by the clerk, as authorized by statute upon this ground, may be made before and passed upon by either the judge or the clerk. From an order made by the judge upon such motion an appeal may be taken to this Court, which has jurisdiction to pass upon and determine all matters of law or legal inference duly presented by appeal. Const. of N. C., Art. IV, sec. 8. From an order made by the clerk upon such motion an appeal will lie to the judge, who shall hear and pass upon the motion, *de novo*, 3 Vol., C. S., 600. From an order made by the judge upon appeal from the clerk an appeal will lie to the Supreme Court. *Duffer v. Brunson*, 188 N. C., 789.

The judgment entered by the clerk in the instant case is not erroneous. A judgment of the Superior Court rendered in term by the judge can be reviewed for error only upon appeal to the Supreme Court upon exceptions duly noted. *Livestock Co. v. Atkinson, ante*, 250; *Duffer v. Brunson, supra*. A decision of one judge of the Superior Court is not reviewable by another judge. *Dockery v. Fairbanks*, 172 N. C., 529. The power of one judge of the Superior Court is equal to and coördinate with that of another. A judge holding a succeeding term of the Superior Court has no power to review a judgment rendered at a former term upon the ground that such judgment is erroneous.

There is no provision in the statute regulating an appeal from a judgment entered by the clerk under the authority of the statute upon the ground that such judgment is erroneous. It would seem that the appeal from such judgment upon this ground may be taken from the clerk to the judge, as provided by the statute, for appeals from orders and judgments upon other grounds. The proper practice, we think, is for the complaining party to except to the judgment as entered by the clerk and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judge of the Superior Court to the Supreme Court. This is the practice expressly provided in the statute for an appeal from an order made by the clerk upon a motion to set aside a judgment entered by him on the ground of mistake, inadvertence, surprise, or excusable neglect, or on the ground that the judgment is irregular; that is, contrary to the usual course and practice of the court, C. S., 600; or from an order made upon a motion to remove as a matter of right, C. S., 913(a); or from an order made upon a motion to remove to the Federal Court, C. S., 913(b). When appeals are taken from judgments of the clerk or judge, not made in term time, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals, C. S., 642(a).

Defendant contended upon her motion before Judge Harding that the judgment entered by the clerk dismissing the action upon plaintiff's voluntary nonsuit was irregular. Either the judge or the clerk had jurisdiction to hear the motion upon this ground. The motion was properly made before the judge, in the first instance, for the judgment which defendant asked to have set aside on the ground that it was entered contrary to the course and practice of the court and, therefore, irregular, was a judgment of the Superior Court; *Moore v. Packer,* 174 N. C., 665.

The clerk also had jurisdiction of this motion; from his order an appeal could have been taken to the judge. The judge's jurisdiction, however, of a motion to set aside a judgment entered by the clerk under the authority of this statute is original as well as appellate; C. S., 633, 635 and 636, regulating appeals from the clerk to the judge are applicable to appeals from orders and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to chapter 92, Public Laws 1921, Extra Session. These sections of Consolidated Statutes do not apply to orders and judgments made or entered by the clerk as authorized by this latter statute.

Plaintiff's first contention upon his appeal in this Court, to wit: That Judge Harding was without jurisdiction to hear and pass upon defendant's motion, because no exception to or appeal from the judgment of nonsuit entered by the clerk was taken, is not sustained.

Upon consideration of defendant's motion, Judge Harding found that the judgment of nonsuit was entered by the clerk without notice to defendant and while plaintiff was in arrears in the payment of the sums which he was ordered by Judge Webb to pay weekly for the use and benefit of defendant during the pendency of the action. Plaintiff contends that the judgment of nonsuit was not irregular and that, therefore, there was error in the judgment setting it aside upon this ground.

In *McKesson v. Mendenhall,* 64 N. C., 502, *Justice Rodman,* after reviewing the authorities relative to the practice as to nonsuits, says: "The principle would seem to be that a plaintiff may elect to be nonsuited in every case where no judgment other than for costs can be recovered against him by the defendant, and when such judgment may be recovered, he cannot." This statement is cited with approval and as authoritative in *Dawson v. Thigpen,* 137 N. C., 463. In such case plaintiff may take a voluntary nonsuit and have judgment dismissing the action at any time before verdict is passed against him. C. S., 604, and cases cited. An action will not be dismissed upon a voluntary nonsuit by plaintiff where defendant in the answer sets up a counterclaim entitling him to affirmative relief; *McLean v. McDonald,* 173 N. C., 429.

Upon the allegations in the complaint, plaintiff prays judgment that the bonds of matrimony between himself and defendant be dissolved. Defendant denies the allegations, but alleges no facts upon which she would be entitled to affirmative relief by final judgment in the action, nor does she pray for any relief by final judgment in the action. She does allege facts upon which she relies upon her application for alimony *pendente lite.* Upon the pleadings no final judgment could be rendered in this action against plaintiff and for defendant, except that plaintiff is not entitled to the relief prayed for and that he pay the costs of the action. Upon plaintiff's motion, a judgment dismissing the action upon voluntary nonsuit was, therefore, proper, unless the principle stated in *McKesson v. Mendenhall* does not apply to an action for divorce.

The question as to whether the plaintiff in an action for divorce is entitled as a matter of right to a judgment dismissing the action upon voluntary nonsuit does not seem to have been heretofore presented to this Court. In 9 R. C. L., 429, it is said: "As in civil cases generally, it is the well-established rule that the complainant in divorce proceedings may as a matter of right dismiss his or her bill or complaint without the consent of the defendant; and it has been held that either party who asks for divorce may withdraw the demand at any time before the decree is entered, and that after such withdrawal the court has no authority to grant a divorce in favor of such party. There is,

however, authority for the position that the rule which governs in ordinary cases is not to be strictly applied in divorce proceedings." *Milliman v. Milliman,* 45 Colo., 291, 101 Pac., 58; 22 L. R. A. (N.S.), 999, and note. Also 35 L. R. A. (N.S.), 1158. In 19 C. J., 147, it is said: "While an application to discontinue is addressed to the sound discretion of the court, ordinarily where no cross bill has been filed complainant may at any time prior to a decree have the bill dismissed." The latter statement is supported by numerous authorities cited.

The better rule seems to be that a motion by the plaintiff for judgment dismissing his action for divorce upon a voluntary nonsuit will not be allowed by the court as a matter of right, but is addressed to the sound discretion of the court, which will be exercised in the interest not only of plaintiff, but of defendant and the State. The State and defendant, each, have an interest in the status of plaintiff and defendant, and the purpose of an action for divorce is to change or alter this status. In the instant case defendant has answered plaintiff's complaint and denied its allegations. She resisted his prayer for relief. The State's interest and the interest of defendant and her child will be served by the maintenance of the marriage relation, to the end, at least, that plaintiff shall be required to support defendant as his wife and their child as its father.

There was no error in the entry of judgment of nonsuit without notice to defendant. This judgment could be entered at any time by the clerk upon motion. No notice to defendant was required of this motion, although it may be well for the clerks of the Superoir Court to notify parties before entering judgments of nonsuit where an answer has been filed. Plaintiff was required by Judge Webb's order to pay alimony *pendente lite.* The action having terminated by judgment dismissing same, entered on 20 March, 1924, no sums were due under this order after that date. Judge Harding found that counsel for plaintiff tendered the sums in arrears and that same were declined by defendant. Before entering judgment dismissing the action the court should have considered whether or not payment of sums in arrears by plaintiff should be made a condition of entering the judgment in accordance with his motion. The presumption is that this matter was considered and passed upon by the clerk. We cannot hold that it was irregular—i.e., contrary to the course and practice of the court—to enter judgment of nonsuit without making the payment of alimony *pendente lite,* in accordance with the order entered while the action was pending, a condition of dismissing the action. The only effect of the judgment was to terminate the action and thus fix the date on and after which no further payments under the order were due. The judgment did not affect liability of plaintiffs for amounts then due. The judge finds, however,

that plaintiff tendered these amounts and that defendant declined to accept them. The termination of the action by judgment of nonsuit or upon a verdict does not affect liability of husband for alimony *pendente lite* due at date of judgment. The judgment dismissing the action upon voluntary nonsuit was not irregular. We must, therefore, hold that there was error in the judgment setting aside and vacating this judgment.

If the facts are as alleged in defendant's answer, and upon which she relied in her application for alimony *pendente lite,* and plaintiff is not moved by his conscience to do justice to defendant whom he has wronged and their child, she is not without remedy. The law of this State is ample to give her relief, and her able and zealous counsel will advise her of her rights and aid her in presenting her cause to the courts of her State. If her allegations are found to be true, the court will be swift to do her justice; *S. v. Bell,* 184 N. C., 701; C. S., 1667; *Crews v. Crews,* 175 N. C., 168; *Walton v. Walton,* 178 N. C., 73.

The judgment in this action, however, must be

Reversed.

LOUISE E. GEROW, ADMINISTRATRIX, v. SEABOARD AIR LINE RAILWAY.

(Filed 3 June, 1925.)

1. Commerce—Carriers — Employer and Employee—Federal Statutes—Boiler Inspection Act—Employers' Liability Act—Negligence.

The Federal Boiler Inspection Act and the Employers' Liability Act are to be construed together, and under the latter act, so construed, a railroad company engaged in interstate commerce is liable in damages to the plaintiff's intestate (employee) for failing to comply with the provisions of the inspection act with respect to the keeping of its locomotives in the safe condition required by the inspection act, when the injury resulting in death was proximately caused thereby, irrespective of the question of contributory negligence.

2. Same—Instructions—Burden of Proof.

Where there is allegation and evidence that the defendant railroad company while engaged in interstate commerce proximately caused the death of plaintiff's intestate by an explosion caused by its negligently permitting the water injectors for the boiler to be in such condition as to admit of the passing of trash into the boiler, the cause of the explosion: *Held,* while the inspection act does not specifically require the use of strainers to catch the trash upon the injectors, their absence being alleged raises a question for the jury as to whether the statutory provision for the safety of employees had been complied with; and an instruction that should the jury find by the greater weight of the evidence that the defendant was negligent in this respect, to find the issue for plaintiff, is not erroneous, the burden being upon the plaintiff.

GEROW *v.* R. R.

APPEAL by defendant from *Daniels, J.*, at January Term, 1925, of WAKE.

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

"2. Did a violation of a Federal statute enacted for the safety of employees contribute to the injury and death of the said Herbert W. Gerow? Answer: Yes.

"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? Answer: ——.

"4. Did the plaintiff's intestate, Herbert W. Gerow, assume the risk of injury and death, as alleged in the defendant's answer? Answer: ——.

"5. What amount of damages, if any, is the plaintiff entitled to recover—

"(a) For the pecuniary loss suffered by his widow? Answer: $8,000.00.

"(b) For the pecuniary loss suffered by James Gerow? Answer: $8,000.00.

"(c) For the pecuniary loss suffered by Elizabeth Gerow? Answer: $8,000.00.

"6. Did the plaintiff's intestate, Herbert W. Gerow, endure conscious pain and suffering before his death as a result of the defendant's negligence, as alleged in the complaint? Answer: Yes.

"7. What amount of damages, if any, is the plaintiff entitled to recover for the conscious pain and suffering endured by the said Herbert W. Gerow? Answer: $2,250.00."

Judgment on the verdict for plaintiff. Defendant appeals, assigning errors.

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

STACY, C. J. This case was before us at a former term, 188 N. C., 76, when a new trial was awarded for error in the exclusion of certain evidence. The facts were reported fully at that time, and we shall not undertake to repeat them here.

It was conceded on the hearing 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 as a locomotive engineer at the time of his injury and death. He was killed by a boiler explosion. The case, therefore, is one arising under the Federal Employers' Liability Act and the Federal Boiler Inspection Act, and it has properly been tried under these acts. *Cobia v. R. R.*, 188 N. C., 487. It is governed by the Federal law. *Capps v. R. R.*, 183 N. C., p. 185. Plaintiff's intestate, a man 34 years of age, left a widow, age 31, and two small children, a son 11 years of age, and a daughter 6 years of age, him surviving, all of whom were dependent upon the deceased for support and maintenance; 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.

On 26 November, 1921, plaintiff's intestate was in charge of defendant's locomotive No. 409, drawing a freight train of cars, which left Raleigh, N. C., on that day about 7:30 p. m., going northward. After running a distance of about 18 miles the boiler of said locomotive engine suddenly and violently exploded, fatally injuring plaintiff's intestate, and causing his death 25 minutes later. He endured excruciating pain and conscious suffering from the time of the explosion until his death. The sixth and seventh issues are addressed to this feature of the case. *Cobia v. R. R.*, 188 N. C., p. 494. Both the recovery and the amount awarded for the conscious pain and suffering of the decedent before his injuries proved fatal are supported by what was said in *St. Louis & Iron Mt. Ry. v. Craft*, 237 U. S., 648.

The explosion of the boiler is alleged and admitted. It is likewise alleged and admitted that said locomotive engine was equipped with injectors, one on the right side and one on the left side of the boiler, which were designed and intended to be used in conveying water from the water tank to the boiler of the locomotive, and that said injectors were connected with the water tank by means of certain hose, known as tank hose, which contained strainers designed and intended to prevent straw, leaves, trash, and other objects from getting into the injectors, or either of them, from the supply tank.

There is allegation to the effect that it was necessary for said injectors to be in proper repair in order to supply a sufficient quantity of water to the boiler, and in order for either of said injectors properly to perform its function it was essential that the tank hose and the strainer contained therein be and remain free and clear of all objects, such as straw, leaves, sediment, etc. It is also alleged, among other things,

that the defendant failed to equip and provide the manhole or tank of said engine with a strainer so as to prevent the entry of trash and other objects into the tank and thence into the tank hose, thereby rendering the locomotive unsafe to operate in the service to which it was put.

In support of these allegations, the plaintiff offered evidence tending to show that the strainers in the tank hose had been clogged or covered with trash, bagging and leaves to such an extent as to stop the flow of water from the tank to the boiler through the injectors, thus causing the explosion which resulted in the death of plaintiff's intestate. Plaintiff offered in evidence the following rule adopted for the inspection and testing of steam locomotives and tenders duly approved by orders of the Interstate Commerce Commission:

"153. (a) Feed water tanks—Tanks shall be maintained free from leaks and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

"(b) Not less frequently than once each month the interior of the tank shall be inspected and cleaned, if necessary.

"(c) Top of tender behind fuel space shall be kept clean and means provided to carry off waste water. Suitable covers shall be provided for filling holes."

That it was the duty of the defendant to have the boiler of said locomotive, and appurtenances thereof, in proper condition and safe to operate in the service to which it was put, is conceded. Sec. 2 of the Federal Boiler Inspection Act is as follows:

"From and after the first day of July, nineteen hundred and eleven, 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 for." 36 Stat. at L., 913, ch. 103.

By amendment of 4 March, 1915, the provisions of the Boiler Inspection Act were extended to "the entire locomotive and tender and all parts and appurtenances thereof." 38 Stat. at L. 1192, ch. 169; *Mangum v. R. R.*, 188 N. C., p. 693.

The Boiler Inspection Act was passed to promote the safety of employees, and it is to be read in connection with the Federal Employers' Liability Act. The two are companion acts. Under the latter act,

defendant is liable for any negligence chargeable to it which caused or contributed to cause the death of plaintiff's intestate (sec. 1); and he will not be held guilty of contributory negligence (sec. 3), or to have assumed the risk of his employment (sec. 4), if a violation of sec. 2 of the Boiler Inspection Act contributed to cause his death. *Great Northern R. R. Co. v. Donaldson,* 246 U. S., 121.

By sec. 2 of the Boiler Inspection Act defendant was bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide. *Murphy v. Lumber Co.,* 186 N. C., 746. The carriers, however, were left free to determine how their boilers should be kept in proper condition for use without unnecessary danger. The things required for that purpose were not prescribed or changed by the act; but use of boilers, unless safe to operate, as specified, was made unlawful, and liability for consequences follows violation of the act.

It is conceded that there is nothing in the act or in any rule, regulation or order authorized by it which specifies the use of strainers over the manhole or intake of the tender. This, however, does not relieve the defendant of the duty to have and to keep its locomotives safe for use as required by the act.

The court, in harmony with the provisions of sec. 2 of the Boiler Inspection Act, instructed the jury that the standard of defendant's duty was to have and to keep its locomotive in proper condition and safe to operate in the service to which it was put.

There are several exceptions appearing on the record which are not altogether free from difficulty, but after a careful perusal of the entire case we are constrained to believe that they should be resolved in favor of the validity of the trial.

Probably the most serious exception is the one addressed to the following portion of the charge:

"If you shall find from the evidence, and by its greater weight, the burden being upon the plaintiff, that the defendant furnished the plaintiff's intestate with a locomotive engine without having the boiler and its appurtenances in proper condition and safe to operate in the active service of the defendant, including the injectors and other appurtenances of said boiler, or that a strainer was not provided for the tender, if such appliance was necessary to render said tender safe, that it might be employed in active service in moving traffic without unnecessary peril to life or limb, there was a violation of the statute, and if you shall find from the evidence, and by its greater weight, that such violation of the statute contributed as a proximate cause of the injury and death of the plaintiff's intestate, you will answer the second issue 'Yes,' but if you are not so satisfied you will answer it 'No.'"

The defendant contends that this instruction is in conflict with what was said in *B. & O. R. R. Co. v. Groeger,* 69 L. Ed., 164, touching a similar instruction in regard to whether the carrier was negligent in failing to provide a fusible safety plug for the engine there in question. In speaking to the question, *Mr. Justice Butler,* for the Court, said:

"If the question whether the standard of duty fixed by the act required defendant to have a fusible plug in the crown sheet of the boiler were one for the determination of a jury, we think there was evidence which would sustain a verdict in the affirmative or in the negative. But we think the question was not for the jury (citing authorities). The act required a condition which would permit use of the locomotive without unnecessary danger. It left to the carrier the choice of means to be employed to effect that result. While the burden was on the plaintiff to prove a violation of the act by defendant, she was not bound to show that any particular contrivance or invention was suitable or necessary to have and keep the boiler in proper condition. There is a multitude of mechanical questions involved in determining the proper construction, maintenance, and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently, and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders, and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end. *Tuttle v. Detroit, C. H. & M. R. R. Co.,* 122 U. S., 194, 30 L. Ed., 1116, 7 Sup. Ct. Rep., 1166; *Richards v. Rough,* 53 Mich., 216, 18 N. W., 785. The presence or absence of a fusible plug was a matter properly to be taken into consideration in connection with other facts bearing upon the kind and condition of the boiler in determining the essential and ultimate question, i.e., whether the boiler was in the condition required by the act."

There is this distinction, however, between the two cases as we understand them. In the case at bar, it is specifically alleged that the defendant's engine was defective in that it had no strainer over the manhole or intake of the tender. The plaintiff, under our practice, is

entitled to recover, if at all, only upon the allegations of her complaint; and it will be observed that the instruction did not impose upon the defendant the duty of having a strainer for the tender merely because such was in general use, or because this particular engine was designed for and intended to have, a strainer, nor because the defendant was admittedly using trashy water. *Richards v. Rough,* 53 Mich., 212. But it was only in the event the jury should find from the evidence, in accordance with plaintiff's allegation, that such appliance was necessary to render said tender safe, that they were instructed to find for the plaintiff. This accords with the duty imposed by the statute, and the instruction merely limited the plaintiff to a recovery in case she established the allegation of her complaint. If the presence or absence of such a strainer were a circumstance properly to be taken into consideration in connection with other facts bearing upon the kind and condition of the locomotive in determining the essential and ultimate question, i. e., whether the locomotive was in the condition required by the act, we see no valid reason why the court should not specifically direct the jury's attention to the matter when it is made the subject of direct allegation.

In *Great Northern Ry. Co. v. Donaldson,* 246 U. S., 121, the following instruction was approved:

"Therefore, if you shall believe, from a fair preponderance of all the evidence in the case, that the boiler of the locomotive engine No. 1902 or the appurtenances thereof were not in proper condition and safe to operate in the active service of the defendant in moving traffic without unnecessary peril to life or limb, by reason of the negligence of the defendant, *in any one or more of the three respects alleged in the complaint* (italics added), then and in that case Vance H. Thomas assumed no risk of death and was guilty of no contributory negligence, and the affirmative defenses must fail."

We do not think the exception can be sustained on the present record.

The remaining exceptions and assignments of error have been carefully scrutinized. We are of opinion that all of them must be overruled. It would only be a work of supererogation to discuss them *seriatim.* There was no error in withdrawing from the jury's consideration the incompetent evidence previously admitted. *S. v. Stewart, ante,* 340, and cases there cited.

Viewing the record in its entirety, we think the verdict and judgment should be upheld.

No error.

J. T. HORNEY v. K. A. PRICE.

(Filed 3 June, 1925.)

1. Contracts—Principal and Agent—Lands—Sales—Breach.

Where the owner of land has made a contract of sale thereof at auction with an agent, he may not avoid damages for a breach thereof in refusing to convey the same to the highest bidder at the sale upon the ground that he had so contracted with another as to render his performance impossible.

2. Lis Pendens—Statutes—Liens—Judgments.

A *lis pendens* filed under the provisions of our statute is notice from the time of its cross-indexing, but cannot create a lien on lands in an action for a money demand. C. S., 500, 501, 502, 503.

3. Same—Real Estate—Words and Phrases.

The intent of our statute, C. S., 501, 502, in the use of the words "real property" is in the sense of "lands, tenements and hereditaments."

4. Appeal and Error—Parties—Interest.

Where one claiming an interest in the subject-matter of the litigation has had his motion to be permitted to make himself a party refused in the Superior Court, his exception becomes immaterial in the Supreme Court on appeal, when it is adjudicated that under the facts of the case he could have neither acquired nor lost any right therein.

APPEAL by defendant and petitioner, George R. Wooten, from *Harding, J.*, at September Term, 1924, of CATAWBA.

Plaintiff instituted this suit against defendant to recover the sum of $1,000, due him under a contract for advertising and selling certain land of defendant at public auction to the highest bidder, located in Hickory and known as defendant's "home place," and formerly the old Presbyterian Manse. Dr. P. D. Pence was made a party to the contract, but never signed it. At the sale, George R. Wooten became the last and highest bidder in the sum of $13,300. Defendant declined to execute a deed to Wooten. The contract provided that the land was to be sold on or before 30 November, 1922, at public auction. It was sold on 30 November, 1922. The next day Price wrote Horney a letter refusing to confirm the Wooten bid and stated in the letter that he had written and wired Doctor Pence to the same effect. In this letter he says: "I had an agreement with Doctor Pence not to take less than $15,000 for the property. . . . I have so notified Wooten, but he seems to think that I did confirm the sale regardless of what agreement I had with Doctor Pence."

On 16 October, 1922, K. A. Price and Dr. P. D. Pence entered into an option for the consideration of $50, under seal, to terminate in 90 days, on the same land—defendant's "home place"—"provided no sale

has been made in the interim to nullify same. K. A. Price to coöperate with P. D. Pence in executing a satisfactory contract with some land agent to sell at auction, or privately (the sale to be advertised under P. D. Pence's name) part or all of this property on or before 30 November, 1922. P. D. Pence to pay K. A. Price $15,000 for the property, together with 50% commission on the money in excess, over and above, said stipulated sum of $15,000, after all expenses in said auction sale have been deducted from such excess funds. P. D. Pence to have 30 days from date of auction sale in which to make full and satisfactory settlement to K. A. Price."

The contract between K. A. Price and Dr. P. D. Pence was made 16 October, 1922, and between plaintiff, J. T. Horney, and defendant, K. A. Price, 30 October, 1922.

On 18 April, 1921, the defendant, K. A. Price, made and executed to Dr. P. D. Pence a note for $3,400, secured by a mortgage on the land, his "home place," which on 20 March, 1923, was duly recorded in the office of the register of deeds of Catawba County, in Book 167, p. 71.

This action was commenced 6 March, 1923, and summons served on defendant 8 March, 1923.

Soon after the institution of this action, Dr. P. D. Pence instituted an action in the Superior Court of Catawba County, N. C., for the foreclosure of his mortgage. A commissioner was appointed, and George R. Wooten became the purchaser, being the last and highest bidder at public auction, for the sum of $15,000, and deed in fee simple by commissioner made to him in August, 1924, which deed has been duly recorded. In July, 1923, a judgment of about $7,350 and interest and cost was rendered against K. A. Price, the defendant in this suit, in an action entitled H. M. Price v. K. A. Price, said judgment was duly docketed and indexed in the office of the clerk of the Superior Court of Catawba County.

For a valuable consideration George R. Wooten purchased this judgment. The purchase price at the commissioner's sale was $15,000, this price was paid in cash and by the payment of prior liens on the property the said commissioner being authorized to enter a proper credit upon the said judgment rendered in the action of H. M. Price v. K. A. Price, before mentioned. J. T. Horney, the plaintiff in this cause, in May, 1923, filed in the office of the clerk of the Superior Court of Catawba County, a *lis pendens* notice, covering the land in controversy, defendant's "home place" and embraced in Dr. P. D. Pence's mortgage. The notice of *lis pendens* was cross-indexed upon the judgment cross-index book in May, 1924.

In plaintiff's complaint, the prayer is as follows: "Wherefore, plaintiff prays judgment for the sum of $1,000 with interest thereon from

30 November, 1922; for cost of action; and for such other and further relief as of right he may demand."

The court charged the jury: "The court charges you, gentlemen of the jury, if you believe the evidence to be true, all of the evidence, if you find it to be true, then the plaintiff is entitled to recover one thousand dollars less the bills of Prevette and the Hickory Daily Record."

The jury answered the issue "$1,000 with interest at 6% from 30 November, 1922, less bill of Hickory Daily Record for $25.00, and Prevette of $6.00."

The following judgment was rendered by the court below:

"It is therefore considered, ordered and adjudged that plaintiff recover of the defendant the sum of $969.00, together with interest on $969.00 from 30 November, 1922.

"It appearing to the court that on 22 March, 1923, the plaintiff filed his *lis pendens* on the lands mentioned in the complaint, and that plaintiff has complied with the statute in filing such *lis pendens*. It is therefore considered, ordered and adjudged, that this judgment is a lien on the lands mentioned and described in the complaint; this being the same land upon which the *lis pendens* above referred to has been filed; and that execution shall issue against said lands;

"It is therefore considered, ordered and adjudged that plaintiff recover of defendant his cost in this suit, the same to be taxed by the clerk of this court."

After the judgment was signed and entries of appeal therefrom by defendant to the Supreme Court, George R. Wooten, before adjournment of the court, made a motion to become a party defendant, the *lis pendens* affecting the title to the property he purchased at the commissioner's sale. Wooten was a witness for plaintiff in the present suit. Defendant and Wooten both made exceptions and assignments of error and appealed to the Supreme Court. The material ones, and further necessary facts, will be considered in the opinion. Some of the facts are taken from those in the Wooten motion, this was done to show consecutive transactions, but the opinion is based on record evidence of plaintiff. Defendant offered no evidence.

A. A. Whitener for plaintiff.
Self & Bagby for George R. Wooten, petitioner.
E. B. Cline for K. A. Price.

CLARKSON, J. The defendant, K. A. Price, in his brief abandons most of his assignments of error. The defendant's assignment of error which relates to the refusal of the court below to give the special in-

struction asked, addressed itself to the failure of Dr. P. D. Pence to confirm the sale. This contention is based on the option given by Price to Doctor Pence. This 90-day option was dated 16 October, 1922. Doctor Pence had a mortgage on the land, and the terms of the option were that Price was to coöperate with Doctor Pence in executing a satisfactory contract with some land agent to sell at auction or privately the land, the sale to take place on or before 30 November, 1922. Price's agreement with Doctor Pence was not to take less than $15,000 for the property. After this option of 16 October, 1922, on 30 October, 1922, Price made the contract with plaintiff. Doctor Pence was made a party to this contract, but never signed it.

It nowhere appears in the record that Doctor Pence ever exercised or claimed his rights under the option. The entire evidence shows that defendant made option contracts, both with plaintiff and Doctor Pence. The fact that he could not carry out the contract made with plaintiff, because he had tied up his property with Doctor Pence, is no fault of plaintiff. If he put himself in a position so that he could not perform his contract, he could not take advantage of his own wrong. "*Nemo ex proprio dolo consequitur actionem.* No one maintains an action arising out of his own wrong." Broom Max., 287. The matter is clearly discussed by *Varser, J.*, in the recent case of *Samonds v. Cloninger, ante,* 610.

In fact, Doctor Pence never asserted any rights under the option and brought a suit to foreclose his mortgage. The evidence shows that plaintiff complied with his contract. On the entire record the charge of the court was correct.

Defendant says: "Exception 16 (12th assignment of error) is of the highest importance. The court signed the judgment tendered by plaintiff and set out in the record granting a recovery of the amount of $969.00 with interest and cost, and declaring it to be 'a lien on the lands mentioned and described in the complaint,' and ordering execution to issue 'against said lands.' The defendant protested this judgment, especially the *lis pendens* clause."

We think there was no error in the judgment allowing a recovery for the amount found by the jury to be due, but there was error in the judgment in holding that plaintiff had a valid *lis pendens* on the land and plaintiff's judgment was a lien on the land and execution could issue on the land. There is no statute in this State giving a lien to the plaintiff, an auctioneer or realtor on land he sells, and there is nothing in the contract giving a lien. We can find no authority to sustain plaintiff's contention that he has a lien—he cites none in his brief. Plaintiff, auctioneer, has no more lien on the land of the party he contracts with to sell land, unless it gives a lien, than a grocer who sells

his groceries, a doctor or lawyer who renders professional services, or any person who brings an action to recover a money judgment.

The statutes now in force—Civil Procedure, Art. II, *Lis Pendens*—are as follows:

C. S., 500. "In an action affecting the title to real property, the plaintiff, at or any time after the time of filing the complaint or when or any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at or any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby."

C. S., 501. "Any party to an action desiring to claim the benefit of a notice of *lis pendens,* whether given formally under this article or in the pleadings filed in the case shall cause such notice to be cross-indexed by the clerk of the Superior Court in a docket to be kept by him, to be called Record of Lis Pendens, which index shall contain the names of the parties to the action, where such notice (whether formal or in the pleadings) is filed, the object of the action, the date of indexing, and sufficient description of the land to be affected to enable any person to locate said lands. The clerk shall be entitled to a fee of twenty-five cents for indexing said notice, to be paid as are other costs in the pending action."

C. S., 502. "From the cross-indexing of the notice of *lis pendens* only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice."

C. S., 503. "The notice of *lis pendens* is of no avail unless it is followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after the cross-indexing."

In 1903 (Public Laws, ch. 472), section 229 of The Code was amended and C. S., 501 and 502 were substantially enacted for Buncombe County. In 1919 (Public Laws, ch. 31), the Buncombe amendment (substantially C. S., 501-2, *supra*) was made applicable to the entire State. The Buncombe provision is section 464, Revisal of 1905. This *lis pendens* statute applies to "an action affecting the title to real property."

"*Real Estate* consists of lands, tenements and hereditaments. Land means the ground and the air above it and all that is below the surface of the earth and all that is erected on it," etc. . . .

"*Real Property* when used in a statute is coextensive with 'lands, tenements and hereditaments.'" I Mordecai's Law Lectures, (2 ed.), p. 461.

"Title is the means whereby the owner of lands has the just possession of his property. Co. Litt., 345; 2 Bl. Com., 195." Black's Law Dic., p. 1157.

The suit of plaintiff is to recover a money judgment and is in no way "an action affecting the title to real property."

The rule of *lis pendens* is well stated in 25 Cyc., p. 1454 III A: "The rule of *lis pendens* applies to actions at law as well as to equity suits. It does not apply to an action merely seeking to recover a money judgment, nor to any other action which does not directly affect property. It applies at common law to all suits or actions which directly affect real property, such as an action to enforce a trust in land, or to set aside a deed or mortgage, or to redeem from a foreclosure sale, or for specific performance, or to charge the separate estate of a married woman with the payment of a debt, or relating to the sale of real estate of decedents, or an action by heirs to set aside the probate of a will devising land, or an action to declare a deed absolute in form a mortgage. So unlawful detainer suits are *lis pendens,* as are replevin suits." 17 R. C. L., 1019.

"The doctrine is thus stated in Am. and Eng. Ency. Law (2 ed.) Vol. 21, p. 630: 'As a general rule an action or suit brought solely for the recovery of a money judgment or for other relief not directly affecting property will not constitute *lis pendens;* and, in the absence of fraud or collusion between the parties thereto, alienations are valid until the property is affixed with a judgment or execution lien, or taken into custody by an attachment, receivership or other auxiliary proceeding.'" *Moragne v. Doe,* 143 Ala., p. 459.

From the view we take of this case, we do not think it necessary to consider the appeal of petitioner, George R. Wooten. Plaintiff has no lien on the land purchased by Wooten at the commissioner's sale. The fact that the court refused to allow Wooten to become a party defendant, in the language of the poet "The subsequent proceedings interested him no more."

Judgment against K. A. Price, in accordance with this opinion, is Modified and affirmed.

Appeal by George R. Wooten, is dismissed.

M. L. BASS, BY HIS NEXT FRIEND, J. C. BASS v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 24 January, 1925.)

APPEAL by defendant from *Bryson, J.,* at March Term, 1924, of FORSYTH.

This was a civil action tried before his Honor, Frank T. Baldwin and a jury, at the April Term, 1923, of the Forsyth County Court, and was heard on appeal at the March Term, 1924, of the Superior Court of Forsyth County, by his Honor, T. D. Bryson.

In the trial of this cause in Forsyth County Court, before Judge Frank T. Baldwin and a jury, the issues of negligence, contributory negligence, assumption of risk and damages were all submitted to the jury and found in favor of plaintiff. Judgment was rendered for plaintiff. The defendant made several exceptions and assignments of error and appealed to the Superior Court. The case was then heard on the assignments of error from the county court before Judge T. D. Bryson, who confirmed the judgment of the Forsyth County Court. Defendant excepted, assigned errors and appealed to the Supreme Court.

Chas. W. Stevens and Archie Elledge for plaintiff.
Manly, Hendren & Womble for defendant.

PER CURIAM. We have heard the arguments of counsel, read the record carefully and gone over the well prepared and exhaustive briefs of the parties. The judge of the Forsyth County Court, in a full and very complete charge, gave fairly the contentions of the parties and charged the law on all the issues, as seems to us, with care and accuracy. The exceptions and assignments of error made by defendant on appeal to the Superior Court were not sustained, and judgment for the plaintiff was confirmed by the Superior Court. *Hines v. R. R.,* 185 N. C., p. 72; *Crisp v. Hanover Thread Mill, ante,* 89.

We can find

No error.

LILLIE A. ZIGLAR ADMINISTRATRIX OF E. C. ZIGLAR v. J. E. SISK.

(Filed 31 January, 1925.)

APPEAL by defendant from *Bryson, J.,* at May Term, 1924, of FORSYTH.

Manly, Hendren & Womble and J. C. Brown for plaintiff.
Glidewell & Mayberry, A. E. Holton and Brooks, Parker & Smith for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for the alleged unlawful homicide of her intestate and recovered judgment. The defendant appealed chiefly assigning as error the exclusion of evidence tending to show the animus and ill-will of the deceased toward the defendant and the court's instruction as to the quantum of proof required of the defendant. A careful examination of the record leads us to the conclusion that the case has been tried in substantial compliance with previous decisions of this Court and that there is no sufficient reason for disturbing the judgment.

We find

No error.

HERMAN H. HOOPS, WILLIAM F. HOOPS AND HERMAN T. HOOPS, TRADING AS HAWLEY & HOOPS v. JAMES ELLISON, TRADING AS JAMES ELLISON & COMPANY.

(Filed 18 February, 1925.)

APPEAL by defendant from *Sinclair, J.*, and a jury, at October Term, 1924, of BEAUFORT.

Edward L. Stewart, Frank H. Bryan and Wiley C. Rodman for plaintiffs.

John G. Tooly and Harry McMullan for defendant.

PER CURIAM. We have heard the arguments of counsel and examined the briefs carefully. From a critical examination of the record in this case and the assignments of error made by defendant, we are unable to find any reversible or prejudicial error.

No error.

BENNETT DAY IMPORTING CO. v. W. J. WOODLY.

(Filed 18 February, 1925.)

APPEAL by defendant from *Lyon, J.*, at September Term, 1924, of PASQUOTANK.

Civil action tried upon the following issues:

"1. Is the defendant indebted to the plaintiff in the sum of $785.38, with interest from 2 January, 1922, as alleged in the complaint? Answer: 'Yes.'

"2. Is the plaintiff indebted to the defendant on the counterclaim as alleged in the answer; if so, in what amount? Answer: 'Nothing.'"

Judgment on the verdict for plaintiff. Defendant appeals.

W. A. Worth for plaintiff.

J. B. Leigh, McMullan & LeRoy for defendant.

PER CURIAM. Plaintiff sues for goods sold and delivered to the defendant and recovers. The defendant sets up a counterclaim asking damages for breach of warranty in the sale of said goods, and loses on his counterclaim. The controversy, on trial, narrowed itself to an issue of fact, which the jury alone could determine. The record presents no reversible error. The judgment will be upheld.

No error.

N. MACON PATTERSON ET AL. v. W. N. EVERETT, SECRETARY OF STATE ET AL.

(Filed 25 February, 1925.)

Bonds—Statutes—Veterans' Loan Fund Act.

Held, in this case, that the proposed issuance of bonds in pursuance of chapter 190, Public Laws of 1923, known as the "World War Veterans' Loan Fund Act," under the facts alleged in the complaint and admitted by the demurrer, has not been approved by a majority of the qualified electors of the State as required by the express provisions of the statute, and are therefore invalid.

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Daniels, J.*, at February Term, 1925, of WAKE.

Civil action to enjoin the issuance of bonds under chapter 190, Public Laws 1923. From a judgment sustaining a demurrer interposed by the defendants, plaintiff appeals.

John H. Manning for plaintiff.

Attorney-General Brummitt, Assistant Attorney-General Nash and Wade H. Phillips for defendants.

HOKE, C. J. The parties having requested a decision in this case during the present session of the Legislature, to the end that further action may be had upon the subject, if found necessary; as now advised, it is the opinion of the Court that on the facts alleged in the complaint and admitted by the demurrer, the authority to issue bonds under chapter 190, Public Laws 1923, known as the "World War Veterans' Loan Fund Act," has not been approved by a majority of the qualified electors of the State, as required by the express provisions of said act; and that

said bonds, if issued, would not be valid and binding obligations of the State of North Carolina. The demurrer, therefore, should have been overruled.

A more extended opinion to this effect will be prepared and filed later.

CLARKSON, J., dissenting. Section 12 of the act under consideration, is as follows:

"The question of contracting a bonded indebtedness of the State of North Carolina to the amount of two million dollars in accordance with the provisions of this act shall be submitted to the vote of the qualified electors of the State at the general election to be held in one thousand nine hundred and twenty-four, for election of members of the General Assembly. A separate ballot shall be printed and distributed to the pollholders in the said election, to be voted by the qualified electors in said election, upon which shall be printed or written the words, 'For World War Veterans' Loan Fund Bonds,' and an equal number of ballots, upon which is written or printed the words, 'Against World War Veterans' Loan Fund Bonds,' shall likewise be distributed. If a majority of the qualified electors in said election vote 'For World War Veterans' Loan Fund Bonds' the board of advisors created by this act shall immediately proceed to carry into effect the provisions hereof. If a majority of said qualified voters shall, in said election, vote 'Against World War Veterans' Loan Fund Bonds,' then this act shall thereby be annulled. Notice of the submission of the proposition shall be given, the ballots canvassed and returned, abstracts of the vote made and submitted, the votes canvassed and a declaration of the result made in the same manner as is provided in the case of the submission of a proposed constitutional amendment."

Under this language, it is my interpretation that a majority of the votes cast in said election is all that is required.

My reasons will be set forth more fully when the Court's opinion is filed.

CAVENESS PRODUCE CO. v. CHANDLER-DAVIS CO., AND STATE BANK OF LAKELAND, FLORIDA, INTERPLEADER.

(Filed 25 February, 1925.)

APPEAL by plaintiff from *Bond, J.*, at September Term, 1924, of VANCE.

Plaintiff, a North Carolina corporation, with its principal place of business at Raleigh, N. C., having a cause of action against Chandler-

Davis Company, a foreign corporation, instituted this suit in the Superior Court of Vance County, and sought to obtain service upon the defendant by attaching the proceeds of a draft in the hands of the Citizens Bank & Trust Company of Henderson, N. C., alleging that said funds belonged to the defendant.

Thereafter, the State Bank of Lakeland, Florida, was allowed to intervene and to set up its claim of title to the proceeds of said draft. Upon the issue thus raised, there was a verdict and judgment for the intervener. The defendant made no appearance and filed no answer. Plaintiff appeals.

D. P. McDuffee and Thomas M. Pittman for plaintiff.
I. B. Watkins and T. T. Hicks & Son for intervener.

PER CURIAM. This case is not unlike many others in our reports, and it seems to have been tried in accordance with the law heretofore declared in a number of decisions. *Sterling Mills v. Milling Co.,* 184 N. C., 461; *Bank v. Monroe,* 188 N. C., 446; *Mangum v. Grain Co.,* 184 N. C., 181.

The record presents no reversible error, and hence the verdict and judgment will be upheld.

No error.

MRS. W. B. ROBERTS v. ROBERTS-ATKINSON CO. AND J. J. TOOMS.

(Filed 4 March, 1925.)

APPEAL by defendant, Roberts-Atkinson Company, from *Barnhill, J.,* at September Term, 1924, of JOHNSTON.

Civil action tried upon the following issues:

"1. Is the defendant J. J. Tooms indebted to the plaintiff as alleged in the complaint? Answer: 'Yes.'

"2. If so, in what amount? Answer: '$675.00 with interest.'

"3. What was the value of the crops of J. J. Tooms, received by defendant Roberts-Atkinson Company, on which the plaintiff held a mortgage, as alleged in the complaint? Answer: '$1,003.84.'

"4. Did defendant J. J. Tooms dispose of the property described in said mortgage, with intent to cheat and defraud the plaintiff? Answer: 'Yes.'"

Judgment on the verdict for plaintiff. Defendant, Roberts-Atkinson Company, appeals.

Wellons and Wellons for plaintiff.
F. H. Brooks for defendant.

PER CURIAM. The trial of this cause reduced itself to a controversy over issues of fact, which the jury alone could determine. A careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the principles of law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to require another hearing. The verdict and judgment, therefore, will be upheld.

No error.

STATE v. GEORGE HUGHES AND LESLIE BEST.

(Filed 11 March, 1925.)

APPEAL by defendants from *Daniels, J.*, at October Term, 1924, of LENOIR.

Defendants were convicted upon an indictment charging them with store-breaking, larceny and receiving. At close of all the evidence, defendants renewed their motion, first made at the close of the evidence for the State, for judgment of nonsuit. Defendants excepted to the refusal of his Honor to allow their motion, and assign same as error. From judgment upon the verdict, defendants appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
Sutton & Green for defendants.

PER CURIAM. The only assignment of error is based upon defendants' exception to the refusal of the court to allow their motion, at the close of all the evidence, for judgment of nonsuit. C. S., 4643. We do not deem it necessary to set out the evidence, which is stated in the case on appeal. The testimony of the witness, if found by the jury to be true, was sufficient evidence to sustain the allegations of the indictment. There was no error in the refusal of defendants' motion. No other error is assigned by defendants. The evidence was sufficient to sustain the verdict. Upon the whole record there is

No error.

C. H. DICKENS v. W. B. DREWRY.

(Filed 11 March, 1925.)

APPEAL by plaintiff from *Lyon, J.*, at September Special Term, 1924, of HALIFAX.

Civil action tried upon the following issues:

"1. Did the defendant speak of and concerning the plaintiff the words in substance alleged in the complaint? Answer: 'Yes.'

"2. If so, what damages is the plaintiff entitled to recover? Answer: '$500.00.'

"3. Did the defendant assault the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"4. If so, what damages, if any, is the plaintiff entitled to recover? Answer: '$250.00.' "

Judgment on the verdict for plaintiff. Plaintiff appeals, assigning errors.

George C. Green and Dunn & Johnson for plaintiff.
Travis & Travis and R. H. Parker for defendant.

PER CURIAM. Plaintiff appeals from a judgment in his favor, alleging errors on the issues relating to damages. He thinks the amounts awarded are too small. 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 that no reversible or prejudicial error was committed on the trial.

No benefit would be derived from a discussion, *seriatim*, of the several exceptions and assignments of error, as they present no new or novel point of law not heretofore settled by our decisions.

The verdict and judgment will be upheld.

No error.

CAVENESS PRODUCE COMPANY v. CITY OF RALEIGH.

(Filed 25 March, 1925.)

APPEAL by plaintiff from *Horton, J.*, at September Term, 1924, of WAKE.

In a suit to recover for loss alleged to have been caused by defendant's negligence or breach of contract in failing to protect plaintiff's fruit while in cold storage, the jury returned this verdict:

1. Did the defendant contract and agree to accept and receive, for hire, fruits of the plaintiff, and to continuously operate its plant and maintain the necessary and proper temperature therein, as alleged in the complaint? Answer: No.

2. If so, did the defendant fail to continuously operate its plant and maintain the necessary and proper temperature therein, as alleged in the complaint? Answer: .....

3. Were the fruits of the plaintiff damaged by the negligence of the defendant, as alleged in the complaint? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: .....

Judgment for defendant. Appeal by plaintiff.

Douglass & Douglass for plaintiff.
Chas. U. Harris and W. G. Barnes for defendant.

PER CURIAM. It is not necessary to consider the question whether the alleged contract of the defendant was *ultra vires*, for upon competent evidence and a charge free from error the jury found that no such contract had been made and that the alleged loss had not been caused by the defendant's negligence.

The exceptions to the admission and exclusion of evidence are without merit.

No error.

FRANK MURPHY ET AL. v. S. A. EDWARDS ET AL.

(Filed 25 March, 1925.)

APPEAL by defendants from *Calvert, J.*, at September Term, 1924, of CUMBERLAND.

Civil action to set aside a deed and to recover possession of the land purported to be conveyed thereby, it being alleged that the paper-writing in question was not the act and deed of plaintiffs' ancestor, in that the same was never signed by him or executed with his authority. The case was tried upon the following issues:

"1. Was the paper-writing, a copy of which is attached to the complaint and marked Exhibit A, and which is registered in the office of the register of deeds of Cumberland County in Book 286, p. 14, the act and deed of Ephraim McNair? Answer: 'No.'

"2. Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint? Answer: 'Yes.'

"3. Are plaintiffs the sole surviving heirs at law of Ephraim McNair, who died intestate in Cumberland County in July, 1918? Answer: 'Yes.'"

Judgment on the verdict for plaintiffs, from which the defendants appeal.

C. M. Walker and Chas. G. Rose for plaintiffs.
Bullard & Stringfield and Downing & Downing for defendants.

PER CURIAM. The controversy on trial narrowed itself to issues of fact, which the jury alone could determine. A careful perusal of the record leaves us with the impression that the case has been heard and determined 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 or prejudicial error.

It would only be a work of supererogation and repetition to discuss the exceptions, *seriatim,* as they present no new or novel point of law not heretofore settled by our decisions. The verdict and judgment will be upheld.

No error.

F. W. MOORE ET AL. v. J. M. CRAWFORD ET AL.

(Filed 1 April, 1925.)

APPEAL by plaintiffs from *Cranmer, J.,* at Chambers, 22 September, 1924, from ALAMANCE.

Civil action to enjoin the defendants from paving Albright Avenue in the town of Graham and from levying an assessment to pay for same as authorized by law. There was a preliminary restraining order issued in the cause, and dissolved on the return day thereof, on the ground that no illegal conduct on the part of the defendants had been shown, or cause for equitable relief established. From the judgment dissolving the temporary restraining order, the plaintiffs appeal.

J. S. Cook for plaintiffs.
W. I. Ward and J. Dolph Long for defendants.

PER CURIAM. The record presents no legal or reversible error, and hence the judgment of the Superior Court, dissolving the temporary restraining order, issued in the cause, must be

Affirmed.

STATE v. JESSE BARBEE.

(Filed 1 April, 1925.)

APPEAL by defendant from *Cranmer, J.*, at December Term, 1924, of DURHAM, upon conviction for a breach of C. S., secs. 4357 and 4358.

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

J. W. Barbee for defendant.

PER CURIAM. Upon examination of the record and the briefs we have concluded that the case has been tried in substantial compliance with the law and that no reversible error has been made to appear.

No error.

THE CITIZENS BANK & TRUST COMPANY v. J. J. KNOX, E. C. WOODBURY AND W. E. MAULTSBY, PARTNERS, TRADING AS EL PASO LUMBER COMPANY.

(Filed 8 April, 1925.)

APPEAL by defendants from *Grady, J.*, and a jury, October Term, 1924, NEW HANOVER.

Wright & Stevens for plaintiff.

Herbert McClammy for defendants.

PER CURIAM. This case was here on appeal and a new trial was awarded defendant, 187 N. C., 565. On the hearing in the court below on the new trial, the issues submitted to the jury and their answers thereto, were as follows:

"1. Did the plaintiff bank exercise due care and diligence in attempting to collect the $500 draft referred to in the answer? Answer: 'Yes.'

"2. What amount, if any, has the plaintiff collected on said $500 draft? Answer: 'Nothing.'

"3. In what amount, if anything, are the defendants indebted to the plaintiff on the $800 note sued on? Answer: ....."

The issues submitted were those properly raised by the pleadings, and in accordance with the former decision in this case.

From a careful inspection of the record, we can find no prejudicial or reversible error. The jury having found the issues in favor of the plaintiff, and the question being one of fact, we find

No error.

STACY, C. J., and VARSER, J., took no part in the consideration or decision of the case.

THE MOTOR COMPANY v. EARLY MARION.

(Filed 8 April, 1925.)

APPEAL by defendants from *Schenck, J.*, February Term, 1925, of FORSYTH.

Hastings, Boone & Dubose for plaintiff.
Holton & Holton and T. W. Kallam for defendant.

PER CURIAM. This case was heard in the Superior Court of Forsyth County, upon appeal from the Forsyth County Court. Defendant's exceptions to the rulings of the county court were overruled, and he appealed to this Court.

Upon examination of the entire record, it appears that the rulings of the Superior Court were, in all respects, in accordance with law;

Therefore, let the judgment of the Superior Court of Forsyth County be

Affirmed.

ROBT. A. JARRELL v. EDNA COTTON MILLS.

(Filed 15 April, 1925.)

APPEAL by plaintiff from *McElroy, J.*, February Term, 1925, of GUILFORD.

R. T. Stiers and R. C. Strudwick for plaintiff.
P. W. Glidewell and King, Sapp & King for defendant.

PER CURIAM. After hearing the arguments of counsel, and from a careful reading of the record and briefs in this case and examination of the authorities in this jurisdiction, we are of the opinion that the instant case is governed by the principles of law laid down in *Butler v. Mfg. Co.*, 182 N. C., p. 547.

The judgment of the court below is

Affirmed.

CECIL OSBORNE, BY HIS NEXT FRIEND, D. E. OSBORNE v. C. V. BUNDY.

(Filed 15 April, 1925.)

APPEAL by plaintiff from *McElroy, J.*, at January Term, 1925, of GUILFORD.

Wilson & Frazier for plaintiff.

Peacock, Dalton & Lyon and King, Sapp & King for defendant.

PER CURIAM. The defendant is engaged in the mercantile business at Oakdale Cotton Mills and operates a Ford car for the delivery of packages, and is sued for personal injury alleged to have been caused by the negligence of his driver. An inspection of the record reveals no sufficient evidence of actionable negligence, and for this reason the judgment is

Affirmed.

GEORGE SOLOMON v. J. A. KOONTZ, TRADING AS LIBERTY TAILORS.

(Filed 15 April, 1925.)

Negligence—Evidence.

In this action to recover damages for the negligent injury to plaintiff's hand caused by a burn, the defendant's objection to the explanation of the plaintiff that he had kept his hand tied up to keep people from worrying him, is untenable.

APPEAL by defendant from *McElroy, J.*, at November Term, 1924, of FORSYTH.

Civil action to recover damages for personal injuries. Plaintiff was employed by defendant as a cleaner and presser of clothes. While engaged in the performance of his duties as such employee, plaintiff was burned about the face and hands by the sudden ignition of gas and

fumes arising from gasoline which he was using in his work. This work was done in a small room, in which it was necessary for plaintiff to use an artificial light. Defendant had furnished for this purpose, an electric light shortly before the injury to plaintiff. This electric light had been disconnected, as a result of the burning of an adjoining building. This fact was brought to the attention of defendant by plaintiff and defendant directed plaintiff to use a kerosene lamp, then in the shop, promising him that he would have the electric light fixed in a few days. Relying upon this promise, plaintiff, although aware of the danger, used the lamp as directed. The gas and fumes were ignited by the flame from the lamp, and plaintiff thereby injured.

The foregoing are the facts as found by the jury. From the judgment, that plaintiff recover of defendant the sum of $3,500 as damages assessed by the jury, defendant appealed.

Manly, Hendren & Womble and L. B. Wall for plaintiff.
Raymond G. Parker and L. V. Scott for defendant.

PER CURIAM. No exceptions to the charge of the court to the jury appear in the statement of case on appeal. The charge is set out in full. It is in all respects full, clear and correct. No errors are assigned to instructions as given, or to failure to give proper instructions upon essential matters involved in the controversy.

Plaintiff, testifying as a witness in his own behalf, was asked the question: "Why do you use that cloth on your hand?" Defendant's objection to this question was overruled. Defendant excepted. Plaintiff replied: "To keep everybody from worrying me about what is the matter with my hand. Some ask me if I had the leprosy, and then I have to go to work and explain it all—how it was done—when I have time to talk." Plaintiff had testified that his hands were burned by the flames and that the skin had peeled off; that he could not use his hands with any satisfaction. There was no motion to strike out the answer or any part of it. Defendant's assignment of error based on this exception cannot be sustained. Both question and answer were competent as tending to show that plaintiff's hand was burned as alleged and contended. The interesting question discussed in defendant's brief as to whether plaintiff could recover for humiliation resulting from a deformed hand does not arise upon the record. The competency of the evidence does not depend upon the answer to this question.

We have examined the other assignments of error. They are not sustained. The verdict of the jury has been rendered upon competent evidence, and the judgment must be affirmed. There is

No error.

LAURA ROSS HARGRAVE AND ELDORA ROSS v. S. S. McNINCH.

(Filed 6 May, 1925.)

APPEAL by defendant from *Shaw, J.*, at November Term, 1924, of MECKLENBURG, upon the following verdict:

1. Are the plaintiffs the owners in fee of the lot described in the complaint? Answer: Yes.

2. Has the defendant any interest in said lot? Answer: No.

D. W. Spencer, Tillett & Guthrie and C. W. Tillett, Jr., for plaintiffs.

J. F. Flowers for defendant.

PER CURIAM. This is an action to remove a cloud from the plaintiffs' title to a lot in the city of Charlotte. In 1914 the defendant executed a deed of trust conveying real estate in Ward 4 to secure certain indebtedness mentioned in said deed and afterward made default in payment. The trustees sold the land in 1918 to the Home Realty Company, subsequently known as the American Title and Guaranty Company, and executed to the purchaser a deed therefor. Suit was then brought to dispossess the defendant, and judgment was rendered against him. In 1919 a part of the land was conveyed to W. F. Buchanan, and in 1923 the remainder thereof was conveyed to C. W. Johnson. Thereafter Johnson conveyed to the plaintiffs that portion of the land which lies between the lot conveyed to Buchanan and the lot known as the Wriston property. The plaintiffs are in possession, and they allege that the defendant has wrongfully set up a claim of title to their property.

The defendant filed an answer outlining his former transactions with the American Trust Company and alleging that this company or the American Title and Guaranty Company, subsidiary thereto, had received the property in question under a trust agreement which had not been performed, and by virtue of which the Title and Guaranty Company was without authority to transfer the title.

Record and parol evidence was introduced, and at the conclusion of the evidence the jury were instructed, under the admissions made by counsel, that if they found the facts to be as shown in the records and testified to by the witnesses they should answer the first issue "Yes" and the second "No."

We are satisfied from an examination of the record that there is no error in this instruction. In fact, upon his own showing the defendant

has failed to establish a valid defense to the plaintiffs' cause of action. A discussion of the exceptions would serve no useful purpose, and for this reason is omitted.

No error.

CLARKSON and VARSER, J.J., not sitting.

STATE v. MARION RAY.

(Filed 20 May, 1925.)

APPEAL from *McElroy, J.*, at November Term, 1924, of BUNCOMBE.

Marion Ray was convicted of larceny and receiving stolen property, and he appeals.

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

Robert R. Reynolds for defendant.

PER CURIAM. The defendant has appealed from a sentence confining him for a period of twelve months in the common jail of Buncombe County and assigning him to work on the roads of Buncombe County without stripes.

The case was fairly and properly tried. The charge of the learned and careful judge who tried the case below was full and fair. The evidence was sufficient to sustain the verdict. The exceptions are without merit.

We can find in the trial

No error.

OSCAR CABLE v. KITCHEN LUMBER COMPANY.

(Filed 3 June, 1925.)

Employer and Employee—Master and Servant—Safe Place to Work—Instructions—Appeal and Error.

The employer is required to furnish his employee a safe place to work, in this case in the performance of his duties around a band saw, only in the exercise of ordinary care, and an instruction that it was his duty to do so is *held* under the facts in this case as reversible error.

APPEAL by defendant from *Finley, J.*, at March Term, 1925, of GRAHAM.

HUGHES *v.* LUTHER.

Civil action to recover damages for an alleged negligent injury sustained by plaintiff, an employee of the defendant, on 22 April, 1924, while working as an "off-bearer" around a band saw in the lumber plant of the defendant company.

From a verdict establishing liability, and judgment thereon, the defendant appeals, assigning errors.

T. M. Jenkins for plaintiff.
R. L. Phillips and A. Hall Johnston for defendant.

PER CURIAM. Defendant assigns as error the following excerpt from the charge: "The court charges you as a matter of law that the duty devolves upon the defendant to furnish the plaintiff a reasonably safe place to work, reasonably safe machinery, appliances, and that they should be operated in a reasonably safe way."

This instruction is in direct conflict with what was said in *Owen v. Lumber Co.*, 185 N. C., 612; *Gaither v. Clement*, 183 N. C., 455; *Tritt v. Lumber Co.*, 183 N. C., 830; *Smith v. R. R.*, 182 N. C., 296, and must be held for reversible error.

Speaking to the question in *Murphy v. Lumber Co.*, 186 N. C., 746, it was said: "It is not the absolute duty of the master to provide for his servant a reasonably safe place to work and to furnish him reasonably safe appliances with which to execute the work assigned—such would practically render the master an insurer in every hazardous employment—but it is his duty to do these things in the exercise of ordinary care. *Owen v. Lumber Co., supra.* This limitation on the master's duty is not a mere play on words, nor a distinction without a difference, but it constitutes a substantial fact, or circumstance, affecting the rights of the parties. *Tritt v. Lumber Co., supra.*"

It is conceded by the plaintiff that the exception to this instruction is well taken unless the error was cured in other portions of the charge. We do not find that it was so cured. A new trial must be awarded.

New trial.

W. I. HUGHES v. BYRON LUTHER.

(Filed 3 June, 1925.)

Negligence—Automobiles—Proximate Cause—Nonsuit.

Where there is evidence tending to show that the plaintiff was driving his automobile at night along a public highway, and was damaged by defendant's truck standing along the side of the road without a light

as required by C. S., 2615, defendant's motion as of nonsuit is properly granted when his violation of the statute had not in any way produced the injury or aided in causing it.

APPEAL by plaintiff from *Stack, J.*, at February Term, 1925, of BUNCOMBE.

Action to recover damages for injury to plaintiff's automobile, alleged to have been caused by the negligence of defendant. At close of evidence introduced by plaintiff, upon motion of defendant, there was judgment of nonsuit. From this judgment plaintiff appealed.

Fortune & Fortune for plaintiff.
George M. Pritchard for defendant.

PER CURIAM. Plaintiff was driving an automobile on a public road in Buncombe County, about 9:30 p. m. As he drove around a curve at the rate of 27 or 28 miles per hour, with the lights on his automobile, he saw, standing on the right-hand side of the road, about three feet from its edge, defendant's truck. There was no light on this truck. Plaintiff saw the truck about 75 yards ahead of him. The road was about 18 feet wide. Another automobile with lights burning was approaching from the opposite direction. Plaintiff did not turn out or stop his automobile, but drove into the truck. He testified that he thought the truck was moving. After he struck the truck his automobile skidded about 20 yards. It was injured by the collision.

Conceding that it was negligence for defendant to stop his truck on the roadside in the night time and not to have a light on the rear, as required by statute (C. S., 2615), this negligence was not the proximate cause of the injury to plaintiff's automobile. Plaintiff approached defendant's truck at a rapid rate of speed, returning, as he says, from a fishing trip, and, it appears, drove into the truck, which he saw first at a distance of 75 yards. He saw the car approaching from the opposite direction, and yet when he struck defendant's truck was going at a rate which caused his automobile to skid 20 yards. There was no error in rendering judgment of nonsuit in this case, and the judgment is affirmed.

No error.

CASES FILED WITHOUT WRITTEN OPINIONS

Croom v. Dunn. (222)

Dunn v. Jones. (224)

Dunn v. Tilghman. (223)

Key v. Lumber Co. (583)

Shaw v. Handle Co. (16)

CHANGE IN RULE 5 REGARDING TIME FOR DOCKETING TRANSCRIPT OF APPEAL

It is ordered by the Court that Rule 5, as published on page 788 of 185 N. C., be amended by striking out the word "seven" on the bottom line of page 788 and inserting in lieu thereof the word "fourteen." The effect of this order being that transcript of appeal shall be required to be docketed in this Court fourteen days preceding the call of the District to which it belongs, instead of seven days as heretofore required, but does not affect time for filing briefs.

This order will become effective 1 January, 1926, but it is desired by the Court that its provision be observed prior to that time.

For the Court: VARSER, J.

24 June, 1925.

APPEALS FROM SUPREME COURT OF NORTH CAROLINA

IN THE SUPREME COURT OF THE UNITED STATES.

List below of the cases which came to the Supreme Court of the United States during the October Term, 1924, on writ of error or writ of certiorari to your court:

No. 71. Southern Ry. Co. et al., Plaintiff in error, v. City of Durham et al., affirmed with costs, November 17, 1924.

No. 250. Yadkin R. R. Co. et al., Petitioners, v. Sigmon, Administratrix, petition granted February 18, 1924; reversed with costs and remanded February 2, 1925.

No. 253. Seaboard Air Line Ry. Co., Plaintiff in error, v. Bedshe, dismissed with costs on motion of Plaintiff in error, January 26, 1925.

No. 322. North Carolina R. R. Co., Petitioner, v. Story, Sheriff, petition granted April 7, 1924; reversed with costs and remanded March 16, 1925.

No. 650. Hiawassee River Power Co., Plaintiff in error, v. Carolina-Tennessee Power Co., dismissed for want of jurisdiction on March 23, 1925.

No. 319, October Term, 1925, Wachovia Bank & Trust Co., Admx., Plaintiff in error, v. Doughton, Comr., docketed March 17, 1925, not yet argued.

No. 387, October Term, 1925, Vanderbilt et al., Receivers, etc., Plaintiff in error, v. Atlantic Coast Line R. R. Co., docketed April 27, 1925, not yet argued.

Note:
Pages
845
thru
848
do not exist.

INDEX.

ABATEMENT. See Grand Jury, 1.

ACCEPTANCE. See Compromise and Settlement, 1; Appeal and Error, 18; Contracts, 17.

ACCIDENT. See Employer and Employee, 10.

ACCOUNT. See Injunction, 1; Contracts, 12.

ACTIONS. See Negligence, 4, 10; Evidence, 27; State Treasurer, 1; Contracts, 7, 14; Taxation, 1, 15; Bills and Notes, 2; Courts, 8; Municipal Corporations, 8; Judgments, 4; Criminal Law, 15; Deeds and Conveyances, 11; Mortgages, 3; Bankruptcy, 3; Illegitimate Children, 1; Statutes, 4; Carriers, 5; Usury, 1; Trade Names, 1; Schools, 3.

1. *Actions—Husband and Wife—Consortium—Death—Survival of Action—Statutes.*—The death of W. T. H. was caused by the negligence of the defendant, and his personal representative brought suit and recovered damages for the intestate's wrongful death. Thereafter, F. L. H., wife of W. T. H., brought her individual action against the defendant to recover damages. The trial judge instructed the jury that damages might be awarded her as a fair compensation for her mental anguish and loss of consortium: *Held*, to be error. *Hinnant v. Power Co.*, 120.

2. *Actions — Parties — Partnership — Deeds and Conveyances — Fraud — Causes of Action—Misjoinder—Pleadings—Demurrer.*—The bringing of a creditor's bill to establish the existence of a partnership between the defendants, to obtain judgment on their respective claims and to set aside a fraudulent conveyance made by one of these defendants to another on all the assets of the alleged copartnership, is not a misjoinder of parties and causes of action, and a demurrer thereto will not be sustained. *Robinson v. Williams*, 256.

3. *Actions — Claim and Delivery — Possession — Title — Principal and Agent—Parties—Statutes.*—Where one has intervened (C. S., 829) in an action, and is allowed to plead that the property attached in the action was his own, and in his possession at the time of the levy under the attachment, and there was evidence thereafter introduced, by affidavit and otherwise, that the possession and ownership was claimed by the intervener, as agent of another who had purchased for value from the defendant in the original action: *Held*, on motion to make such third person a party, the refusal of the motion is not a matter of discretion with the trial court, but should have been granted to have all the parties at interest before the court and determine the matters involved in one and the same action. C. S., 460. *Bank v. Murphy*, 479.

4. *Same—Merchandise in Bulk—Sales—Instructions—Appeal and Error.*—The failure to comply with the provisions of C. S., 1013, in attempting to make a sale of merchandise in bulk, makes the sale void as to existing creditors, etc., of the vendor, and not as to subsequent creditors after the merchandise has been taken over by the purchaser through his agent and the business has been thus continued; and an instruction is reversible error upon evidence of this character that

ACTIONS—*Continued.*

failure to comply with C. S., 3288, rendered the transaction void, and C. S., 3291, making such failure a misdemeanor, does not affect the result. *Ibid.*

ADMISSIONS. See Insurance, 4; Wills, 11.

ADVANCEMENTS.

1. *Advancements.*—An advancement is a provision made by a parent on behalf of a child for the purpose of advancing this child in life and to enable him to anticipate his inheritance to the extent of such advancement. *Lunsford v. Yarbrough*, 476.

2. *Same—Wills—Devise—Interest—Estates—Remainders.*—The ordinary rule that an advancement bears interest from the death of the parent does not control the intent manifestly appearing from the parent's will to the contrary; nor will the death of the testator control in instances where his express intent is to postpone an equal division among his children until after the death of his wife, to whom the estate is thus given, for in such cases interest on the advancements commences from the death of the life tenant. C. S., 3234, providing that the existence of the widow's life estate is no bar to the rights of vested remainders, has no application. *Ibid.*

ADVERSE POSSESSION. See Grants, 1; Deeds and Conveyances, 7.

AFFIDAVITS. See Injunction, 2.

AGENCY. See Government, 1.

AGREEMENT. See Bills and Notes, 1; Appeal and Error, 19, 25.

ALIMONY. See Divorce, 1.

ALLOWANCE. See Husband and Wife, 1.

AMENDMENT. See Appeal and Error, 7; Statutes, 4.

ANSWER. See Pleadings, 8.

APPEAL. See Appeal and Error.

APPEAL AND ERROR. See Slander, 6; Corporations, 5; Courts, 2, 4, 5, 6, 10; Criminal Law, 3, 6, 18, 25, 27; Homicide, 5, 7, 9, 10; Instructions, 1, 2, 3, 5, 6, 7, 8, 9; Judgments, 1, 3, 4, 13; Partnership, 1, 2; Register of Deeds, 1; Verdict, 1, 3; Evidence, 4, 9, 15, 17, 20, 23, 24, 25, 26, 27; Negligence, 6, 8; Attachment, 1; Wills, 10; Deeds and Conveyances, 7, 10; Divorce, 1; Issues, 1, 2; Taxation, 2, 9; Actions, 4; Employer and Employee, 6, 7, 8, 16, 17; Intoxicating Liquor, 5.

1. *Appeal and Error—Objections and Exceptions—Unanswered Questions—Record.*—Exceptions to the exclusion of answers to questions taken by the prisoner upon the trial for a homicide will not be sustained on appeal when it is not indicated of record what the answers would have been and the materiality and competence of the proposed evidence may not be seen. *S. v. Collins*, 15.

2. *Appeal and Error—Instructions—Record—Presumptions—Prayers for Instructions.*—Where the judge's charge is neither excepted to nor set out in the record on appeal, it will be presumed that it was cor-

APPEAL AND ERROR—*Continued.*

rectly given upon the evidence in the case; and where exceptions for failure to give certain prayers for instructions are insisted upon, on appeal, the refusal to give them will not be held for error, it being required only that the judge give them in his own language substantially as prayed for. *S. v. Rideout*, 156.

3. *Appeal and Error—Case—Settlement by Judge—Record.*—Where, upon disagreement of counsel, the trial judge has regularly settled the case on appeal, the case so settled imports verity and must be accepted as true as to all matters involved therein and determined by the judge; and where only one party has appealed, the other may not successfully move before another judge holding a subsequent term of court to have the judgment set aside as embracing an unauthorized agreement by their attorney, evidently passed upon by the former judge in settling the cause. *In re Ricks*, 187.

4. *Appeal and Error—Harmless Error—Instructions.*—The introduction of irrelevant and immaterial evidence upon the trial is not reversible error when the charge of the court renders it nugatory. *Alston v. Odd Fellows*, 204.

5. *Appeal and Error—Evidence—Identity of Prisoner—Prejudice—Harmless Error.*—Upon this trial for the capital offense of murder in the first degree, the evidence was sufficient to convict of the crime and was conflicting as to whether the defendant continued after reaching his home to drive the deceased in his automobile to the place of the occurrence, or whether another in the automobile did so and committed the offense: *Held*, under this and other evidence in the case, it was not prejudicial or reversible error to the defendant to permit a witness to testify that the defendant drove in his automobile the deceased to the place of the homicide. As to whether this testimony would be error otherwise, *Quere?* *S. v. Evans*, 233.

6. *Appeal and Error—Contentions—Objections and Exceptions—Instructions—Prejudice.*—A statement by the trial judge of the contention of the parties, if incorrect, should be excepted to at the time, in order to be available on appeal; and when it relates to contentions as to the law upon the evidence, it will not be held for reversible error, in the absence of an erroneous instruction to that effect. *Proctor v. Fertilizer Co.*, 244.

7. *Appeal and Error—Opinion of Supreme Court—Modification—Pleadings—Amendments—Principal and Surety.*—When a case has been remanded by the Supreme Court modifying a former opinion to ascertain certain defalcations on official bonds separating the liability under each bond therefor: *Held*, error for the trial judge to exclude from the case on the second trial the consideration as to other defalcations; and to this end he may allow amendments to the pleadings, and such action is not excluded by the former judgment. *S. v. Martin*, 247.

8. *Appeal and Error—Damages—Verdict—Interest.*—Where the issue of the amount of damages has been presented to the jury for determination, and the amount practically agreed upon, depending upon the question as to the defendant's negligence, it is not thereafter open to the defendant, for the first time after verdict, to contend that interest had erroneously been included by the verdict. *Herring v. R. R.*, 286.

APPEAL AND ERROR—*Continued.*

9. *Appeal and Error—Instructions—Evidence—Harmless Error.*—As to whether testimony between the prosecuting witness and the defendant previous to the commission of the offense was competent under the facts of this case, *quere?* But, if error, it was rendered harmless by the instruction to the jury that it was incompetent and not to be considered by them. *S. v. Dickerson*, 328.

10. *Appeal and Error—Criminal Law—Bail—Statutes.*—Upon conviction of a misdemeanor, the appellant may now be released, as a matter of right, upon his giving a bail bond approved by the court as to its sufficiency. C. S., 4653. *S. v. Bradsher*, 401.

11. *Same—Recognizance.*—In this State the difference between a recognizance and a bail bond, on appeal in a criminal action, is not recognized, and the obligation under each is held to be identical; and where the bail bond is given, with sureties, in accordance with the order of the court, approved as required therein, and filed with the court, it becomes in legal effect a recognizance. *Ibid.*

12. *Same—Form—Approval.*—A bail bond for a criminal offense is not required to be in any particular form, and an order of court in respect thereto may designate the approval of the clerk as a prerequisite, or that of some other officer thereof. *Ibid.*

13. *Same—Signing of Sureties Upon Condition—Parties—Notice—Courts.*—The failure of the principal to sign a bail bond is an irregularity that does not necessarily release the sureties thereon, and held sufficient if the sureties signed the bond in the presence of the principal, who delivered it to the clerk of the court, and it was approved by the clerk in accordance with the order of the court, and filed by him as a court record. *Ibid.*

14. *Same—Record.*—Where the court has ordered that one convicted of a criminal offense be released on bail, pending an appeal, requiring the bond to be justified by the sureties and approved by the clerk, in or out of term, etc., any conditions between the parties upon which the sureties may have signed will not be binding upon the State unless approved by the court, and the fact that the sheriff was aware of and approved these conditions is not available to the sureties seeking to avoid liability, and is not alone sufficient. *Ibid.*

15. *Same—Judgments.*—Whether the facts found by the trial judge and contained in the record would entitle the appellants to consideration in the Superior Court under the provisions of C. S., 4588, is not presented on this appeal. *Semble*, one of the sureties (appellants) who signed the bail bond conditionally, who was not present when the bond was delivered to the clerk, and had no notice of the discharge of the prisoner until the next day, would not be considered to have waived his rights. *Ibid.*

16. *Appeal and Error—Record—Courts—Jurisdiction.*—The jurisdiction of the court in the determination of an action does not arise on appeal when the record is silent as to the facts whereon the motion is based, and the matter is called to the attention of the Supreme Court, by demurrer, the first time. *Crawford v. Allen* and *Realty Co. v. Crawford*, 435.

APPEAL AND ERROR—*Continued.*

17. *Appeal and Error — Objections and Exceptions — Briefs — Rules of Court.*—It is necessary that exceptions appearing in the record on appeal be mentioned in appellant's brief, with reason or argument to support them, to entitle them to be considered by the court, for otherwise they are taken as abandoned. Rule of Court, 185 N. C., 798. *In re Fuller et al.*, 509.

18. *Appeal and Error—Criminal Law—Solicitor's Acceptance of Appellee's Case—Record.*—Where the convicted defendant on a trial of a criminal action serves in apt time his case on appeal on the solicitor, who endorses his acceptance thereon as the case tried, it will conclusively be taken as the case on appeal, and may not be corrected by affidavit of the stenographer that the judge's charge to the jury had been inaccurately transcribed by her from her notes taken at the trial. *S. v. Palmore*, 538.

19. *Appeal and Error—Agreement as to Facts—Evidence—Inference—New Trials.*—Where the parties to a civil action have agreed after verdict and judgment upon the case so as to present the question of law on appeal, a new trial will be ordered if the facts so agreed upon permit of inferences favorable to both of the contending parties and sufficient to support a verdict in favor of both of them. *Tucker v. Ashcraft*, 546.

20. *Appeal and Error—Settlement of Case—Notice to Parties—Statutes.*—Unless the case on appeal to the Supreme Court has been settled by agreement of counsel, C. S., 644, gives the parties the right to be notified by the judge of the place and time he will settle the case, and where the appellant has asked the judge to fix the time and place for the purpose, it is error for the trial judge to disregard his right to be present. *S. v. Bost*, 639.

21. *Appeal and Error—Jurors—Challenge—Prejudice—Recordari.*—Where the appellant makes a motion in the Supreme Court for a recordari to show that he had been prejudiced by being wrongfully compelled to accept a juror, he must not only show that his peremptory challenge had been exhausted, but that the juror had been retained subject to his exception. *Ibid.*

22. *Appeal and Error—Questions and Answers—Objections and Exceptions—Evidence—Motions.*—Exceptions to answers unresponsive to questions should be made on motion to strike them out; and general exceptions to evidence incompetent only in part will not be considered on appeal. *Martin v. Hanes Co.*, 644.

23. *Appeal and Error—Findings of Lower Court—Appellant Must Show Error—Schools—School Districts.*—While on appeal from a judgment refusing to continue an order restraining the formation of a new school district within a county for nonconformity with the statutes applicable, the Supreme Court may disregard the finding of fact of the lower court and conclude differently upon its own findings, it is upon appellant to show error, and in the present case the facts found by the lower court are sustained. *Howard v. Board of Education*, 675.

24. *Appeal and Error — Rules of Court — Dismissal — Reinstatement — Laches.*—It is imperative that appellants observe the rules of court regulating appeals in order to preserve this right, and where the

APPEAL AND ERROR—*Continued.*

appellant and appellee have agreed as to the time for serving case and countercase or exceptions, the mere fact that the appellant afterwards thought he had a longer time for the purpose than that agreed upon is no ground for his motion to reinstate his case after its dismissal under the rules. *Hamby v. Construction Co.*, 747.

25. *Appeal and Error—Courts—Agreement as to Findings of Fact—Evidence—Verdict.*—Where the parties to the action have agreed in writing that the trial judge should find the facts and draw his conclusions of law therefrom, the findings so made, supported by competent evidence, are as conclusive, on appeal, as those otherwise found by the jury. *Aderholt v. Condon*, 748.

26. *Appeal and Error—Evidence—Prejudice—Harmless Error—Homicide—Murder.*—Where the prisoner has been convicted of murder in the first degree with plenary evidence that he has committed the offense, tending, among other things, to show motive in the ill-will of the prisoner toward the deceased in the latter's attack upon the prisoner's father, with previous threats of the prisoner to take the life of the deceased on that account, and the prisoner has taken the stand in his own behalf and testified to the absence of malice or ill-will, the exclusion of the testimony of another of the defendant's witnesses of a conversation he had had with the deceased, tending to corroborate him in this respect, is: *Held*, if erroneous, not to be reversible under the other evidence brought out on the trial. *S. v. Love*, 766.

27. *Appeal and Error—New Trials—Stare Decisis.*—Where upon the new trial granted on appeal by the Supreme Court the evidence is materially different from that on the former trial, the former adjudication is not conclusive and another appeal will lie. *McCall v. Institute*, 775.

28. *Same—Evidence—Nonsuit—Contracts—Specific Performance.* — Where the only question involved in a determinative issue is whether the duly authorized agent to sell land had signed the required writing for his principal as such agent, or simply as an attesting witness, and the place for the signature of the seller is left blank, and there is no other evidence except that the proposed purchaser was informed that the agent had authority only to submit to the owner offer for the property, in the purchaser's suit for specific performance the defendant is entitled to a judgment as of nonsuit upon his motion therefor. *Ibid.*

29. *Appeal and Error—Criminal Law—Instructions—Presumption of Innocence—Requested Instructions.*—Defendant's counsel in a criminal action may presume that the trial judge will charge the jury upon the presumption of defendant's innocence, and a special request, with exception to its refusal, to this effect, is not necessary to present the question on appeal. *S. v. Hardy*, 799.

30. *Appeal and Error—Parties—Interest.*—Where one claiming an interest in the subject-matter of the litigation has had his motion to be permitted to make himself a party refused in the Superior Court, his exception becomes immaterial in the Supreme Court on appeal, when it is adjudicated that under the facts of the case he could have neither acquired nor lost any right therein. *Horney v. Price*, 820.

APPLICATION. See Insurance, 7.

APPOINTMENT. See Wills, 9.

APPROVAL. See Appeal and Error, 12.

ARGUMENT OF COUNSEL. See Criminal Law, 25.

ASSAULT. See Criminal Law, 6.

ASSESSMENTS. See Evidence, 2; Municipal Corporations, 3, 4, 6; Statutes, 3; Courts, 16.

ASSETS. See Bankruptcy, 1.

ASSUMED NAMES. See Trade Names, 1.

ASSUMPTION OF RISKS. See Employer and Employee, 3, 11; Negligence, 6.

ATTACHMENT. See Warehousemen, 4.

1. *Attachment — Clerks of Court — Appeal — Statutes—Motions—Undertakings—Bond.*—Where in the husband's civil action for damages for the alienation of his wife's affection the plaintiff has given the undertaking in attachment, and the defendant has moved before the clerk of the court for an increase of the bond and appealed from the denial of his motion, and the same has been sent to the resident judge of the district accordingly, the appeal is from a question of fact as distinguished from an issue of fact, the statutes on the subject give the plaintiff the right to be heard before the judge, and where the judge, notwithstanding the plaintiff's expressed desire to be heard, proceeds without affording him this opportunity and increases his bond, his action is contrary to the requirements of the statute and ineffectual. C. S., 633, 635, 636. *Byrd v. Nivens*, 621.

ATTORNEY AND CLIENT. See Bills and Notes, 11; Criminal Law, 25.

AUTHORITY. See Principal and Agent, 1.

AUTOMOBILES. See Courts, 4; Highways, 1; Instructions, 4; Negligence, 2, 3, 7, 12; Taxation, 5.

BAIL. See Appeal and Error, 10.

BANKS AND BANKING. See State Treasurer, 2; Statutes, 3; Bills and Notes, 3, 7.

1. *Banks and Banking—Bills and Notes—Deposits—Debtor and Creditor.*—A bank is debtor to its depositor to the amount of the deposit, and when a note of the depositor to the bank becomes due, to the amount of the note, the depositor becomes a debtor to the bank, and in this relationship the bank may credit the note in whole or in part, as the case may be, with the amount of the deposit. *Graham v. Warehouse Co.*, 533.

2. *Same—Deposits for Collection—Payment.*—Where a bank has received a valid check of its depositor through a correspondent bank, and sends it with other items for payment against its reserve account in another bank, and the check of its depositor remains unpaid at the time the payee bank thereof goes into a receiver's hands still owing its depositor a certain balance and holds a past due note of his

BANKS AND BANKING—*Continued.*

likewise, the double relationship of debtor and creditor exists in the receiver's action upon the note, and the depositor is entitled to a credit to the extent of his deposit; and, *Held further*, the fact that the payee bank marked the depositor's check paid, returned it to him and had this transaction entered regularly upon its books, cannot vary the fact that the check had not been paid or affect the result. *Ibid.*

3. *Same—Subrogation.*—Where a depositor in a bank has drawn a check thereon to a third person, and by reason of the afterward insolvency and receivership of the payee bank the check remains unpaid in the hands of a bank that has received it in the course of collection, by paying the check so held the depositor is subrogated to the rights of the bank thus holding the check in an action thereon brought against him, by the receiver of the payee bank. *Ibid.*

4. *Banks and Banking—Officers—Principal and Agent—Bills and Notes—Endorsers—Holder with Notice.*—The president of a bank has no implied right from his official position to use the moneys of the bank for his own advantage, and where he has endorsed in the name of the bank a note given by a corporation or third person wherein he is pecuniarily interested, to a payee, the transaction puts the payee upon notice of the want of authority of the president to so act for the bank, and where the bank has no financial interest in the transaction and the president no express authority so to bind it, the payee of the note may not recover from the bank as endorser the amount due her thereon. *Stansell v. Payne*, 647.

BANKRUPTCY. See Estates, 4.

1. *Bankruptcy—Estates—Relinquishment of Assets—Election—Courts.*—Where a trustee in bankruptcy has determined that certain of the lands of the deceased bankrupt were valueless to the estate and would be a burden rather than an asset in his administration, and for this reason turns them over to the administrator of the deceased bankrupt to be used by him in settling his estate, which the bankrupt court has approved, his election so to do is irrevocably binding upon him, and upon the lands thereafter becoming valuable he may not claim the same as a part of the assets of the bankrupt estate. *Irvin v. Harris*, 465.

2. *Same—Questions for Jury—Trials.*—*Held*, upon conflicting evidence in this case as to whether the trustee in bankruptcy had turned over to the administrator of the deceased certain lands as valueless, etc., or whether he had done so only for the purpose of administration and payment of debts, the question of full release or relinquishment of the lands was settled by the affirmative verdict of the jury. *Ibid.*

3. *Same—Intervention—Actions—Guardian and Ward.*—Where the controversy is made to depend upon whether the widow of the deceased in her action was entitled to a certain fund in the administrator's hands of her deceased husband as against the trustee in bankruptcy of his estate, an intervener, in behalf of herself and her two children, as between the widow and her children, the better practice would be an independent adversary proceeding, or the same may be determined in the present action by having a guardian *ad litem* appointed for the children who are minors. *Ibid.*

BARGAIN AND SALE. See Contracts, 8.

BENEFICIARIES. See Insurance, 6, 11.

BENEFITS. See Municipal Corporations, 1, 7.

BILLS OF LADING. See Commerce, 1; Carriers, 4, 6.

BILLS AND NOTES. See Banks and Banking, 1, 4.

1. *Bills and Notes—Negotiable Instruments—Surety—Endorser—Agreement to Waive Notice—Statutes.*—Where upon the face of a negotiable note there is an agreement to waive notice of dishonor or an extension of time, etc., one placing his name on the back thereof is deemed to be an endorser without indication of other liability therein, and is bound by the agreement expressed in the face of the instrument waiving notice, etc. C. S., 2998 (6), 3044, 3092. *Gillam v. Walker*, 189.

2. *Same—Evidence—Equity—Contribution—Actions.*—It may be shown by parol evidence as between one signing a negotiable note and one who has endorsed the same that the former had signed for the accommodation of the maker, and the endorser for accommodation had verbally agreed with the surety whose name appeared upon the face of the note as a joint maker that they both were to be bound equally thereon as sureties, and under the evidence in this case the comaker who has paid the note may maintain his action for contribution against the one whose name appeared thereon as endorser. C. S., 3965. *Ibid.*

3. *Bills and Notes—Negotiable Instruments—Fraud—Holder in Due Course—Notice—Banks and Banking—Certificates—Deposits.*—When one has acquired a note tainted with fraud between the original parties, with notice of the fraud, he is not an innocent holder for value, under the provisions of the statute; and when a bank has issued to him a certificate of deposit upon acquiring the note in good faith, for value, for the amount thereof, without notice and before maturity, the original fraud invalidates the certificate of deposit as to such holder, and can confer no superior right upon him than that existing under the note itself. *Proctor v. Fertilizer Co.*, 243.

4. *Same—Evidence—Burden of Proof.*—When the evidence and verdict thereon establishes the fact that a negotiable instrument had been acquired by a holder with notice of the fraud between the original parties, the burden of proof is on him, claiming to be an innocent holder in due course, to establish that fact. *Ibid.*

5. *Bills and Notes—Negotiable Instruments—Due Course—Mortgages—Statutes.*—Defendants, payees of a note, endorsed the note secured by mortgage on lands duly recorded to plaintiff in due course for value before maturity, and thereafter the equitable owners of the land sold and conveyed the same to another for value. *Held,* in the absence of agreement to the contrary, the endorsement of the note by the payee to the plaintiff carried the mortgage security, C. S., 3033, and the mortgagee held the legal title in trust for the plaintiff under the terms of the mortgage; and under a decree of sale by the court, with all parties at interest before the court, it becomes immaterial whether the plaintiff had no right to exercise the power of foreclosure. *Trust Co. v. White*, 281.

BILLS AND NOTES—*Continued.*

6. *Same—Estoppel—Cancellation—Parties—Privies.*—An equitable estoppel will not operate upon strangers thereto, and under the facts of this case: *Held*, the holder in due course of a note secured by mortgage was not estopped by the representations of the mortgagee that the mortgagor of lands had an unencumbered title therein, or the subsequent cancellation of the mortgage, when the mortgage securing the note had been duly executed and registered and the representation of the mortgagee was made without knowledge or consent of the holder of the note. *Ibid.*

7. *Bills and Notes—Banks and Banking—Payment—Cashier's Check—Collection—Negligence—Burden of Proof.*—Where the defense to an action by a bank upon an unpaid check given for a partial payment upon one of a series of mortgage notes is the negligence of the plaintiff bank in not having used a course of collection wherein the check would have been promptly presented to the drawee bank and paid, the burden is on the defendant relying thereon. *Bank v. Barrow*, 303.

8. *Same—Evidence—Nonsuit—Questions for Jury.*—In an action by plaintiff land bank to recover upon certain notes given by a borrower, secured by mortgage on the amortization plan for default in payment of one of its notes in the series wherein, under the terms of the transaction, all of the notes became due and payable, there was evidence tending to show that under instructions of the plaintiff the defendants obtained a cashier's check for the full amount of the payment of the note then due, which the plaintiff was to accept as payment, and, owing to the plaintiff's negligence, the check reached the bank of its issuance after it had suspended payment: *Held*, two issues of fact were raised for the jury—one, whether the plaintiff had agreed to accept the cashier's check in absolute payment; and the other, whether the plaintiff had negligently selected for the cashier's check a delayed course of collection that prevented the check reaching the bank of its issuance before payment had been there suspended; and a motion as of nonsuit was properly denied. *Ibid.*

9. *Bills and Notes—Nonnegotiable Instruments—Recitations for Value—Prima Facie Case—Presumption.*—There is no presumption of a consideration for a nonnegotiable instrument, and upon the plaintiff in an action thereon rests the burden of proof throughout the trial of showing a sufficient consideration; and the same ruling applies when the instrument makes out a prima facie case by the recital of value when its execution and delivery are shown. *Hunt v. Eure*, 482.

10. *Same—Burden of Proof—Instructions.*—Where in an action to recover upon a nonnegotiable note the plaintiff has made out a prima facie case by showing the execution and delivery of the instrument, the burden of disproving the issue does not shift to the defendant, and recovery in the action will be denied if taking all the evidence into consideration the jury may find it sufficient to sustain a verdict in the defendant's favor, or that notwithstanding the presumptive evidence in the plaintiff's favor it had not satisfied the jury by its greater weight that he was entitled to recover thereon, or if the evidence in defendant's favor has been sufficient to balance in the minds of the jury the prima facie presumption in the plaintiff's favor. *Ibid.*

BILLS AND NOTES—*Continued.*

11. *Bills and Notes—Attorney and Client—Attorneys' Fees—Statutes.*—A provision incorporated in an instrument for the payment of money for counsel fees for collection is not enforceable. C. S., 2983. *Finance Co. v. Hendry*, 550.

BILL OF PARTICULARS. See Intoxicating Liquor, 4.

BOILER INSPECTION ACT. See Commerce, 4.

BONDS. See Injunctions, 1; Removal of Causes, 1; Attachment, 1; Contracts, 20.

Bonds—Statutes—Veterans' Loan Fund Act.—Held, in this case, that the proposed issuance of bonds in pursuance of chapter 190, Public Laws of 1923, known as the "World War Veterans' Loan Fund Act," under the facts alleged in the complaint and admitted by the demurrer, has not been approved by a majority of the qualified electors of the State as required by the express provisions of the statute, and are, therefore, invalid. *Patterson v. Everett*, 828.

BOUNDARIES. See Grants, 1; Evidence, 4, 6; Judgments, 6; Deeds and Conveyances, 7, 10; Pleadings, 3.

BREACH. See Deeds and Conveyances, 3; Mortgages, 1; Contracts, 8, 13, 19, 24.

BRIEFS. See Appeal and Error, 17.

BURDEN OF PROOF. See Criminal Law, 2, 6, 19, 21; Courts, 9; Employer and Employee, 3; Homicide, 8; Municipal Corporations, 3; Taxation, 8; Negligence, 3, 10; Bills and Notes, 4, 7, 10; Railroads, 2; Commerce, 5; Contracts, 15; Instructions, 9; Wills, 14; Carriers, 7.

BURNING. See Evidence, 10.

CANCELLATION. See Bills and Notes, 6; Deeds and Conveyances, 20.

CAPIAS. See Criminal Law, 7, 8.

CARNAL KNOWLEDGE. Constitutional Law, 1.

CARRIERS. See Negligence, 1; Commerce, 1, 4.

1. *Carriers—Railroads—Livestock—Negligence—Evidence—Nonsuit.*—Evidence that a carload of livestock transported over several lines of connecting carriers were received at destination in bad condition, consisting of internal bruises as well as inter-diseases, is sufficient to carry the case to the jury, and there was no error in so holding. *Farming Co. v. R. R.*, 63.

2. *Same—Damages.*—In an action to recover damages against a railroad company for a negligent injury to a carload shipment of livestock, the measure of damages, when recoverable, is the difference between the reasonable market value of the animals when they arrived at destination, when they were found to have reached there in a damaged condition and what the reasonable market value would otherwise have been except for the carrier's negligence. *Ibid.*

3. *Carriers—Employer and Employee—Master and Servant—Railroads—Wrongful Death—Homicide—Vice-Principal—Evidence—Nonsuit.*—A

CARRIERS—*Continued.*

railroad company is held liable for the homicide of its employee on its railroad yard by another employee, when its vice-principal thereon was or should have been aware beforehand of the intended killing, and should, with the exercise of proper care, prevented it, and where the evidence is conflicting as to whether the killing could have been thus prevented by the defendant's vice-principal acting for the defendant at the time, the question should be submitted to the jury, whether the deceased was engaged in interstate commerce at the time of his death or in intrastate commerce. *Southwell v. R. R.*, 417.

4. *Carriers — Commerce — Order Notify Shipments — Delivery Without Requiring Bill of Lading—Waiver—Title.*—The ruling of the Interstate Commerce Commission that the carrier must demand the surrender or possession of the bill of lading of an order notify interstate shipment in accordance with its express terms before delivering the shipment to the person therein designated must be observed, and where the delivery is made contrary to this requirement, the consignee acquires no title thereto, and the custom of the dealings between the parties cannot waive this requirement. *R. R. v. Armfield*, 581.

5. *Same—Actions—Contracts—Trover and Conversion.*—Where the terminal carrier's delivering agent on an interstate carload shipment has delivered the shipment to the person to be notified without requiring the surrender of the order notify bill of lading, and the carrier has paid the shipper for the goods thus delivered, whether in an action upon the contract assigned to it, or in wrongful conversion, the carrier may maintain its action against the consignee of the shipment, though the latter may have bought through a third person whom he has paid with knowledge that the shipment was upon an order notify bill of lading subject to the ruling of the Interstate Commerce Commission in the respect stated. *Ibid.*

6. *Carriers of Goods—Evidence—Bills of Lading—Connecting Lines—Damages—Commerce—Federal Statutes.*—A bill of lading for the transportation of goods over several lines of common carriers for delivery at destination is evidence of a joint contract of carriage including a liability on the delivering carrier, and this position is not affected by the Carmack Amendment applying to interstate commerce. *Riff v. R. R.*, 586.

7. *Same—Lost Contents—Evidence—Burden of Proof.*—Where the bill of lading and receipt issued by a railroad company calls for two boxes or packages "in apparent good condition, contents and condition of contents unknown," and an action has been brought against the terminal carrier to recover a part of the contents alleged to have been taken therefrom while in the carrier's possession, the proof of the receipt and bill of lading is only prima facie evidence of the receipt of the packages as therein stated, with the further burden of proof on the plaintiff of showing his loss, which he may do by showing the missing articles had been packed in the cases before delivery to the carrier and were missing when received by the consignee, with further evidence tending to show that the contents of the package had been tampered with while in the carrier's possession. *Ibid.*

CARRIERS—*Continued.*

8. *Carriers—Negligence—Evidence—Nonsuit—Last Clear Chance.*—Upon a motion as of nonsuit in this case: *Held*, the evidence was sufficient upon the issue of the contributory negligence of the plaintiff's intestate to sustain a verdict in plaintiff's favor, there being testimony that the engineer on defendant railroad company's locomotive should have seen the intestate in time to have avoided the injury, under the rule of the last clear chance. *Ghorley v. R. R.*, 634.

CARRIERS OF GOODS. See Carriers.

CASE. See Appeal and Error, 3, 8.

CASHIER'S CHECK. See Bills and Notes, 7.

CAUSE OF ACTION. See Actions, 2.

CAVEAT. See Wills, 10.

CERTIFICATES. See Bills and Notes, 3.

CHALLENGE. See Appeal and Error, 21.

CHARACTER. See Witnesses, 1; Criminal Law, 12, 23.

CHARITIES. See Corporations, 3, 4, 5.

CHARTER. See Municipal Corporations, 8.

CHATTEL MORTGAGE.

Chattel Mortgages — Registration — Constructive Notice — Possession.— Where before making a deed of assignment the creditor had given a mortgage on his stock of merchandise (personal property), and the mortgagee was in peaceful possession thereof at the time the general assignment was made, the trustee under this deed takes with notice, notwithstanding the mortgage was ineffectual under our registration law as constructive notice, and a temporary restraining order of sale under the mortgage is properly dissolved. *Cowan v. Dale*, 685.

CHAUFFEURS. See Taxation, 5.

CHECKS. See Compromise and Settlement, 1.

CHILD. See Constitutional Law, 1; Wills, 7.

CHOSES IN ACTION. See Partnership, 2.

CIRCUMSTANTIAL EVIDENCE. See Murder, 2.

CITIES AND TOWNS. See Highways, 1; Municipal Corporations, 1, 3, 4, 6, 8, 9; Taxation, 5; Constitutional Law, 2.

CLAIMS. See Municipal Corporations, 8.

CLAIM AND DELIVERY. See Evidence, 5; Actions, 3.

CLERKS OF COURT. See Pleadings, 1; Judgments, 4, 5, 10; Mortgages, 3; Attachment, 1; Wills, 20.

CLOUD ON TITLE. See Taxation, 13.

COLLECTIONS. See Criminal Law, 3; Employer and Employee, 4; Bills and Notes, 7; Partnership, 2; Banks and Banking, 2; Education, 3.

COLLUSION. See Injunctions, 4.

COLOR OF TITLE. See Grants, 2; Limitation of Actions, 4.

COMMERCE. See Carriers, 4, 6.

1. *Commerce—Interstate Commission—Federal Statutes—Damages—Total Loss—Bills of Lading—Conditions—Contracts—Express Companies—Carriers.*—In an action brought against an express company for loss of an interstate shipment: *Held*, a total loss in transit of the consignment comes within the exception of the Federal statute (Cummins Amendment, 4 March, 1915), "damaged in transit by carelessness or negligence," rendering it unnecessary, as a condition precedent to recovery, to file written notice within four months after a reasonable time for delivery has elapsed. *Scott v. Express Co.*, 377.

2. *Same—Torts.*—An action against an express company to recover damages for the total loss of an interstate consignment of goods lost in transit is covered by the stipulation as to the partial loss in the bill of lading, sounds in tort, and is cognizable in the jurisdiction of the Superior Court, when exceeding in amount that given, in cases of tort, to a justice of the peace. *Ibid.*

3. *Same—Federal Courts—Precedents—Conflict of Decisions of Lesser Courts.*—Where a Federal question is presented in an action in the State courts, within their jurisdiction, the Federal law governs, but where the Supreme Court of the United States has not decided the particular question and the Federal courts of lesser jurisdiction are in conflict with each other, the State court will decide in accordance with its own opinion. *Ibid.*

4. *Commerce—Carriers—Employer and Employee—Federal Statutes—Boiler Inspection Act—Employers' Liability Act—Negligence.*—The Federal Boiler Inspection Act and the Employers' Liability Act are to be construed together, and under the latter act, so construed, a railroad company engaged in interstate commerce is liable in damages to the plaintiff's intestate (employee) for failing to comply with the provisions of the inspection act with respect to the keeping of its locomotives in the safe condition required by the inspection act, when the injury resulting in death was proximately caused thereby, irrespective of the question of contributory negligence. *Gerow v. R. R.*, 813.

5. *Same—Instructions—Burden of Proof.*—Where there is allegation and evidence that the defendant railroad company while engaged in interstate commerce proximately caused the death of plaintiff's intestate by an explosion caused by its negligently permitting the water injectors for the boiler to be in such condition as to admit of the passing of trash into the boiler, the cause of the explosion: *Held*, while the inspection act does not specifically require the use of strainers to catch the trash upon the injectors, their absence being alleged raises a question for the jury as to whether the statutory provision for the safety of employees had been complied with; and an instruction that should the jury find by the greater weight of the evidence that the defendant was negligent in this respect, to find the issue for plaintiff, is not erroneous, the burden being upon the plaintiff. *Ibid.*

COMMISSION. See Principal and Agent, 2; Liens, 5; Government, 2; Courts, 15.

COMMON SOURCE. See Title, 1.

COMPROMISE AND SETTLEMENT.

1. *Compromise and Settlement—Acceptance of Check in Full—Contracts—Parol Evidence—Statute of Frauds.*—Upon the controversy as to whether the plaintiff and defendant were partners in the sale of certain real estate, entitling the plaintiff to his share of the profits therein, depending upon the question of his having paid his part of the purchase price of the property, in the absence of evidence of fraud, a check drawn to the order of the defendant, endorsed to be in full settlement of the disputed difference, and accepted by him as such, concludes the defendant so accepting the check upon the issue (C. S., 895), and also excludes parol evidence as contradictory of the writing under the statute of frauds. *DeLoache v. DeLoache*, 394.

2. *Same—Fraud—Issues—New Trials.*—Upon the record in this appeal: *Held*, there was not evidence of fraud in the acceptance of the check as in full of the difference between the parties of the amount in dispute; and, *held further*, upon the new trial an issue should be submitted to the jury under the allegation thereof in the complaint, should the evidence be sufficient. *Ibid.*

CONDEMNATION. See Municipal Corporations, 1.

CONDITIONS. See Insurance, 1; Criminal Law, 7; Commerce, 1; Appeal and Error, 13.

CONFISCATION. See Taxation, 8.

CONFLICT. See Commerce, 3.

CONFLICT OF LAWS. See Wills, 15.

CONNECTING LINES. See Carriers, 6.

CONSENT. See Judgments, 6; Estates, 2.

CONSIDERATION. See Contracts, 1, 16; Illegitimate Children, 1.

CONSOLIDATED STATUTES.

SEC.

2. Executor under power of wills has power to sell lands in another county. *Clark v. Homes*, 703.

160. Action for wrongful death must be brought by personal representative; and widow may not independently recover when death instantaneously follows the wrongful act. *Craig v. Lumber Co.*, 137.

203. Defendant has fundamental right that his attorney argue matters of law and fact to jury. *S. v. Hardy*, 799.

267. Contract between mother with father of illegitimate child while in *ventre sa mere* for child's support is valid, and afterward action thereon by child will be sustained. *Thayer v. Thayer*, 502.

CONSOLIDATED STATUTES—*Continued.*

SEC.

415. When no complaint has been filed, plaintiff may not show by parol that he has commenced his action within one year after nonsuit in a former action for the same cause. *Young v. R. R.*, 238.

428-430. Under grant of land when color of title adverse possession shown for seven years, otherwise for twenty years. *Land Co. v. Potter*, 56.

440 (1). There is no exception to this statutory limitation as to a recovery of land from a railroad company. *Young v. R. R.*, 238.

476, 479. The omission of clerk's seal from copy of summons running out of county is not alone sufficient to invalidate it. *Elramy v. Abeyounis*, 278.

500, 501, 502, 503. *Lis pendens* is notice from time of cross indexing, but cannot affect title to land when brought on money demand. *Horney v. Price*, 820.

518. Demurrer to sufficiency of allegations of complaint made in Supreme Court waiver of right. *Horney v. Mills*, 724.

519, 521, 522. Judgment upon counterclaim set up in answer properly rendered when plaintiff fails to file reply. *Shearer v. Herring*, 460.

564. Remarks of trial judge in jury's presence discreditable to testimony cannot be eradicated. *S. v. Bryant*, 112.

564. Remarks made by trial judge applicable in equal degree to parties not held for reversible error. *Davis v. Long*, 129.

564. An instruction as to whether a fact at issue is sufficiently proven is reversible error. *S. v. Hardy*, 799.

567. Nonsuit on evidence, see 2617.

567. When judgment by nonsuit upon the evidence should not be granted. *Lindsey v. Lumber Co.*, 118.

567. When plaintiff's motion for judgment upon his exceptions is in effect a motion for judgment as of nonsuit upon the evidence. *Holton v. Mocksville*, 144.

567. Nonsuit not granted when evidence as a whole is sufficient. *Hicks v. R. R.*, 548.

580. Issues can only be raised by the pleadings. *Geddie v. Williams*, 333.

582 (2). Reversible error for trial court to refuse to submit a new issue raised as a defense by the answer. *Brown v. Ruffin*, 262.

600. Negligence before judgment, while defeating right to have judgment by default for want of answer set aside, does not prevent review by appeal duly prosecuted. *Livestock Co. v. Atkinson*, 250.

600. No judgment by consent can be entered by clerk in action for divorce, and appeal lies from judgment of Superior Court upon exception duly noted. *Caldwell v. Caldwell*, 805.

633, 635, 636. Right of appellant to have notice from judge as to time and place to settle case on appeal. *Byrd v. Nivens*, 621.

644. Trial judge may not disregard appellant's request to be present when case on appeal is settled. *S. v. Bost*, 639.

CONSOLIDATED STATUTES—*Continued.*

SEC.

829-460. An intervener in possession of property in attachment claiming for another: *Held*, the principal a necessary party. *Bank v. Murphy*, 479.

856 *et seq.* Pleadings may be read as affidavits on hearing for injunction, but not necessary that answer should have been filed. *Tobacco Growers' Ass'n v. Harvey & Son Co.*, 494.

860. Equity will not afford injunctive relief when remedy at law. *Hurwitz v. Sand Co.*, 1.

895. Acceptance of check purporting to be in full settlement concludes the acceptor and introduction of parol evidence. *DeLoache v. DeLoache*, 394.

913 (a), (b). Procedure on appeal from order to remove cause. *Caldwell v. Caldwell*, 805.

970. Purchaser acquiring land under sheriff's tax deed must show compliance with this section. *Price v. Slagle*, 757.

988, 3309. Restrictions in deeds of development company regarded as easements requiring writing and notice by registration. *Davis v. Robinson*, 589.

991. Reservation of mineral rights to deed to lands descendible to heirs at law of grantor. *Trust Co. v. Wyatt*, 107.

997, 3324. Wife's deed to land must be with husband's written consent, etc. *Best v. Utley*, 356.

1013. Sale of merchandise in bulk void only as to existing creditors when statute not complied with. *Bank v. Murphy*, 479.

1214. This section applies to pending actions. *Martin v. Vanlaningham*, 656.

1443. Where adjournment of court to scene of murder for view of jury and explanation of testimony not held for error. *S. v. Stewart*, 340.

1473. Action to remove lien for street improvements on land involves title, and cognizable only in Superior Court. *Hahn v. Fletcher*, 729.

1611. Applies to preëxisting debt and to creditors existing at time of execution of the instrument. *Cowan v. Dale*, 684.

1654. Rule 8. Illegitimate son does not inherit from father against widow's dower, his mother, when no issue born after marriage. *Wilson v. Wilson*, 85.

1666. Finding of trial judge as to wife's allowance for alimony may be reviewed on appeal when it appears to be grossly unjust to husband. *Davidson v. Davidson*, 625.

1799. Defendant in criminal action becoming a witness for himself is subject to have his character impeached on cross-examination. *S. v. Dickerson*, 327.

1799. In exercising constitutional right not to take stand in criminal action, the prisoner may not be prejudiced. *S. v. Hardy*, 799.

1809. Signature of deponent to his evidence is not absolutely necessary. *Riff v. R. R.*, 585.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2305, 442 (2). Bar of two-year statute on usurious paper. Accounting. *Sloan v. Ins. Co.*, 690.

2306. Usurious charge of interest strips the paper of interest-bearing quality. Remedy of maker. *Sloan v. Ins. Co.*, 690.

2333. A true bill may be sufficient if endorsed or passed upon by more than eighteen of the grand jurors. *S. v. Stewart*, 340.

2377 *et seq.* When consolidation of actions under Torren's law and for trespass has been made by trial judge as involving the same cause of action, objections that the issues were confused untenable under the record in this case. *Blount v. Sawyer*, 210.

2480. Contract with coöperative association does not transfer title to growing crops or affect right of farmer to place agricultural liens thereon. *Tobacco Growers' Ass'n v. Harvey & Son. Co.*, 494.

2482. Allegations of fraud held insufficient to continue injunction to hearing. *Tobacco Growers' Ass'n v. Harvey & Son Co.*, 494.

2503. In father's action against register of deeds for issuing marriage license to his daughter under eighteen years, under conflicting evidence, the judge should instruct the jury as to the law. *Spencer v. Saunders*, 183.

2515. A mortgage of land by wife to husband is void when not in conformity with this section; is conclusive in absence of fraud, and may not thereafter be corrected. *Best v. Utley*, 356.

2591. Mortgagor necessary party after resale to compel bidder at second sale to take the lands sold. *Trust Co. v. Powell*, 372.

2601, 2616. Town ordinance contrary to provisions of these sections is void. *S. v. Stallings*, 104.

2615. A negligent violation of a statute which in no wise contributed to an injury will not prevent a judgment as of nonsuit upon the evidence. *Hughes v. Luther*, 841.

2617. Upon evidence that defendant was violating speed law proximately causing collision plaintiff should not be nonsuited. Burden on him to show plaintiff's contributory negligence. *Davis v. Long*, 129.

2673, 2786, 2787 (3), (4). The Constitution, Art. VII, sec. 7 does not inhibit a municipal corporation from using funds on hand to erect a public building without submitting the question to its voters. *Adams v. Durham*, 232.

2711. Map evidence that statute has been complied with as to assessing, roll, etc. *Holton v. Mocksville*, 144.

2787 (5), (6), 2799. The operation of an incinerator by city is a governmental function without liability to employee for negligence. *Scales v. Winston-Salem*, 469.

2918, 2932, 2934, 2935. Constitutional requirements for municipality to pledge their credit. Ratification to make valid issue of bonds. *Storm v. Wrightsville Beach*, 679.

2983. Counsel fees are not recoverable as costs in action. *Finance Co. v. Hendry*, 549.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2998 (6), 3044, 3092. Endorser of negotiable instrument receiving notice of dishonor upon its face is bound by its terms. *Gillam v. Walker*, 189.

3005, 3007, 3010. Negotiability of statutory warehouse receipts in hand of innocent holder for value. *Lacy v. Indemnity Co.*, 24.

3033. Endorsement of mortgage note carries the security in trust for endorsee. *Trust Co. v. White*, 281.

3214. Objection to executor under power of will selling land of intestate in wrong county is to venue, with remedy to transfer the cause. *Clark v. Homes*, 703.

3234. Intent of testator controls as to interest on advancement to child. *Lunsford v. Yarbrough*, 476.

3288, 3291. The failure to comply with sec. 1013 as to sale of merchandise in bulk applying only to existent creditors is not affected by these sections. *Bank v. Murphy*, 479.

3288, 3291. Violation of these sections does not prohibit setting up valid defense to an action. Strictly construed. *Finance Co. v. Hendry*, 549.

3293. Probate officer taking acknowledgment of a deed acts judicially, or *quasi* judicially. *Best v. Utley*, 356.

3311. Probate officer may not take valid probate of conveyance if interested party. Notice. *Cowan v. Dale*, 684.

3965. Parol evidence competent to show endorser of negotiable instrument signed as accommodation surety with other surety on note. *Gillam v. Walker*, 189.

4041, 4042, 4044, 4045, 4046. Warehouse receipts properly endorsed passes title to goods stored to transferee though deposited by part owners. *Webb v. Friedburg*, 166.

4065, 4066. Attachment will not lie for creditors of owner against rights of holder of warehouse receipts. *Webb v. Friedburg*, 166.

4087. Notice and bad faith invalidates statutory warehouse receipts in holder's hands. *Lacy v. Indemnity Co.*, 24.

4099, 4100, 4104, 4105, 4108. Sections not necessarily followed where widow takes under husband's will in lieu of dower. *Freeman v. Ramsey*, 790.

4125. Widow's allowance from deceased husband's income is for one year based upon the average of three years next preceding his death. *Holland v. Henson*, 742.

4131. Not necessary for witness to will to sign at same time. *In re Fuller*, 509.

4162. When husband takes fee simple by devise from wife further provisions repugnant to fee are void. *Roane v. Robinson*, 628.

4169, 1654. When a will is construed to make provision for a posthumous child. *Rawls v. Insurance Co.*, 268.

4209. A 30-year sentence under this section not necessarily "cruel or unusual" and prohibited by our Constitution. *S. v. Swindell*, 151.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4214. Burden to disprove beyond a reasonable doubt is not cast upon defendant on criminal trial for assault with deadly weapon with intent to kill, upon the evidence in this case. *S. v. Redditt*, 176.

4277. Burden of proof beyond reasonable doubt upon State when indictment is under sec. 4643. *S. v. Roberts*, 93.

4331, 3789. Upon conviction under both of these sections a sentence upon both, one to begin at the expiration of the other, is not objectionable. *S. v. Malpass*, 349.

4357, 4358. Evidence sufficient for conviction under these sections. *S. v. Sinodis*, 565.

4515. Defendant in criminal action has fundamental right to legal counsel. *S. v. Hardy*, 799.

4613, 4623. Indictment for violating prohibition law not quashed if charges are sufficiently stated. Defendant's remedy by motion for bill of particulars. *S. v. Jarrett*, 516.

4622. When placing nails, etc. upon highway and consequent injury to automobile are properly consolidated by trial judge as separate counts in the indictment. *S. v. Malpass*, 349.

4622. Where two cases for violation of Turlington Act may be consolidated under one indictment containing two counts. *S. v. Jarrett*, 516.

4643. Evidence of wilful representations as to land sufficient for conviction. *S. v. Roberts*, 93.

4643. When defendant's motion as of nonsuit upon the evidence is properly denied. *S. v. Ridcout*, 156.

4653. Appellant released as a matter of right upon giving proper bail bond. *S. v. Bradsher*, 401.

4925. Liability of surety on bond of manager of statutory storage warehouse. Warehouse receipts negotiable. *Lacy v. Indemnity Co.*, 24.

5473. When consolidation of school districts in county-wide plan does not require approval of voters, the tax remaining the same. *Scroggs v. Board of Education*, 110.

5481, 5657, 5639, 5642. New district under county-wide school plan operated under new statute, eliminating former tax levies of several districts. Date of tax levy. *Harrington v. Commissioners*, 572.

5481. Section solely applicable to new school districts within the county. *Howard v. Board of Education*, 675.

5645, 5640, 5639. County commissioners may not refuse to call another election for school purposes after six months from time the question has been defeated at the polls. *Board of Education v. Comrs. of Yancey*, 650.

6289. Where misrepresentations in application for life insurance policy are held representations and not warranties and evidence presents mixed issues of law and fact for jury. *Howell v. Insurance Co.*, 212.

6436, 6437. Parol evidence is incompetent in absence of fraud to vary terms of standard policy forms. *Hardin v. Insurance Co.*, 424.

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SEC.

6508. Limitation as to beneficiaries in policy of fraternal insurance. Unlawful change of beneficiaries. *Andrews v. Masons*, 697.

7545. Where junior grant to State lands in 1893 not color of title. *Land Co. v. Potter*, 56.

8019, 8028, 8029, 8030. Necessary for purchaser of land at tax sale to show compliance with these sections. Notice to owner. Remedy of purchaser. *Price v. Slagle*, 757.

CONSOLIDATION. See Courts, 8; Criminal Law, 15.

CONSORTIUM. See Actions, 1.

CONSPIRACY. See Criminal Law, 5, 13.

CONSTITUTION.

ART.

I, sec. 10. The presumption of payment of mortgage debt after fifteen years under statutory provisions, is prospective in affect. *Hicks v. Kearney*, 316.

I, sec. 14. Sentence of 30 years for violating C. S., 4209 (Vol. 3), not necessarily "cruel or unusual punishment." *S. v. Swindell*, 151.

I, sec. 14. Upon conviction under two separate statutes properly consolidated, a sentence may be imposed as to each offense within the limits of each term prescribed. *S. v. Malpass*, 349.

I, secs. 17, 13. The right of defendant to become his own witness in criminal action, or not to do so, without prejudice, is a part of the due-process clause of Constitution. *S. v. Hardy*, 799.

I, sec. 19. Polling of jury may be demanded by losing party as matter of right. *Culbreth v. Mfg. Co.*, 208.

I, sec. 29. Recurrence to fundamental principles of government. *S. v. Hardy*, 799.

II, sec. 14. The requisites for a municipal corporation to pledge its credit. *Storm v. Wrightsville Beach*, 679.

IV, sec. 8. Appeal from judgment in action for devisor will lie to Supreme Court. *Caldwell v. Caldwell*, 805.

IV, sec. 27. Action to remove lien for street improvements cognizable only in Superior Court. *Hahn v. Fletcher*, 729.

VII, sec. 7. This does not inhibit a municipal corporation from using funds on hand to erect a public building without submitting the question to its voters. *Adams v. Durham*, 232.

VII, sec. 7. The requisites for a municipal corporation to pledge its credit. Sea jetties. *Storm v. Wrightsville Beach*, 679.

VIII, sec. 4. A curative general statute as to assessment against owner of lands abutting on street improved is valid. *Hutton v. Mocksville*, 144.

X, sec. 6. Wife's conveyance of lands must be with husband's written consent. *Best v. Utley*, 356.

CONSTITUTIONAL LAW. See Municipal Corporations, 6, 9; Wills, 2; Courts, 16; Jury, 1; Taxation, 5, 10; Warehousemen, 5; Limitation of Actions, 3; Mortgages, 2; Judgments, 14; Criminal Law, 17, 24; Deeds and Conveyances, 12; Insurance, 12.

1. *Constitutional Law—Carnal Knowledge of Female Child—Punishment—Discretion of Court—Statutes.*—Upon conviction of a male person for violating the provisions of C. S., 4209 (Vol. III), for carnally knowing a female child thirteen years of age, who had not previously had sexual intercourse with any person, making the offense a felony: *Held*, a sentence of hard labor at the State's Prison for thirty years is not a cruel or unusual punishment prohibited by our Constitution, Art. I, sec. 14, or an abuse of the sound discretion of the trial judge, given him in such cases by the statute, under the evidence of this case. *S. v. Swindell*, 151.

2. *Constitutional Law—Taxation—Faith and Credit—Municipal Corporations—Cities and Towns.*—A town may not pledge its faith or credit for the issuance of bonds for municipal purposes, unless under statutory authority given in conformity with the requirements of the State Constitution, Art. II, sec. 14, by its passage on separate days by each branch of legislation, or when so given without the approval of its voters at an election held for the purpose, unless for necessary expenses. Const., Art. VII, sec. 7. *Storm v. Wrightsville Beach*, 679.

3. *Same—Necessary—Expenses—Statutes — Seaside Resorts — Jetties.* — What are necessary expenses for which a town may issue bonds without submitting the question to its electors for approval may, to some extent, vary in accordance with local conditions, and in this case of a seaside resort: *Held*, that an incinerator for the burning of refuse matter is necessary to health requirements, as well as the building of sea jetties for the preservation of the lands, were necessary expenses within the contemplation of Art. VII, sec. 7. *Held*, likewise, as coming within the term "necessaries," are systems of waterworks, constructing streets and sidewalks and boardwalks, enlarging sewer systems, and, where the special statute is unconstitutional, bonds for these purposes may be so issued under the Municipal Finance Act. C. S., vol. 3, sec. 2918. *Ibid.*

4. *Same—Ratification—Ordinances.*—Where a municipality has obtained temporary loans to pay for necessary expenses, C. S., 2932, 2934, 2935, (vol. 3), and thereafter seeks to issue bonds therefor under the provisions of the Municipal Finance Act, C. S., 2918, and the municipal authorities have accordingly ratified this indebtedness and included it with certain further sums for which the bonds are to be issued, it is a ratification and sufficient to sustain the issuance thus to be made. *Ibid.*

CONSTRUCTION. See Contracts, 20.

CONSTRUCTIVE NOTICE. See Chattel Mortgages, 1; Deeds, and Conveyances, 25.

CONSTRUCTIVE POSSESSION. See Deeds and Conveyances, 27.

CONTENTIONS. See Instructions, 1; Appeal and Error, 6.

CONTINGENT INTERESTS. See Wills, 9.

CONTINGENT REMAINDERS. See Wills, 7.

CONTRACTS. See Principal and Agent, 1; Loans, 1; Employer and Employee, 4; Appeal and Error, 28; Insurance, 5, 6, 8, 9, 11; Mortgages, 1; Commerce, 1; Deeds and Conveyances, 18; Carriers, 5; Compromise and Settlement, 1; Estates, 2; Physicians and Surgeons, 1; Illegitimate Children, 1.

1. *Contracts, Written — Consideration — Statute of Frauds — Parol Evidence—Mortgages—Deeds in Trust.*—Where the consideration of the extension of time for the mortgagor to redeem his lands is expressed as one dollar, it may be shown by parol that it was upon a different consideration, the written contract in this respect not being either within the intent and meaning of the statute of frauds or the varying of the words of a written agreement by parol. *Whedbee v. Ruffin*, 257.

2. *Contracts, Written—Fraud—Evidence.*—Where a corn-meal mill is the subject of a written contract of sale and purchase, and sought to be set aside for fraudulent representations of the seller in its procurement as to the quantity and quality of its daily output, the alleged fraud goes to the validity of the written instrument as a binding contract, and evidence is competent to sustain the allegations of fraud, irrespective of the written expressions of the agreement that would otherwise exclude it. *Wolf Co. v. Mercantile Co.*, 322.

3. *Same — Damages — Election of Remedies.* — Where the defendant, in plaintiff's action to recover the purchase price of a corn-meal mill, attacks the validity of the contract itself for fraud, he may at his election rescind the trade, wherein he may recover the purchase price or such portion as he may have paid, or avail himself thereof as a defense in bar of recovery of the purchase price or a part thereof remaining unpaid, or he may hold the seller for the damages he may have sustained in consequence of the fraud. *Ibid.*

4. *Same—Negotiations.*—Where the written contract of sale for a corn-meal mill is sought to be set aside for fraud in its procurement, evidence of verbal and written communications between the accredited representatives of the parties extending over the time inclusive, from the first to the last of those forming the negotiations leading up to the execution of the written instrument, is competent and not confined to those contemporaneous with the execution of the contract of sale and purchase. *Ibid.*

5. *Same—Damages—Evidence.*—Where a written contract for the sale of a corn-meal mill has been vitiated for fraud, and in the seller's action to recover the balance of the purchase price the purchaser alleges damages arising from the former's fraudulent representations as to the daily capacity of the mill, etc., it is competent for the purchaser to show his loss by reason of the failure of the mill to come up to the seller's representations of its daily output, and his expenditures necessary to put it in operation to produce the results obtained. *Ibid.*

6. *Same—Measure of Damages.*—In this case, *held*, the measure of the purchaser's damages upon the fraudulent representations of the seller of a corn-meal mill in the procurement of the contract was the difference between what the mill was actually worth and what it would have been worth if it had been as represented, with such additional

CONTRACTS—*Continued.*

damages as would have reasonably been foreseen by the parties at the time they made the contract, and which would naturally grow out of the failure of the seller's representations to be true. *Ibid.*

7. *Contracts—Infants—Disaffirmance of Contracts—Actions.*—An executory contract of an infant is voidable by him and not absolutely void, and he, after coming of age, may repudiate an executory contract he has theretofore made within a reasonable time, and recover such amounts of money as he may have paid thereunder, or restore such benefits as he may have received and still enjoys, and three years are regarded as a reasonable time, and an action to rescind the contract brought by the infant within a year after he has reached his majority is held to be a sufficient disaffirmance by the infant of his contract. *Faircloth v. Johnson*, 429.

8. *Contracts—Bargain and Sale—Covenants—Breach.*—Where the owner of lands, for a valid consideration, enters into an unconditional contract for the sale thereof, at a fixed price, and the other party unconditionally contracts to purchase the same at a future time, it is an executory contract of sale and purchase, whereunder each of the parties acquire rights and equities for performance upon complying with its terms, and where the purchaser agrees to pay a certain per cent of the purchase money in lieu of interest, and the taxes and insurance, these considerations are to be regarded as covenants, and not conditions the breach of which will work a forfeiture of his right to specific performance. *Crawford v. Allen* and *Realty Co. v. Crawford*, 434.

9. *Same—Equity—Liquidated Damages.*—Where an executory contract for the sale and purchase of land expressly provides for the purchaser's payment of a certain amount of liquidated damages in the event of his failure to perform its terms, and it appears upon the breach of the contract that the seller has not been damaged, no liquidated damages are recoverable; and where the purchaser has received the specified amount of liquidated damages, the courts of equity will apply such damages to the consideration for the transaction provided for in the contract. *Ibid.*

10. *Same—Forfeitures.*—Courts of equity do not favor forfeitures; and where a contract of sale and purchase of lands provides for the payment of liquidated damages by the purchaser in breach of its terms, this provision will not be enforced where there has been no injury and no loss. *Ibid.*

11. *Same—Time of the Essence.*—A provision of a contract for the sale and purchase of land that "time is of the essence of the contract" will be disregarded in equity when it is apparent, under the application of equitable principles to the case in hand, that it was not of the essence thereof. *Ibid.*

12. *Same—Payment—Accounting.*—Equity will decree specific performance in favor of a purchaser under a contract for the sale and purchase of lands who has failed to perform certain covenants therein required of him as to payments of certain moneys and the balance of the purchase price, and reasonably extend the time for payment when at the institution of the vendor's suit for damages he is ready, able,

CONTRACTS—*Continued.*

and willing to pay the amounts chargeable against him; and upon a disagreement as to this amount, an accounting between the parties may be taken. *Ibid.*

13. *Contracts—Breach—Personal Service—Measure of Damages.*—A contract for buying material for a building and superintending its construction is one calling for the personal services of the ones thus undertaking to furnish their services; and upon the breach thereof by the other party in otherwise constructing his building, the measure of damages is the actual net loss after payment of expenses sustained by them, as measured by the contract price and terms agreed upon, less such amount as they may have reasonably been able to reduce the amount first ascertained. *Construction Co. v. Wright*, 456.

14. *Same—Actions.*—Where the plaintiff has breached his contract of employment of a contractor to buy the materials for and superintend his building upon a percentage basis of the cost, the defendant may elect to take the course of awaiting the completion of the building and suing for the full amount of his damages, or he may sue from time to time as payments may have become due, as provided for in the contract of employment. *Ibid.*

15. *Same—Diminution of Damages—Burden of Proof—Evidence—Trials.*—Where the plaintiff seeks to have the amount of damages reduced by such sums as the defendant could have reasonably avoided upon plaintiff's breach of a contract of employment to buy material for and superintend the erection of his building, the burden of proof as to such diminution of damages is on the plaintiff, upon which it is competent to show the amount of contract work of this character the defendant had done in this locality during the life of the contract sued on. *Ibid.*

16. *Contracts—Options—Seals—Consideration.*—An option of purchase of lands given by the owner in writing under seal indisputably imports a consideration sufficient to enforce it upon the payment of the purchase price within the time therein specified, and upon an unconditional acceptance of its terms by the optionee, with his readiness and ability to comply therewith, it becomes a bilateral or binding contract. *Samonds v. Cloninger*, 610.

17. *Same—Acceptance—Tender—Waiver.*—Where the optionee in an option on lands offers to comply therewith according to its terms within the period of time granted therein, and is ready, able, and willing to do so, a tender of the agreed purchase price is unnecessary where the owner has previously sold the lands, and by his breach has put it out of his power to make the conveyance contemplated in the option. *Ibid.*

18. *Same—Evidence—Questions for Jury—Nonsuit.*—Where the optionee of lands accepts the option within the time limited, evidence that he had then correctly informed the owner that he had a cashier's check for the amount of payment required is sufficient to be submitted to the jury upon his readiness and ability to make this payment, and to deny the defendant's motion as of nonsuit thereon. *Ibid.*

19. *Contracts—Writing—Options—Parol Evidence—Principal and Agent—Breach—Defenses.*—In an action by the optionee for damages against

CONTRACTS—*Continued.*

the owner for the breach of his contract of option in failing to convey the land according to its terms, the latter, without seeking reformation of the contract in equity, cannot maintain the position that the instrument did not contain the contract as made, but that it rested in parol, whereby the optionee was an agent to sell and had not advertised, etc., as he had agreed to do, when it appears that the defendant had sold the lands to another within the time prescribed, and had put it beyond his power to comply with the agency contract he has attempted to establish. *Ibid.*

20. *Contracts—Principal and Surety—Highways—Construction—Bonds—Material—Labor—Electricity.*—Electric power used in the crushing of rock for the construction of a highway and coming within the terms of the contract of construction is a part of the value of labor or material necessary for the construction of a highway and comes within the intent and meaning thereof when thus expressed and covered by the bond accordingly given. *Town of Cornelius v. Lampton*, 714.

21. *Contracts—Independent Contractor—Employer and Employee—Principal and Agent—Evidence—Roads—Highways.*—Whether the relation of the contractor and independent contractor exists for the construction of a State highway to be built under contract with the State Highway Commission depends upon whether the concern signing the contract exercises the right of control over the other concern in the latter's doing the work, and evidence tending to show that the latter was supervised by the former therein, sent money to pay off the laborers thereon, etc., is competent upon the question, under the facts of this case. *Aderholt v. Condon*, 748.

22. *Same—Principal and Surety—Laborer—Material Furnishers.*—Where the contractors for the building of a State highway have employed another concern to fulfill their contract under the former's control, the latter is regarded as the agent or employee of the former, and with the surety on the construction bond is liable to laborers or material men upon default of the agent, whose claims are sufficiently covered by the contract and the surety bond given for its performance. *Ibid.*

23. *Same—Liens.—Held*, under the facts of this case, that lumber necessary for the preparation of the concrete, etc., used on a State highway constructed under contract with the State Highway Commission, are materials, etc., within the intent and meaning of our statute giving a lien therefor. *Town of Cornelius v. Lampton, ante*, 714, cited and applied. *Ibid.*

24. *Contracts—Principal and Agent—Lands—Sales—Breach.*—Where the owner of land has made a contract of sale thereof at auction with an agent, he may not avoid damages for a breach thereof in refusing to convey the same to the highest bidder at the sale upon the ground that he had so contracted with another as to render his performance impossible. *Horney v. Price*, 820.

CONTRACTS, WRITTEN. See Contracts.

CONTRIBUTION. See Bills and Notes, 2.

CONTRIBUTORY NEGLIGENCE. See Instructions, 4; Negligence, 3, 6, 10; Electricity, 1; Railroads, 6.

COOLING TIME. See Homicide, 6, 7.

CO-OPERATIVE MARKETING. See Injunction, 4.

COPY. See Process, 1.

CORPORATIONS. See Employer and Employee, 4; Slander, 3; Statutes, 4; Principal and Agent, 6.

1. *Corporations—Slander—Principal and Agent—Employer and Employee.*—A corporation may be held in damages in a civil action for the torts or slander of its employees when committed or uttered in pursuance of their employment. *Sawyer v. Gilmers, Inc.*, 7.

2. *Corporations—Ultra Vires Acts.*—The acts of a corporation will not be declared *ultra vires* when the authority therefor is expressly conferred upon it by the Legislature or reasonably incidental thereto, and its general business is confined to the scope or compass prescribed for the general purpose of its creations, or necessary, expedient, or profitable in the care and management of the property it is authorized to hold. *Hospital v. Nicholson*, 44.

3. *Same—Charitable Organizations—Hospitals.*—*Held*, under the facts of the case, a lease by an incorporated charitable hospital association made to one of its members of the hospital grounds, buildings and equipment, having management thereof, will not be declared invalid as a matter of law, construing its charter with reference to its powers and the record of the meeting at which the lease was voted to be made, there being some evidence that it was made in pursuance of and in accordance with the powers granted by charter, and that it was necessary to continue in operation thereunder. *Ibid.*

4. *Corporations — Charitable Institutions — Hospitals — Lease—Majority Vote.*—Where a majority vote of the members of a charitable hospital association is necessary to execute a lease of the incorporated association, a majority of a quorum of those present at a duly constituted meeting is sufficient. *Ibid.*

5. *Corporations — Charitable Institutions — Leases — Management—Good Faith—Appeal and Error—Remanding Case.*—Where the affairs of a charitable hospital association are managed by its incorporating members who execute a lease to one of them having the management and exclusive control thereof, the lease is not void, but voidable, and it is encumbent upon him to show, when the validity of the lease is attacked for fraud in fact or in law, that the lease was fairly and openly authorized and executed for an adequate consideration, and that its execution was free from his undue or controlling influence, oppression or imposition; and this case is remanded for further inquiry on the subject. *Ibid.*

CORPORATION COMMISSION. See Statutes, 3.

CORRECTION. See Courts, 11; Deeds and Conveyances, 13.

CORROBORATION. See Criminal Law, 23.

COUNSEL. See Criminal Law, 25.

COUNTS. See Intoxicating Liquor, 1.

COUNTERCLAIM. See Pleadings, 4; Usury, 1.

COUNTIES. See Government, 2.

COUNTY-WIDE. See Schools, 1; Education, 1.

COURTS. See Injunction, 1; Judgments, 2, 8; Pleadings, 1; Equity, 1; Deeds and Conveyances, 13; Appeal and Error, 13, 16, 25; Estates, 2; Bankruptcy, 1; Criminal Law, 26.

1. *Courts—Improper Remarks—Statutes—Prejudice.*—A remark made by the judge in reference to the testimony of a witness prejudicial to a party to the litigation in criminal and civil cases is forbidden by C. S., 564, and when once made an instruction intending to eradicate the impression is ineffectual, irrespective of the intention of the judge in uttering the prejudicial words. *S. v. Bryant*, 112.

2. *Same—Instructions—Appeal and Error—Objections and Exceptions.*—Where the judge in the presence of the jury remarks about the manner in which a witness is giving his testimony, to the prejudice of a party, it is not necessary for the party to except at the time, the requirements of the statute in such instances being prohibitory. *Ibid.*

3. *Same.*—The remarks of the judge during the giving of evidence on the trial and in the presence of the jury, "This witness has the weakest voice or the shortest memory of any witness I ever saw," is susceptible of the construction that the testimony of the witness was at least questioned by the court, and comes within the inhibition of C. S., 564. *Ibid.*

4. *Courts—Improper Remarks—Statutes—Appeal and Error—Negligence—Evidence—Automobiles.*—In an action to recover damages for a negligent injury alleged to have been caused by a collision between the automobile driven by the plaintiff and that driven by the defendant, remarks by the trial judge in his instruction to the jury as to the danger of automobiles apply equally to the plaintiff and defendant, and may not be held for prejudicial error to the defendant, against whom a verdict has been rendered, as an expression of opinion upon the evidence prohibited by our statute. C. S., 564. *Davis v. Long*, 129.

5. *Courts—Superior Courts—Inferior Courts—Appeal—Supreme Court—Appeal and Error.*—Where the Superior Court judge remands a case to the inferior or county court for another hearing, it is desirable that he specify the particulars upon which he has acted; and on appeal from him to the Supreme Court the question presented is whether error is shown on the face of the record. *Smith v. Winston-Salem*, 178.

6. *Courts — Discretion — Judgments — Motions — Appeal and Error.* — A motion to set aside a verdict as being against the weight of the evidence is addressed to the sound discretion of the trial judge, and is not reviewable on appeal when it appears, as on this appeal, that this discretion had not been abused by him. *Fountain v. Anderson*, 186.

7. *Courts—Discretion of Court—Evidence—Motion to Set Verdict Aside.*—In the absence of its abuse, the refusal by the trial judge of a motion

COURTS—*Continued.*

to set aside a verdict as being against the weight of the evidence is addressed to his sound discretion, and is not reviewable on appeal. *Alston v. Odd Fellows*, 204.

8. *Courts—Actions—Consolidation—Torrens Law—Trespass—Injunction.*—The trial court has the authority to consolidate proceedings pending under the Torrens Law (C. S., 2377 *et seq.*), wherein the title to the lands was put in issue, and proceedings for injunction brought by separate action by the adverse party, wherein the same matters were put at issue. *Blount v. Sawyer; Sawyer v. Morrison*, 210.

9. *Same—Procedure—Burden of Proof.*—Where the trial judge has acted within his authority in consolidating proceedings to register title under the Torrens Law with an independent action to enjoin a trespass between the same parties involving the same subject-matter, objection that such consolidation would confuse the question as to which party had the burden of proof is untenable, being only an objection to the procedure. *Ibid.*

10. *Courts—Discretion—Motion to Set Aside Verdict—Appeal and Error.*—A motion to set the verdict aside as being against the weight or credibility of the evidence is to the sound discretion of the trial judge; and in the absence of an abuse of this discretion is not reviewable on appeal. *Bank v. Barrow*, 303.

11. *Courts—Evidence—Correction of Error.*—It is competent for the judge, upon a trial for murder, to correct the admission of incompetent evidence and withdraw it from the consideration of the jury, and so instruct them. *S. v. Stewart*, 341.

12. *Courts—Issues.*—While the framing of issues is left largely to the discretion of the trial judge, and no error will be found if the issue permit the parties to present every phase of their contentions and evidence relating thereto without prejudice to their rights, yet the trial judge should, in the exercise of his discretion, clarify the issuable matters so that the jury, in the exercise of their intelligence, may correctly decide them upon the evidence under correct instructions of the court as to the principles of law applicable. *Hunt v. Eure*, 482.

13. *Courts—Jurisdiction—Demurrer—Waiver—Supreme Court—Statutes.*—A demurrer to the jurisdiction of the court for that the allegations of the complaint are insufficient to constitute a cause of action may be made upon motion to dismiss at any time when properly brought before the court, and originally in the Supreme Court under the provisions of C. S., 518, and a failure to have previously done so cannot be held as a waiver of the right. *Horney v. Mills*, 724.

14. *Same—Pleadings—Questions of Law.*—Upon demurrer to the jurisdiction of the court that the allegations of the complaint are insufficient to constitute a cause of action, the rule that the allegations of fact of the pleader are taken to be true for the purpose of passing upon the demurrer is inapplicable to his erroneous conclusions of law. *Ibid.*

15. *Same—Principal and Agent—Commission—Sales.*—Where an agent for the sale of land sues the owner for compensation for his services, the allegations of his complaint in effect that he was to sell the lands so

COURTS—*Continued.*

as to give the owner the right to reject the sale provided the amount did not exceed a certain sum, that at the sale accordingly made this sum was not realized and the owner refused to confirm: *Held*, the further allegation that as a part of this contract he was to receive a certain sum of money to pay for expenses is construed as depending upon his effecting a sale within the terms of the contract, and a demurrer is good. *Ibid.*

16. *Courts — Jurisdiction — Street Improvements — Assessments — Constitutional Law—Statutes.*—An assessment on land made for street improvements created a lien by statute involves the title and comes within the intent and meaning of a covenant against encumbrances in a later deed conveying the lands upon which the lien exists; and where the grantee in the deed has paid off this lien to clear his title, the amount involved, though less than the sum of two hundred dollars, carries it within the jurisdiction of the Superior Court, exclusive of that of the justice of the peace. North Carolina Constitution, Art. IV, sec. 27; C. S., 1473. *Hahn v. Fletcher*, 729.

COURTHOUSES. See Trials, 1.

COVENANTS. See Deeds and Conveyances, 3; Contracts, 8.

CREDITOR'S BILL. See Equity, 1.

CRIMINAL LAW. See Highways, 3; Appeal and Error, 10, 18, 29; Homicide, 8.

1. *Criminal Law — False Pretense — Evidence — Questions for Jury — Nonsuit.*—Where there is evidence under a criminal indictment that the defendant knowingly and falsely misrepresented that he owned a certain tract of land of value by reason of its having on it a mill shoal, and that he had included it within the description of certain tracts he had mortgaged to the prosecuting witness to secure a loan, and that acting thereon and induced thereby the prosecuting witness had loaned the money, and that the lands included in the mortgage were grossly inadequate to secure the loan, resulting in a loss to the prosecuting witness, an illiterate man, who could not read and understand his deed, or know that the mill shoal tract had not been included in the description, it is sufficient to sustain a verdict of conviction. C. S., 4643. *S. v. Roberts*, 93.

2. *Same—Burden of Proof.*—Upon a criminal indictment for obtaining a thing for value by false pretense, the plea of not guilty places the burden of proof on the State to establish defendant's guilt beyond a reasonable doubt. C. S., 4277. *Ibid.*

3. *Criminal Law—False Pretense—Collection of Debt—Appeal and Error.*—It appearing upon the trial of the criminal offenes of obtaining goods under false pretense that the jury have found the defendant guilty upon competent evidence: *Held*, the defendant's objection that the prosecuting witness was attempting to collect a debt by criminal process cannot be sustained on appeal. *Ibid.*

4. *Criminal Law—Evidence—Nonsuit—Statutes—Questions for Jury.*—Defendant's motion as of nonsuit in a criminal case, under the

CRIMINAL LAW—*Continued.*

statute (C. S., 4643), will be denied if construed in the light most favorable to the State it is legally sufficient to convict, its weight and credibility being for the jury to determine. *S. v. Rideout*, 156.

5. *Same—Conspiracy—Homicide.*—Where two defendants are tried for a homicide, the evidence is sufficient to convict both equally of the offense as principals if it tends to show they were both engaged in the unlawful operation of a whiskey still and had agreed that they should have a gun at the place to frighten away any one who attempted to interfere with them, which resulted in one of them firing upon and killing a person who had endeavored to stop them with a pistol, the killing being the consequence of a conspiracy to do an unlawful act. *Ibid.*

6. *Criminal Law—Assault—Deadly Weapon—Statutes—Burden of Proof—Instructions—Appeal and Error.*—For a conviction under the provisions of C. S., 4214, for an assault with a deadly weapon, with intent to kill, and inflicting a serious injury, not resulting in death, the burden of proof is on the State to show the various elements of the offense, beyond a reasonable doubt; and it is reversible error for the trial judge to instruct the jury, upon the evidence, that the use of a deadly weapon cast the burden upon the defendant to disprove his guilt. *S. v. Redditt*, 176.

7. *Criminal Law—Sentence—Suspended Judgment—Capias—Judgments Upon Condition.*—A sentence imposed for the violation of the prohibition law confined the defendant for a definite period in the county jail, suspended for thirty days upon payment of costs by defendant, with *capias* to issue if the defendant was then found in this State, is not objectionable as a conditional judgment. *S. v. McAfee*, 320.

8. *Same—Capias—Solicitor's Discretion—Discretion of Court.*—Where sentence in a criminal action is suspended, with *capias* to issue in the discretion of the solicitor, that part of the judgment which leaves the issuing of the *capias* to the solicitor's discretion is without authority of law, and will be disregarded, the discretion to issue the *capias* remaining with the judge in term. *Ibid.*

9. *Criminal Law—Spirituous Liquor—Evidence—Impeachment—Escaping Arrest.*—Where the prosecuting witness has seen several men whom he identifies as those illicitly operating a whiskey still, for which only one was put upon trial, it is competent for the State to show by his evidence that the others had fled arrest as an explanation to repel the inference of animus towards the defendant on trial that would otherwise have a tendency to discredit the testimony of the witness. *S. v. Dickerson*, 327.

10. *Same.*—Evidence of the flight of the offender, after violating a criminal statute, cannot have the effect of impeaching the character of an alleged accomplice who remains for arrest, and who upon the trial denies any connection with the offense for which he was charged. *Ibid.*

11. *Criminal Law—Evidence—Declarations.*—Declarations and acts of one on trial for a criminal offense, after the unlawful act has been committed, cannot be received in evidence against others charged as his accomplices or confederates in the commission of the crime. *Ibid.*

CRIMINAL LAW—*Continued.*

12. *Criminal Law—Witnesses—Evidence—Character—Cross-Examination—Statutes.*—While under the provisions of C. S., 1799, the defendant in a criminal action may not be required to testify as a witness to matters that would tend to incriminate himself, yet when he voluntarily takes the stand he is subject to cross-examination upon circumstances that would tend to impeach his character. *Ibid.*

13. *Criminal Law—Conspiracy—Evidence—Instructions.*—Where there is evidence tending to show that the prisoners on trial for murder had entered into a conspiracy to kill the deceased, an instruction is proper that each party to a criminal conspiracy is the agent of the other, and that an act in furtherance of the common design done by one of them is the act of all. *S. v. Stewart*, 341.

14. *Criminal Law—Homicide—Murder—Verdict—Polling Jurors—Recommendation for Mercy.*—Where upon the rendering of an adverse verdict to the defendants on trial for murder their attorney requests the polling of the jury, and, acting in response to the judge's question to each of the jurors asked accordingly, they each responded guilty of murder whereof they were charged, and upon a second inquiry by the court responded guilty of murder in the first degree: *Held*, the verdict was not objectionable as being too indefinite, and sentence thereon was properly imposed: *Held, further*, a recommendation for mercy was not properly to be considered as a part of the verdict. *Ibid.*

15. *Criminal Law — Obstructing Highways — Actions — Consolidation — Trials—Statutes.*—Two bills of indictments—one charging the statutory offense of obstructing a public highway by wrongfully and wilfully placing nails or tacks thereon, so as to obstruct the highway by causing punctures in tires of automobiles traveling thereon, and the other, in this manner injuring the automobiles of certain persons—are founded upon the same offense, the one growing out of the other, and are properly consolidated by the trial judge and tried together as separate counts of the same indictment. C. S., 4622. *S. v. Malpass*, 349.

16. *Criminal Law—Obstructing Highways—Evidence—Questions for Jury.*—Where the defendant denies the charge of obstructing a highway and injuring automobiles passing along it, by wilfully and wantonly placing nails or tacks thereon, and the evidence is conflicting, an issue of fact is raised for the determination of the jury. *Ibid.*

17. *Criminal Law—Statutes—Sentence—Constitutional Law.*—Where there is a conviction of the violation of two separate criminal statutes consolidated and tried as two counts under one bill of indictment, a sentence for each offense—the one to begin upon the expiration of the other term—confining the punishment as to each within that prescribed in the statute relating to it, cannot be considered under the facts of this case as cruel and unusual within the inhibition of our Constitution. Art. I, sec. 14. *Ibid.*

18. *Criminal Law—Instructions—Reasonable Doubt—Appeal and Error.*—The requisite of the law that the State must show the defendant in a criminal action guilty beyond a reasonable doubt in order to convict him is for the defendant's benefit, and a charge that likewise

CRIMINAL LAW—*Continued.*

puts the burden on defendant to show his innocence beyond a reasonable doubt is prejudicial error, entitling him, on conviction, to a new trial. *S. v. Palmore*, 538.

19. *Criminal Law—Seduction—Statutes—Burden of Proof—Evidence.*—In order to convict of seduction under our criminal statute, it is necessary for the State to satisfy the jury beyond a reasonable doubt of the innocence and virtue of the prosecutrix, the promise and the carnal intercourse induced thereby, and a conviction may not be had where there is no supporting evidence that she was innocent and virtuous. *S. v. Crook*, 545.

20. *Criminal Law — Prostitution — Statutes—Evidence—Reputation—Nonsuit—Trials.*—Under the rule that upon a motion as of nonsuit the evidence is to be construed in the light most favorable to the plaintiff, giving him the benefit of every reasonable intendment therefrom, *it is held* that circumstantial evidence is sufficient for the conviction of violation of our prostitution law, C. S., 4357, 4358, tending to show that the three defendants were partners in the cafe or restaurant business where rooms were also rented, with a bad reputation in this respect, and for cursing and drinking, and where rooms were rented for the purpose of illicit intercourse between men and women, and assignments for this purpose were made by two of the proprietors under such circumstances that the other, also indicted, must have known of the immorality for which the place had the reputation. *S. v. Sinodis*, 565.

21. *Criminal Law—Reasonable Doubt—Burden of Proof.*—The burden of showing guilt beyond a reasonable doubt required of the State in criminal cases, though not easily defined, imports an uncertainty of mind by the jury after a full, fair, and reasonable consideration of the evidence. *S. v. Williams*, 616.

22. *Criminal Law—Evidence—Unrelated Offenses—Motive—Identification.*—While the general rule is that substantive evidence of a separate and distinct criminal offense is inadmissible on the trial of a felony, it is an exception to this rule when the evidence of the former conduct of the defendant on trial tends to establish malice or motive in the instant case, or identify him as the one who committed the felony for which he is being tried. *S. v. Miller*, 694.

23. *Criminal Law—Evidence—Character—Corroborative Evidence—Substantive Evidence.*—While the good character of the defendant upon trial for a homicide is put in issue by his taking the stand as a witness in his own behalf, evidence of statements made to and testified by another of defendant's witnesses tending to corroborate the defendant's testimony can only bear upon the credibility of defendant's testimony, and is incompetent as substantive evidence. *S. v. Love*, 766.

24. *Criminal Law—Constitutional Law—Statutes.*—The defendant in a criminal action may not be convicted under the provisions of our Constitution, Art. I, sec. 17, except by the law of the land or under a unanimous verdict of guilty by the jury, Art. I, sec. 13, and upon his denial of guilt he is presumed to be innocent, with the statutory right to request to go on the stand as a witness in his own behalf, in not exercising which no prejudice shall be created against him.

CRIMINAL LAW—*Continued.*

C. S., 1799; and with further right to have counsel for his defense. C. S., 4515, who may argue the matters of law as well as of fact to the jury, C. S., 203; and the trial judge, in his instructions to the jury, shall not give his opinion whether a fact is fully or sufficiently proven. C. S., 654; and these are among the fundamental principles to which recurrence is directed by our Constitution, Art. I, sec. 29. *S. v. Hardy*, 799.

25. *Same—Attorney and Client—Counsel—Argument—Instructions—Appeal and Error.*—Upon the trial of a criminal case it is the duty of the defendant's counsel to argue his case to the jury upon the evidence introduced, and the remarks of the judge to the jury in effect that defendant's attorney, notwithstanding he had informed them of his rulings of the law, had argued the law to the jury, is virtually an instruction that the jury should give no consideration thereto, and is a prejudicial invasion of the defendant's rights, and constitutes reversible error. *Ibid.*

26. *Same—Courts—Jury.*—An instruction in a criminal case that defendant's counsel was under obligation to make his side the best side, and it was different with the court and jury who were to maintain a fair and impartial trial, is an erroneous conception of the law; and, *Held*, erroneous. *Ibid.*

27. *Criminal Law—Instructions—Reasonable Doubt—Appeal and Error.*—Where the accused on a criminal trial denies his guilt of the offense charged, he is presumed to be innocent, and for conviction the State must prove his guilt beyond a reasonable doubt; and an instruction is erroneous that the jury should return a verdict of guilty if they found the uncontradicted evidence in the case to be true. *Ibid.*

CROSS-EXAMINATION. See Witnesses, 1, 2; Criminal Law, 12; Wills, 14.

CROSSINGS. See Highways, 1; Negligence, 2.

DAMAGES. See Carriers, 2, 6; Municipal Corporations, 2, 8; Principal and Agent, 5; Slander, 2, 5; Appeal and Error, 8; Contracts, 3, 4; Judgments, 7; Commerce, 1; Physicians and Surgeons, 3; Government, 1; Railroads, 6.

Damages—Negligence—Evidence.—Upon the issue of damages recoverable by an employee for injuries negligently and proximately caused by his employer, it is *Held*, under the facts of this case, that evidence of the amounts charged by the hospital where the surgical operation had been performed on plaintiff, in consequence of the injury, doctor's bills, and charges for like treatment or services, was properly admitted on the trial. *Perkins v. Wood & Coal Co.*, 602.

DEADLY WEAPON. See Criminal Law, 6.

DEATH. See Actions, 1.

DEBT. See Criminal Law, 3.

DEBTOR AND CREDITOR. See Banks and Banking, 1.

DECISIONS. See Statutes, 1; Commerce, 3.

DECLARATIONS. See Insurance, 2; Evidence, 5, 7, 20; Criminal Law, 11.

DEDUCTION OF COMMISSIONS. See Employer and Employee, 4.

DEEDS AND CONVEYANCES. See Grants, 1; Actions, 2; Evidence, 7; Wills, 12, 24, 25; Pleadings, 3; Limitation of Actions, 4; Taxation, 10, 15; Title, 1.

1. *Deeds and Conveyances—Mines and Minerals—Exceptions from Deed—Fee Simple—Statutes—Estates.*—A conveyance of land in fee simple with habendum excepting one-half of all the mineral which thereafter may be found upon the premises, which is hereby expressly reserved by the grantors, is *held* to be an exception from the deed conveying the land as to the minerals, and the mineral rights are descendable to the heirs of the deceased grantor, without the use of the word heirs. C. S., 991. The distinction between an exception in the deed to the thing granted, and a reservation therein, discussed by ADAMS, J. *Trust Co. v. Wyatt*, 107.

2. *Same—Partnership.*—And *held, further*, the exception in the deed, being followed by a stipulation that if minerals should be found upon the lands the parties shall incur equal expense in testing the mine and divide the profits creates, in the event stated, a partnership between the grantor and grantee, the termination thereof by the death of the grantor not affecting the inheritance from him. *Ibid.*

3. *Deeds and Conveyances—Personal Covenants—Warranties—Breach—Covenants Running with Land.*—Where, in his deed to lands, the grantor, for himself and heirs, covenants with the grantee, a corporation, its successors and assigns, that he is seized in fee simple of the lands, with right to convey the fee simple free, clear of incumbrance, with warranty to defend the said title against lawful claims: *Held*, the covenant and warranty do not run with the land, but are personal to the grantee, and action thereon may be brought by him upon the delivery of the deed when there is a mortgage then existing against the title; and when the grantee has, in like deed of covenant and warranty, conveyed the title to another, such other person may not maintain an action against the original covenantor or warrantor for damages arising from the breach of his covenant and warranty. *Lockhart v. Parker*, 138.

4. *Deeds and Conveyances—Mortgages—Deeds in Trust—Title.*—Where the defendants have received from the plaintiff a certain sum in consideration of which the former were to convey to the latter a certain number of acres of land at a stated price by a specified time, and have tendered their deed as agreed upon and the plaintiff refused to accept the same and pay the purchase price on the ground that this land was included in a larger acreage covered by a mortgage and, therefore, the defendants could not convey a good title, it may be shown that the plaintiff held the mortgage and had agreed to credit the proceeds of the sale of the lands thereon, raising a necessary issue for the consideration of the jury. *Brown v. Ruffin*, 262.

5. *Deeds and Conveyances—Registration—Statute of Frauds.*—The defendants contracted upon a valid consideration to convey to plaintiff the fee-simple title to lands embraced in a larger boundary, upon which plaintiff held a deed in trust, and the defendants held a contract to convey from the mortgagor, duly signed by him and his wife, for the ten acres, upon payment of the purchase price within a certain time which was extended by an unrecorded endorsement, and within the

DEEDS AND CONVEYANCES—*Continued.*

time specified in the contract between the plaintiff and defendants the defendants offered the plaintiff a deed executed in proper form by the mortgagor and his wife and by the defendants without joinder therein by their wives. *Held*, the deed tendered was sufficient without the joinder of the defendants' wives, and the extension endorsed upon the contract between the mortgagor and the defendants did not require registration. *Ibid.*

6. *Deeds and Conveyances—Statute of Frauds.*—An agreement that the mortgagor apply the proceeds of sale of a part of the mortgaged lands upon his secured note, and an extension of time for the payment of the purchase price of lands, are not required to be in writing by the Statute of Frauds. *Ibid.*

7. *Deeds and Conveyances—Grants—Boundaries—Issues—Instructions—Adverse Possession—Appeal and Error.*—Where the controversy relates solely to the establishment of a certain dividing line of adjoining lands of the parties to the action, both claiming the same line called for in their deeds or grants, but differing as to its location upon the land, no issue of title is raised, and it is reversible error for the court to instruct the jury as to the evidence of adverse possession for twenty years by one of the parties beyond the line claimed by him, ripening his title thereto. *Geddie v. Williams*, 333.

8. *Same—Questions of Law—Questions for Jury.*—What is sufficient to constitute a disputed boundary to adjoining lands in controversy is a matter of law for the court, but where the evidence is conflicting as to its location a question of fact arises, to be given to the jury under a charge as to the law involved in the issue. *Ibid.*

9. *Same—Evidence.*—Where the controversy is solely to determine the location of the true dividing line between owners of adjoining lands in accordance with a boundary given in a deed or grant, the admission of evidence as to the adverse possession of one of the parties is harmless error as to the other party, under proper instructions. *Ibid.*

10. *Deeds and Conveyances—Grants—Boundaries—Possession—Evidence—Title—Instructions—Appeal and Error.*—Where the plaintiff alleges his title to a boundary line given in his deed, and defendant admits plaintiff's title, but only denies the location of the line so given between his land and that of the plaintiff, evidence of defendant's possession may be received as tending to establish his contention as to the true location of the line at the time of plaintiff's deed or grant; and an instruction that this evidence is otherwise to be considered as establishing defendant's title by twenty years adverse possession to the land beyond the true location of the line is reversible error. *Ibid.*

11. *Deeds and Conveyances—Probate—Judicial Acts—Statutes.*—The act of the proper officer in taking the acknowledgment of a deed is a judicial or a *quasi*-judicial act. C. S., 3293. *Best v. Utley*, 356.

12. *Deeds and Conveyances—Probate—Husband and Wife—Constitutional Law—Statutes.*—Under the provisions of our State Constitution, Art. X, sec. 6, a deed from a wife to another than her husband must be with the latter's written consent, with the certificate of the probate officer that she states to him, upon her private examination, separate and apart from her husband, that she signed the same freely and voluntarily, etc. C. S., 997, 3324. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

13. *Same—Defective Probate—Correction—Courts.*—A deed made by the wife to the husband of her lands must not only comply with the requirements of our Constitution, Art. X, sec. 6, and C. S., 997, 3324, but must also rebut the presumption of his influence over her by reason of the marital relations, as required by C. S., 2515, by the probate officer stating his conclusion in his further certificate that she freely consents to the same at the time of her separate examination, and that he is satisfied that her deed so made was not unreasonable or injurious to her; and when the probate is defective in this respect it cannot, after its execution and delivery, be corrected by the court so as to render it valid, except at least upon due notice to the parties. *Ibid.*

14. *Deeds and Conveyances—Probate—Husband and Wife—Impeaching Evidence.*—By express terms, our statute relating to the certificate of the probate officer of a deed by a wife conveying her lands to her husband, "the certificate shall state the conclusions of the officer and shall be conclusive of the facts therein stated," to the effect, among other things, that the wife's deed was not "unreasonable or injurious to her"; and in the absence of fraud on the part of the husband in procuring the execution of the deed, such conclusion of the officer, so stated in his certificate, regular in form, may not thereafter be attacked by his evidence on the trial to set aside the deed. C. S., 2515. *Ibid.*

15. *Same—Deeds in Trust—Mortgages.*—The requirements of C. S., 2515, as to the certificate of the probate officer to a deed from the wife to her husband conveying her lands applies to a deed in trust by the wife to secure an indebtedness by her to her husband. *Ibid.*

16. *Deeds and Conveyances—Probate—Registration—Presumption.*—Where a deed has been registered upon a probate regular in form, it is prima facie taken as correct; and upon an issue as to whether it was executed and delivered, the law raises a presumption from the probate and registration that it had been executed and delivered, which may be rebutted by sufficient evidence. *Ibid.*

17. *Same—Fraud.*—The certificate of a probate officer of a deed by the wife to her husband of her lands as not complying with C. S., 2515, cannot be impeached, except upon allegation and proof of fraud in the taking of the acknowledgment, the making the private examination, or in arriving at the conclusion as stated in the certificate. *Ibid.*

18. *Deeds and Conveyances—Contracts—Timber—Extension Periods—Tender—Payment—Determinable Rights.*—Where the right to cut and remove timber growing upon land is given upon consideration for a period of years, with right of grantee to continue thereafter to do so as to the remaining uncut timber by paying interest upon the original purchase price, from year to year, for an additional time, time for the tender or payment of the yearly interest for the continuance of the yearly right is ordinarily of the essence of the contract, and it should be tendered or paid by the grantee before the termination of the first period, or before the beginning of each successive year thereafter, or the grantee will lose his right. *Elvington v. Shingle Co.*, 366.

DEEDS AND CONVEYANCES—*Continued.*

19. *Deeds and Conveyances—Mortgages—Registration—Delivery—Presumption.*—The registration of a mortgage irrebuttably presumes its delivery to the mortgagee in favor of a bona fide purchaser. *Faircloth v. Johnson*, 429.

20. *Deeds and Conveyances—Mortgages—Cancellation—Statutes.*—It is only those named in the statute (not the mortgagor) who may require the register of deeds to cancel the instrument upon his record on endorsement of payment and satisfaction, to wit: the payee, mortgagee, trustee, or assignee of the same, etc., and where a subsequent purchaser has acquired the mortgaged lands relying upon a proper cancellation of this character, his title is not affected by any undisclosed agreement or understanding between the original parties. *Ibid.*

21. *Same—Presumptions.*—Where an entry is made by the register of deeds upon the margin of a registered mortgage, "the original being exhibited to me marked paid in full, I adjudge the same null and void, and it is hereby canceled of record," presumes, no evidence appearing to the contrary, that it was exhibited by the mortgagee or the proper person designated by the statute. *Ibid.*

22. *Deeds and Conveyances—Restrictions—Development Companies—Evidence.*—Conveyances of land by an improvement company from a plat of the original purchase in large acreage, divided into lots showing reserved streets with certain parks laid off, with restrictions in the deeds given for a large number of the lots sold as to the erection of residences only of a certain class or at a certain price in the printed and written conveyance, and without these restrictions by like conveyances as to other lots scattered through the development, is not sufficient to evidence a mutual mistake of the parties in failing to incorporate the restrictions in all of the deeds, enforceable in a court of equity. *Davis v. Robinson*, 589.

23. *Same—Equity—Injunction.—Held*, under the facts of this case, that a mesne purchaser of a lot of land conveyed by a deed restricting the use of lots to residential purposes cannot maintain his suit in equity for injunctive relief against the erection of a business building, a filling station for automobiles, against a purchaser under a deed containing no restrictions as to the use of the lot he has purchased. *Ibid.*

24. *Same—Easements—Statute of Frauds—Subsequent Purchaser—Registration.*—Where the owner of certain lots in a land development has acquired title by deed with others restricted as to the erection of dwellings, and claims this right against other purchasers whose deeds do not contain this provision, the right so claimed is that of a negative easement, required by the Statute of Frauds to be in writing (C. S., 988), and as against subsequent purchasers for value, their prior registration is required to establish the right. C. S., 3309. The acquisition and incidents of easements discussed by VARSER, J. *Ibid.*

25. *Deeds and Conveyances — Mortgages — Probate — Interest—Statutes—Registration—Constructive Notice.*—The probate of a deed or mortgage is a judicial act and may not in case of a mortgage be taken by a probate officer who is likewise one of the mortgagees, and his act in so doing is insufficient to pass the title against subsequent

DEEDS AND CONVEYANCES—*Continued.*

purchasers, etc., for value, and the registration of the mortgage when this is apparent is not constructive notice under the provisions of the statute, C. S., 3311. *Cowan v. Dale*, 685.

26. *Same—Trusts—Trustee—Purchasers for Value.*—A trustee in a deed of general assignment for the benefit of creditors is a purchaser for value within the intent and meaning of our Registration Act, C. S., 3311. *Ibid.*

27. *Deeds and Conveyances—Constructive Possession.*—Where the lands in controversy have not been in the possession of defendant claiming under a tax deed, or his predecessor in title, at any time for a longer period than three years, and then only by placing a fence enclosing a small portion thereof, and relies upon constructive possession, the constructive possession follows the better title shown by the plaintiff under a chain of title originating under a State grant of the *locus in quo*. *Price v. Slagle*, 758.

28. *Deeds and Conveyances—Evidence—Possession—Presumption.*—Where the grantee of a deed is in possession of the lands in dispute, according to the description therein, it is prima facie evidence that such possession was under the deed to the lands, nothing else appearing, and the deed itself may properly be introduced at the trial as evidence. *Freeman v. Ramsey*, 791.

DEEDS IN TRUST. See Liens, 2; Contracts, 1; Deeds and Conveyances, 4, 15; Mortgages, 1, 3.

DEFAULT. See Judgments, 5, 7.

DELIBERATION. See Homicide, 3, 8; Verdict, 1.

DELIVERY. See Deeds and Conveyances, 19; Carriers, 4.

DEMURRAGE. See Railroads, 5.

DEMURRER. See Taxation, 3; Actions, 2; Courts, 13; Pleadings, 8.

DEPOSITIONS. See Evidence, 19.

DEPOSITS. See Bills and Notes, 3; Banks and Banking, 1, 2.

DESCENT AND DISTRIBUTION.

Descent and Distribution—Statutes—Illegitimate Children—Widow.—Where the owner of lands dies without lineal or collateral heirs, leaving a widow, the illegitimate son of his mother, born before her marriage with his father, and being thus of the half blood, may not claim the estate from his father by descent, and the widow takes under the provisions of C. S., 1654, Rule 8. *Wilson v. Wilson*, 85.

DESCRIPTION. See Wills, 23.

DETERMINABLE RIGHTS. See Deeds and Conveyances, 18.

DEVELOPMENT COMPANIES. See Deeds and Conveyances, 22.

DEVISE. See Wills, 6, 12; Advancements, 2.

DISAFFIRMANCE. See Contracts, 7.

DISCRETION. See Discretion of Court.

DISCRETION OF COURT. See Homicide, 5; Constitutional Law, 1; Courts, 6, 7, 10; Criminal Law, 8; New Trials, 1; Intoxicating Liquor, 3.

DISMISSAL. See Appeal and Error, 24.

DISTRICTS. See Schools, 3.

DIVORCE. See Judgments, 11.

Divorce—Alimony Pendente Lite—Statutes—Appeal and Error.—While the amount allowed in the Superior Court as alimony for the wife's support and counsel fees *pendente lite* (C. S., 1666) is not ordinarily reviewable on appeal to the Supreme Court, it may be otherwise in exceptional cases, where the allowance is altogether disproportioned to the husband's earnings or income from property, and the findings in this case appearing to be meager in this respect, the case is remanded for the inquiry to be proceeded with, to ascertain what allowance would be "just and proper, having regard to the circumstances of the parties." *Davidson v. Davidson*, 625.

DOWER. See Limitation of Actions, 2; Wills, 15, 22; Estates, 5.

DRUNKENNESS. See Homicide, 8.

DUE COURSE. See State Treasurer, 3; Bills and Notes, 3; Actions, 5.

DUE PROCESS OF LAW. See Taxation, 10.

DURATION OF EMPLOYMENT. See Physicians and Surgeons, 4.

DUTIES. See Employer and Employee, 15; Schools, 2.

DYING DECLARATIONS. See Homicide, 4.

EASEMENTS. See Deeds and Conveyances, 24.

EDUCATION. See Schools, 1.

1. *Education — County-wide Plan — Statutes — Petition—Endorsement.*—Under the adoption of a county-wide plan of education, C. S., 5481, it is not required that petitions in the district therein, when signed by the requisite number of qualified voters, be endorsed by the governing boards of at least a majority of the school districts, as applicable to "special school taxing districts," under the provisions of C. S., 5657, the proceedings being under a different statute, C. S., 5639, relating and confined to "school districts," the new district operating of itself and not by virtue of component units. *Harrington v. Comrs. of Anson*, 572.

2. *Same—Taxation.*—Where a new school district has been formed on the county-wide plan of organization adopted according to law, C. S., 5481, and the election removes all taxing powers, the validity of the district thus formed is not affected by the fact that some of the districts theretofore existing had power to tax by virtue of previous elections and others had not, the taxing power in the county-wide plan of organization necessarily being the same. *Ibid.*

3. *Same—Levy and Collection of Taxes.*—Where the county-wide plan of organization for educational purposes (C. S., 5481) has been adopted, the annual levy and collection of taxes, as those prescribed for other taxes, C. S., 5642, are expressly authorized by the Statute of 1923 to

EDUCATION—*Continued.*

be made for general county purposes, in the months of July, August, and September, and the objection that the county commissioners should have acted in this respect in a different month is untenable. *Ibid.*

EJECTMENT. See Loans, 1.

ELECTIONS. Schools, 2.

ELECTION OF REMEDIES. See Contracts, 3; Removal of Causes, 6; Bankruptcy, 1; Wills, 15; Intoxicating Liquor, 3.

ELECTRICITY. See Evidence, 8, 10; Contracts, 20.

Electricity—Negligence—Contributory Negligence—Evidence—Nonsuit.—In an action to recover damages of the defendant electrical company, caused by its negligent stringing of its highly charged wires, there was evidence in plaintiff's behalf tending to show the plaintiff was a lad 15 years of age, of the mentality of a boy 8 or 10 years old, and came in contact with the defendant's uninsulated wires, strung some three months before, a few feet above the top of a sawdust pile, where the boys of a rural district were in the custom of playing, and of which the defendant had either actual or constructive notice: *Held*, companies of this character are held to the highest degree of care not to cause injury to others, and the evidence was sufficient to take the case to the jury upon the issue of defendant's actionable negligence and plaintiff's contributory negligence, and to deny the defendant's motion as of nonsuit. *Graham v. Power Co.*, 382.

EMERGENCY. See Employer and Employee, 14.

EMPLOYER AND EMPLOYEE. See Contracts, 21; Corporations, 1; Commerce, 4; Slander, 1, 3; Partnership, 1; Negligence, 5; Carriers, 3.

1. *Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Sufficient Help—Vice-Principal.*—The principle requiring an employer to furnish his employee a reasonably safe place in which to perform his duties, under the circumstances thereof, applies also, in like manner, to his furnishing him reasonable help for his safety under conditions reasonably requiring it, and, this duty not being delegable, he is answerable in damages for an injury negligently caused to an employee by the acts of his vice-principal in the failure to perform this duty. *Crisp v. Thread Mills*, 89.

2. *Same—Evidence—Nonsuit—Questions for Jury.*—Evidence in this case tending to show that an employee at a yarn mill was injured or ruptured by being required by his boss, representing his employer, to work with insufficient help after he had notified him thereof, and who had failed to supply the help reasonably necessary, is *held* sufficient to take the issue to the jury, and deny a motion as of nonsuit thereon. *Ibid.*

3. *Same—Assumption of Risks—Burden of Proof.*—In order to defeat recovery in an action of an employee to recover damages for an injury caused by his continuing to work after he had knowledge of the danger therein, under the doctrine of assumption of risks, it must be made to appear that he continued to work under the circumstances when a man of reasonable prudence would not have done so, with the burden of this issue on defendant. *Ibid.*

EMPLOYER AND EMPLOYEE—*Continued.*

4. *Employer and Employee—Contracts—Collections—Salaries—Deductions —Corporations—Receivers—Liens.*—Where an employee of a corporation has money in his hands collected for the corporation, and accepts another position, that of State manager of the same corporation, under a contract that he shall deduct his salary and expenses from the collections he may make for the company as such manager, and files his claim against the receiver of the corporation, which has become insolvent, the claimant may only deduct from his collections as State manager, his salary and expenses as such, and the balance is held by him as a fiduciary and not subject to his salary then due him in the former occupation, and the former services having been rendered more than two months prior to the receivership, he can acquire no superior rights to general creditors to the surplusage. *Lumber Co. v. Phosphate Co.*, 206.

5. *Employer and Employee—Master and Servant—Vice-Principal—Torts.* As a general rule, a principal who intrusts an employee with authority to control other employees, is held responsible for the manner in which this authority is exercised. *Southwell v. R. R.*, 417.

6. *Employer and Employee—Master and Servant—Parent and Child—Negligence—Instructions—Appeal and Error.*—The parent is the natural guardian of her 15-year-old lad; and upon evidence that her son, employed to work in the woods for a shingle company, was put to work by his employer, against her instructions, as a "tripper" at the saw table, a place attended with danger, and with which he was inexperienced, it is a breach of duty of the defendant, and is actionable negligence when proximately causing the death of the boy, though not a matter of contract between the company and the parent; and a peremptory instruction that the jury should not consider it upon the issue is reversible error. *Satchwell v. McNair*, 472.

7. *Employer and Employee—Master and Servant—Negligence—Evidence—Instructions—Appeal and Error.*—The plaintiff's intestate, a lad of 15 years of age, was employed by the defendant to work as a "tripper" at a shingle saw, under the sawyer, with allegation and evidence tending to show that it was necessary for the sawyer to see the plaintiff's intestate when the latter was operating the saw carriage, in order that the intestate might work in safety, and that a board was suspended about 5 inches above the saw in such a manner as to obstruct his view, and in consequence the intestate's death was caused: *Held*, reversible error for the trial judge to instruct the jury to disregard the evidence of this obstruction in passing upon the question of defendant's actionable negligence. *Ibid.*

8. *Employer and Employee — Master and Servant — Negligence — Evidence—Instructions—Appeal and Error.*—Where there is allegation and evidence tending to show that the death of plaintiff's intestate was caused by the negligent failure of the defendant, his employer, to furnish him a safe place to work at its shingle saw, and to instruct him, an inexperienced boy, in this dangerous work, it is reversible error for the trial judge to fail to instruct the jury in the law arising from the evidence as to the defendant's duty thereunder. *Ibid.*

9. *Employer and Employee—Master and Servant—Negligence—Evidence—Nonsuit.*—Evidence that plaintiff was defendant's employee and was

EMPLOYER AND EMPLOYEE—*Continued.*

injured in the course of his duties by the falling of a brick upon his head by reason of employees of defendant tossing bricks to others on an overhead scaffold near which plaintiff was ordered to work to be laid by brickmasons in the wall of the building being erected, is sufficient upon the issues of defendant's actionable negligence to take the case to the jury, and deny defendant's motion as of nonsuit thereon, or a peremptory instruction in his favor. *Thomas v. Lawrence*, 521.

10. *Same—Accident.*—Where the employer is sued for damages for negligent injury to his employee, the former may not successfully defend the action upon the contention that it was an accident not reasonably to have been anticipated, especially when the defendant's negligence concurs and proximately causes the injury in suit. *Ibid.*

11. *Same—Assumption of Risks.*—In order for the application of the doctrine of assumption of risks, it is necessary for the employee to have known of the danger he is alleged to have assumed, and where there is evidence tending to show that the injury in suit resulted from his obedience to an order from the defendant's vice-principal, who was aware of the dangerous conditions existing at the place the employee was instructed by him to work, and which caused the injury, and the employee was unaware thereof, a motion as of nonsuit on this ground will be denied. *Ibid.*

12. *Same—Fellow-Servants.*—Where an employee was injured by a brick falling upon his head while engaged in the scope of his duties, which was one of those being tossed by other employees or his fellow-servants to a scaffold to be placed in the wall by defendant's brickmasons, and the place wherein the employee was thus engaged did not meet the requirements that the employer, in such instances, furnish his employee a safe place to work, which resulted in the injury, this duty is one the employer may not delegate, and the defense that the injury in suit was caused by the negligent acts of the employee's fellow-servant for which the employer was not answerable, is untenable. *Ibid.*

13. *Employer and Employee—Master and Servant—Negligence—Evidence.* The plaintiff was a laborer employed by a construction company in placing dirt upon a public highway being built by his employer, which was excavated by a heavy steam shovel operated by an independent company, and received the injury in suit while acting at the request of the one operating the shovel in placing logs for the safe passage of the shovel on the road whereunder was placed a drain pipe, as the shovel was being taken from one locality to another to resume its work: *Held*, the plaintiff, under the circumstances, to be regarded as an employee of the defendant company operating the steam shovel, to the extent stated, who owed him the nondelegable duty to furnish him a safe place to work. *Perkins v. Wood and Coal Co.*, 602.

14. *Same—Emergency—Trespasser—Volunteer.*—A third person may render services to another at the request of the latter's employee having charge of its work under an emergency that renders the person performing such service also an employee and not a mere volunteer or trespasser. *Ibid.*

15. *Same — Safe Place to Work — Nondelegable Duty — Fellow-Servant.*— Where an employee is injured by the negligence of the employer in

EMPLOYER AND EMPLOYEE—*Continued.*

failing to furnish him a safe place to work, the duty being nondelegable, the latter may not avoid liability on the ground that the injury was caused by a fellow-servant of the plaintiff, when an exercise of ordinary care on the employer's part, or on the part of the one having charge of the work, would have prevented it. *Ibid.*

16. *Employer and Employee — Master and Servant — Fellow-Servant — Instructions—Negligence—Appeal and Error.*—In an action for damages for a negligent personal injury inflicted on an employee, there was evidence tending to show negligence of another of defendant's employees after he had finished his daily hours of work, and the question was presented as to whether he was at the time of the injury a fellow-servant or a trespasser or licensee. *Held*, this was a mixed question of law and fact under proper instructions from the court, and a charge on the question of negligence which failed to charge the principles of law upon the question of defendant's liability under the fellow-servant principle, and in case its employee was a licensee or trespasser is reversible error. *Richardson v. Cotton Mills*, 653.

17. *Employer and Employee—Master and Servant—Safe Place to Work—Instructions—Appeal and Error.*—The employer is required to furnish his employee a safe place to work, in this case in the performance of his duties around a band saw, only in the exercise of ordinary care, and an instruction that it was his duty to do so is *held* under the facts in this case as reversible error. *Cable v. Lumber Co.*, 840.

EMPLOYERS' LIABILITY ACT. See Commerce, 4.

EMPLOYMENT. See Physicians and Surgeons, 4.

ENDORSER. See Bills and Notes, 1; Banks and Banking, 4.

ENDORSEMENT. See Education, 1.

ENTIRETIES. See Estates, 1.

EQUITY. See Principal and Agent, 1; Bills and Notes, 2; Taxation, 13; Liens, 2; Contracts, 9; Deeds and Conveyances, 23.

Equity—Creditors' Bill—Courts—Jurisdiction.—A creditor's bill is an equitable remedy and is cognizable in the Superior Court; and the jurisdiction of the court in such suits applies to the joinder of creditors whose claims ordinarily would be only cognizable in the court of a justice of the peace. *Robinson v. Williams*, 256.

ESCAPING ARREST. See Criminal Law, 9.

ESTATES. See Deeds and Conveyances, 1; Wills, 6, 7, 9, 17; Advancements, 2; Bankruptcy, 1; Evidence, 27.

1. *Estates — Entireties — Husband and Wife — Judgments—Execution.*—Execution against the lands of husband and wife held by them in entireties will not be issued under a consent judgment against them individually upon a debt due by one of them to the judgment creditor. *Distributing Co. v. Carraway*, 420.

ESTATES—*Continued.*

2. *Same—Consent Judgment—Individual Liability—Contracts—Courts.*—A consent judgment is the act of the parties entered of record with the sanction of the court; and where the wife and another have incurred an obligation, trading as a partnership, and a consent judgment has been entered against them as a partnership and individually, and also against her husband individually, who likewise consents as a party to the action, the use of the word "individually" excludes lands held by the husband and wife by entireties, and the same is not subject to be sold under the execution of the judgment. *Ibid.*

3. *Estates—Rule in Shelley's Case.*—The rule in *Shelley's case* is now well established as a rule of property, as well as a rule of law, in the jurisdiction of our State, subject to change by statute. *Hartman v. Flynn*, 452.

4. *Same—Remainders—Homestead—Bankruptcy.*—A devise of land to the testator's son, and then to his bodily heirs, by the application of the rule in *Shelley's case*, gives to the son a fee-simple estate, and a further devise to his wife, should she survive him, does not affect the application of this rule: and when the son has become bankrupt, his trustee in bankruptcy may maintain his action to enter into possession of the lands and sell the same for the benefit of the creditors of the estate, subject to the contingent estate of the wife and the homestead of the bankrupt. *Ibid.*

5. *Estates—Dower—Life Estate—Ownership—Fee Simple.*—While a tenant for life or one having acquired a dower interest in lands may be entitled to the possession as owner, this ownership is limited to the purposes of the life estate and not to a complete ownership of the fee-simple title. *Freeman v. Ramsey*, 791.

ESTOPPEL. See Insurance, 3; Bills and Notes, 6; Judgments, 4, 6; Mortgagor and Mortgagee, 1; Wills, 25.

EVIDENCE. See Carriers, 1, 3, 6, 7, 8; Courts, 4, 7, 11; Criminal Law, 1, 10, 11, 13, 16, 19, 20, 22, 23; Employer and Employee, 2, 7, 8, 9, 13; Homicide, 1, 2, 3, 4, 6, 7; Instructions, 3, 4, 6, 7; Insurance, 2, 4; Grants, 3; Municipal Corporations, 4; Negligence, 1, 2, 5, 7, 9, 11; Principal and Agent, 1; Slander, 1, 2; Wills, 5, 10, 14; Bills and Notes, 2, 4, 8; Partnership, 1; Register of Deeds, 1; Verdict, 1; Warehousemen, 5; Appeal and Error, 5, 9, 19, 22, 25, 26, 28; Contracts, 2, 5, 15, 18, 21; Witnesses, 2; Deeds and Conveyances, 9, 10, 14, 22, 28; Murder, 1; Title, 1; Electricity, 1; Intoxicating Liquor, 2; Damages, 1; Pleadings, 6.

1. *Evidence—Nonsuit—Statutes—Questions for Jury.*—A judgment as of nonsuit upon the evidence (C. S., 567) should not be rendered when construed in the light most favorable to the plaintiff, giving him the benefit of every reasonable intendment and every reasonable inference therefrom, it is sufficient in law to be submitted to the jury upon the controverted questions. *Lindsey v. Lumber Co.*, 118.

2. *Evidence — Nonsuit — Municipal Corporations—Streets—Assessments—Statutes.*—In a suit to restrain the collection of an assessment by the town on plaintiff's land abutting on a street for the purpose of improvement thereon, plaintiff's motion at the close of defendant's evidence for judgment upon her exception is, in effect, a motion for

EVIDENCE—*Continued.*

judgment as of nonsuit upon the evidence, under the provisions of our statute (C. S., 567), and will be denied when there is sufficient legal evidence to sustain the assessment. *Holton v. Mocksville*, 145.

3. *Evidence—Prima Facie Case—Nonsuit.*—Defendant's motion as of nonsuit upon the evidence is properly denied if plaintiff has made out a prima facie right to recover. *Alston v. Odd Fellows*, 204.

4. *Evidence—Boundaries—Issues of Fact—Verdict—Appeal and Error.*—*Held*, under the evidence in this case, the questions of inconsistencies in the description of lands and boundaries contained in the several deeds under which the parties claimed title, and the subsequently changed location thereof, were properly issues of fact that have been determined by the jury, and presented no questions of law that were reviewable on appeal. *Carter v. Vann*, 252.

5. *Evidence—Declarations—Mortgages—Claim and Delivery—Res Gestæ—Hearsay.*—Where, in claim and delivery for two mules by the mortgagor under an unregistered mortgage, the defendant claims as a purchaser from the deceased mortgagor, evidence by the plaintiff as to what the deceased mortgagor had subsequently said tending to establish the plaintiff's claim is not part of the *res gestæ*, and is incompetent as hearsay. *Chandler v. Marshall*, 301.

6. *Evidence—Issues—Boundaries—Nonsuit.*—Where there is only an issue raised by the complaint and admission of the answer as to the true dividing line between plaintiff and defendant, as located by plaintiff's grant or deed, and there is evidence to support the plaintiff's contention, defendant's motion as of nonsuit thereon is properly denied. The statutory proceedings in processioning and the common-law doctrine of the writ of perambulation discussed by VARSER, J. *Geddie v. Williams*, 334.

7. *Evidence—Declarations—Interest—Deeds and Conveyances—Husband and Wife.*—Where the heirs at law of the deceased wife seek to set aside her deed to her lands to her husband, her declarations affecting the validity of the deed are in her own interest, and not available to her heirs at law claiming under her title. *Best v. Utley*, 357.

8. *Evidence—Nonexpert Witnesses—Collective Facts—Electricity.*—Where there is evidence tending to show that defendant electric power company was negligent in the construction of transmission lines, uninsulated, near the top of a sawdust pile, where children were accustomed to play, and that the plaintiff was injured thereby, a boy of 15 years of age, it is competent for an expert in such matters to testify, from his own observation of the plaintiff, that he was only of the mentality of a boy 8 or 10 years of age, relative as to whether he should have been aware of the dangerous circumstances under which he had voluntarily acted at play, and which produced the injury, and that such low mentality was hereditary in his family. *Semble*, a nonexpert witness may likewise testify from his own observation as to the boy's mentality. *Graham v. Power Co.*, 381.

9. *Evidence—Appeal and Error—Harmless Error.*—Where there is evidence tending to show that the plaintiff, 15 years of age, and immature for his age, was injured by the negligence of the defendant electrical power company in stringing its uninsulated high-power

EVIDENCE—*Continued.*

lines near the top of a sawdust pile where boys were accustomed to play, the admission of testimony of the plaintiff's father, after he had said the plaintiff had previously told him he was at play on the sawdust pile, but that afterwards the plaintiff told him he could not remember this circumstance, is not reversible error, when the trial judge instructed the jury they must disregard the plaintiff's own testimony as to his playing on the sawdust pile when he had received the shock causing the injury complained of. *Ibid.*

10. *Evidence — Electricity — Burns — Opinion Evidence — Nonexpert Witnesses.*—In an action to recover for the negligent injury caused the plaintiff from the power line of an electric company carrying a high voltage of electricity, it is competent for a witness to testify, from his own observation, that the injuries he had observed on the plaintiff after the accident had been caused by burns from highly electrically charged wires, though he may not have proved that in this respect he could give an expert opinion. *Ibid.*

11. *Evidence—Nonsuit—Statutes—Waiver.*—Upon a motion as of nonsuit, the evidence is to be considered in the light most favorable to the plaintiff, whether offered by her or elicited on cross-examination, entitling her to the benefit of every reasonable intendment and inference to be drawn therefrom in her favor; and, under our statutes, where the defendant's motion is refused after the introduction of the plaintiff's evidence, by introducing evidence defendant waives the benefit of his exception, and the entire evidence will be considered under the rule stated. *Nash v. Royster*, 408.

12. *Evidence—Nonsuit.*—The evidence, upon defendant's motion to nonsuit thereon, will be considered in the light most favorable to the plaintiff, and the motion will be denied if thus considered it is legally sufficient to support a verdict in plaintiff's favor. *Southwell v. R. R.*, 417.

13. *Evidence—Letters—Secondary Evidence.*—Where the issuable matter in the controversy is whether the defendant was a member of a partnership and thus liable for its debts, original letters addressed to the defendant asserting he was a member are the best evidence of their contents, and not collateral to the issue, and the admission of parol evidence of their contents is reversible error, in the absence of legal notice to the defendants to produce them or other evidence or findings of the trial court required as a prerequisite thereto. *Mahoney v. Osborne*, 445.

14. *Same—United States Mail—Presumptions.*—Where a letter from the plaintiff is primary evidence of its contents upon the trial of an issue, evidence that it had been properly addressed, stamped, and mailed prima facie presumes its delivery to the defendant; but, before secondary evidence of its contents is properly admitted, the lawful prerequisites as to its admissibility must be observed. *Ibid.*

15. *Same—Notice—Appeal and Error—Findings of Fact.*—In an action to fix liability on defendant for the debts of a partnership as a member thereof, plaintiff relied upon a letter he had written to the defendant charging him with this connection, and properly addressed, stamped, and mailed it, but received no reply. There was evidence that defendant had left the State, and consequently the jurisdiction of our courts, and he was absent from the trial. In the absence of due

EVIDENCE—*Continued.*

notice to defendant to produce the letter: *Held*, the burden of proof was on the plaintiff to show that the defendant had the letter or that it was under his control or he had lost the same, and that diligent search had ineffectually been made in the proper place or places, or sufficient to establish the loss of the instrument, requiring the trial judge to make his findings upon the evidence and the review of the law applicable being only permissible on appeal. *Ibid.*

16. *Evidence—Replies to Letters.*—Answers to letters written to a party to an action are competent as evidence therein, and prima facie presumed to be genuine. *Ibid.*

17. *Evidence—Prima Facie Case—Appeal and Error—Prejudice—Harmless Error.*—The rules of evidence are important to the establishment of the rights of litigants, and a disregard of the rules establishing a presumptive right or prima facie case wherein a litigant has been substantially prejudiced may not be regarded as a mere technical or harmless error, and an instruction that erroneously places the burden of the issue upon the defendant, when it should have remained on the plaintiff in a civil action, is reversible error. *Hunt v. Eure*, 483.

18. *Evidence—Nonsuit—Statutes.*—A motion as of nonsuit made under the provisions of C. S., 567, at the close of the plaintiff's evidence and renewed at the close of all the evidence, will be denied if it is sufficient to support a verdict in plaintiff's favor taken in the light most favorable to him, whether elicited on direct or cross-examination, and he is entitled to the benefit of every reasonable inference to be drawn therefrom. *Hicks v. R. R.*, 548.

19. *Evidence—Depositions—Signature of Witness—Statutes.*—The certificate of the proper commissioner or notary public before whom a deposition has been taken is sufficient for the deposition to be received in evidence upon the trial without requiring the signature of the deponent, though such is the better practice for the purpose of identification. C. S., 1809. *Riff v. R. R.*, 585.

20. *Evidence—Principal and Agent—Declarations—Hearsay—Appeal and Error.*—Statements of the agent of a railroad company as to the condition of its stockyard, where injuries to plaintiff's shipment of stock is alleged to have been caused from exposure in inclement weather, are not part of *res gestæ* when made after the alleged injury has occurred, and are incompetent as hearsay, but the error may be cured by defendant's further evidence or admissions on the subject. *Nance v. R. R.*, 638.

21. *Evidence—Experts.—Held*, in this case the evidence given by an expert in answer to hypothetical questions was incompetent, applying *Hill v. R. R.*, 186 N. C., 475. *Ibid.*

22. *Evidence—Suffering—Hearsay.*—In an action to recover damages for a wrongful death resulting from a negligent personal injury, the remarks or ejaculations of the patient brought forth by present suffering are competent, though incompetent as to past suffering as evidencing the condition of the patient. *Martin v. Hanes Co.*, 644.

23. *Evidence—Expert Opinions—Physicians—Questions for Jury—Appeal and Error.*—In an action to recover of the employer of intestate damages for its failure to provide him a safe place to work, the death

EVIDENCE—*Continued.*

resulting several months after the injury, it is competent for a medical expert to testify his opinion in answer to a question hypothecated upon the jury's finding of negligence, that the injury so inflicted resulted in the intestate's death, and not objectionable as invading the province of the jury. *Ibid.*

24. *Evidence—Hearsay—Negligence—Appeal and Error—Objections and Exceptions—Harmless Error—Motions—Instructions.*—Where there is pleading and evidence tending to show and *per contra* that the plaintiff sustained the injury in suit by the negligence of defendant's driver in unexpectedly swerving his truck loaded with granite so as to catch the plaintiff between the truck and the sidewalk, causing the personal injury in suit, upon objection of the defendant to plaintiff's evidence that some one "hollered" at the time that some one "ought to shoot that driver," the court said, "Yes, do not tell that": *Held*, the statement of the court was equivalent to sustaining the defendant's objection and, should defendant have desired, it should have moved to strike out the unsolicited evidence with instructions that the jury must not consider it, and otherwise the conduct of the court will not be held for error on appeal. *Gilland v. Stone Co.*, 783.

25. *Evidence—Instructions—Appeal and Error—Objections and Exceptions.*—Where in the cross-examination of defendant's witness in an action to recover damages for a personal injury alleged to have been negligently inflicted there is reference to the agent of an indemnity company securing the presence of the witness at the trial from another State, etc., a motion of defendant to withdraw a juror and mistrial ordered is properly denied, when on plaintiff's motion all the evidence as to the indemnity company defending the action is withdrawn by the court from the consideration of the jury and becomes but an immaterial incident of the trial. The comments made thereon by plaintiff's counsel in this case is not approved, though not held for reversible error upon the record in defendant's appeal. *Ibid.*

26. *Evidence—Nonsuit—Appeal and Error.*—Where the defendant introduces evidence after its motion as of nonsuit upon the plaintiff's evidence has been denied, it waives its right to a nonsuit thereon, and when renewed at the close of all the evidence it will be denied if, when viewed in the light most favorable to the plaintiff, it is sufficient to sustain a judgment in his favor. *Ibid.*

27. *Evidence — Nonsuit — Estates — Homestead—Actions—Heirs at Law—Title—Appeal and Error—New Trials.*—Upon a motion of nonsuit, the evidence tending to establish the defendant's rights are not considered; and, *Held*, on the record of this appeal, it appearing that the heirs at law of the deceased husband were parties plaintiff claiming title to the lands in controversy, being the life estate or dower interest of the widow, now living, there is no estoppel on them except as to the life estate as to which only an estoppel could be successfully set up and a judgment of nonsuit entered, and a new trial is ordered for the determination of this further question presented by the record. *Freeman v. Ramsey*, 791.

EXCEPTIONS. See Deeds and Conveyances, 1; Objections and Exceptions.

EXECUTION. See Estates, 1; Wills, 13.

EXECUTORY DEVISE. See Wills, 17.

EXPENSES. See Constitutional Law, 3.

EXPERTS. See Evidence, 21, 23.

EXPRESS COMPANIES. See Commerce, 1.

FAITH AND CREDIT. See Constitutional Law, 2.

FALSE PRETENSES. See Criminal Law, 1, 3.

FEDERAL COURTS. See Removal of Causes, 1, 2, 3, 5; Commerce, 3.

FEDERAL STATUTES. See Commerce, 1, 4; Carriers, 6.

FEE SIMPLE. See Deeds and Conveyances, 1; Wills, 9, 17; Estates, 5.

FELLOW-SERVANT. See Employer and Employee, 12, 15, 16.

FINDINGS. See Evidence, 15; Railroads, 5; Appeal and Error, 23, 25; Taxation, 9.

FIRES. See Instructions, 5; Railroads, 2.

FLIGHT. See Homicide, 1, 2, 3.

FORECLOSURE. See Mortgages, 3; Taxation, 15.

FORFEITURES. See Contracts, 10.

FRATERNAL ORDERS. See Insurance, 11.

FRAUD. See Trade Names, 2; Warehousemen, 2; Bills and Notes, 3; Actions, 2; Contracts, 2; Deeds and Conveyances, 17; Compromise and Settlement, 2; Injunction, 4.

FRAUDULENT JOINDER. See Removal of Causes, 1, 3.

GAMING. See Taxation, 7.

GIFTS. See Taxation, 7.

GOOD FAITH. See Corporations, 5; Pleadings, 7.

GOVERNMENT.

1. *Government—Municipal Corporations—Agency—Principal and Agent—Negligence—Torts—Damages.*—An incinerator operated by a city for the burning of its garbage comes within the authority conferred upon it by statute—C. S., 2787 (5), (6), 2799—and its operation being a purely governmental function, exercised as a local agency of State government, the city is not liable for an injury caused by defects therein to an employee, in the absence of statutory provision to the contrary. *Scales v. Winston-Salem*, 469.

GOVERNMENT—*Continued.*

2. *Government—Roads and Highways—Counties—Road Commissions—Negligence.*—An agency of county government incorporated by statute to assume control and working of the county highway, formerly performed by the county commissioners, exercises therein a purely governmental function, from which no liability will attach for personal injuries inflicted on others by the negligence of its employees. *Jenkins v. Griffith*, 633.

GRAND JURY.

Grand Jury—True Bill—Twelve Jurors—Motion to Quash—Abatement.—The presence of the full number of the grand jury in finding a true bill under an indictment for murder is not necessary, and an endorsement thereon and finding by twelve thereof, or more, is sufficient, and a motion to quash under a plea in abatement on that ground is properly denied. C. S., 2333. *S. v. Stewart*, 340.

GRANTS. See Deeds and Conveyances, 7, 10; Pleadings, 3.

1. *Grants—State's Land—Adverse Possession—Deeds and Conveyances—Boundaries.*—Where plaintiffs have located senior grants under which they claim title, defendants seeking to establish title by adverse possession under junior grants must show adverse and exclusive occupation of the lappage under color of title for seven years, or without color, such possession for twenty years, under known and visible lines and boundaries. C. S., 428, 430. *Land Co. v. Potter*, 56.

2. *Same—Lappage—Color of Title—Statutes.*—In this case, the principal lappage on plaintiff's grants being under a junior grant bearing date in 1895, the same is rendered void, C. S., 7545, and unavailable as color of title, and defendants asserting title thereunder may not use same as color, and may only establish title by showing adverse exclusive possession under known and visible lines and boundaries for twenty years. *Ibid.*

3. *Same—Senior Grants—Evidence.*—Defendants being without written document or colorable title delineating their claim in order to establish title by adverse possession to known and visible lines and boundaries, there must be actual occupation asserting ownership with evidence tending to connect such occupation with the boundaries claimed, or some exclusive control and dominion over the unoccupied portion sufficiently definite and observable to apprise the true owner of the extent of the claim, and in this case, as to the principal lappage, there is no sufficient evidence to uphold the title of defendants to the lines and boundaries established in their favor. *Ibid.*

4. *Same.*—As to a second and different lappage, this interference and claim of ownership being under a junior grant of date in 1886, such grant not coming under the effect and operation of the statute referred to (C. S., 7545), same is available as color, and exclusive occupation thereunder for seven years asserting ownership would ordinarily mature title to the boundaries of such colorable claim, but where, as in this case, the lappage is on plaintiff's senior grants, such occupation to have the effect stated must be of the lappage and not otherwise. An instruction, therefore, that occupation anywhere within the lines of the junior grant would mature title to the outer boundaries of such grant, whether within or without the lappage, is error. *Ibid.*

GUARDIAN AND WARD. See Bankruptcy, 3; Wills, 21.

HARMLESS ERROR. See Appeal and Error, 4, 5, 9, 26; Evidence, 9, 17, 24; Intoxicating Liquor, 5.

HEARINGS. See Injunction, 2.

HEARSAY. See Evidence, 5, 20, 22, 24.

HEIRS. See Wills, 9; Evidence, 27.

HIGHWAYS. See Judgments, 6; Criminal Law, 15, 16; Contracts, 20, 21.

1. *Highways — Automobiles — Speed Regulations — Crossings—Municipal Corporations—Cities and Towns—Ordinances.*—Our statute regulating traffic at public crossings applies to the streets of a city or town, and requires that a person operating a motor vehicle must have it under control and operate it with due regard to traffic and to the safety of the public, and cross the intersecting street at a speed not exceeding ten miles an hour; and a town ordinance that requires him to come to a full stop before crossing certain streets, irrespective of traffic conditions at the time and place, is in conflict with the statute. C. S., 2616, 2601. *S. v. Stallings*, 104.

2. *Highways—Obstructions.*—The original meaning of an obstruction of a highway, that it is a physical barrier placed across it, so as to impede or interfere with travel thereon, is now regarded in a broader sense, and includes such acts as will interfere with the travel thereon by causing injury to vehicles passing over it. *S. v. Malpass*, 349.

3. *Same—Injury—Criminal Law.*—The placing of nails or tacks upon the public highway in such manner as to puncture and injure the tires of automobiles passing thereon, thus obstructing it, is the violation of separate statutes, each imposing a punishment, and the two are consistent with each other growing out of the same unlawful act, the one comprehending the other, though perhaps requiring the proving of additional facts; and, *Held*, upon the conviction under both sections, a sentence is not objectionable as too indefinite which makes the term of one of them begin immediately upon the expiration of the other. C. S., 4331, 3789. *Ibid.*

"HOME PLACE." See Wills, 5.

HOMESTEAD. See Estates, 4; Evidence, 27.

HOMICIDE. See Instructions, 3; Criminal Law, 5, 14; Carriers, 3; Appeal and Error, 26.

1. *Homicide—Murder—Evidence—Fleeing Arrest.*—Upon the question of whether the accused for murder intended to give himself up to the officers of the law, but fled from arrest, owing to the intimidation of a crowd assembled who were hostile to him, declarations thereof by another, who has not testified, are incompetent as mere hearsay. *S. v. Collins*, 15.

2. *Homicide — Murder — Evidence — Threats — Fleeing Arrest.* — Threats against the prisoner that he claims caused him to conceal himself and avoid giving himself up to the authorities of the law, to be competent as evidence in his behalf, must be shown to have been known by him at the time he had avoided arrest. *Ibid.*

HOMICIDE—*Continued.*

3. *Homicide — Murder — Deliberation and Premeditation — Evidence — Fleeing Arrest.*—Where the prisoner has been convicted of murder in the first degree, the exclusion of evidence tending to show the reason of his flight after committing the crime is not error, and has no bearing upon the question of his premeditation and deliberation necessary for a conviction of this degree of the crime. *Ibid.*

4. *Homicide—Murder—Evidence—Dying Declarations.*—Upon a trial for murder, the declarations of the deceased are competent for conviction when there is evidence that they were made by the deceased when he knew he was soon to die, from the effect of the wound inflicted on him by defendant, when he had sufficient mental clearness to understand the purport and effect of his statement, and, in fact, died within a short time thereafter; and an exception to their admissibility may not be sustained on the ground that they were not complete, judging from the other evidence in the case, their credibility being for the jury to determine. *Ibid.*

5. *Homicide—Murder—Recalling Witnesses—Discretion of Court—Appeal and Error.*—It is within the sound discretion of the trial judge to permit the State on a murder trial to recall and examine a witness after it had closed its evidence, and not reviewable on appeal in the absence of an abuse of this discretion. *Ibid.*

6. *Homicide—Murder—Cooling Time—Evidence—Questions for Jury.*—While ordinarily the question of whether the prisoner had sufficient cooling time from the time his passions had been aroused by the deceased and the time of the killing is one of law, it is proper for the court to submit the question to the jury when the evidence upon the subject varies by fixing this length of time from "a short while" to three-quarters of an hour. *Ibid.*

7. *Homicide — Murder — Instructions — Evidence—Cooling Time—Appeal and Error.*—When the dying declarations of the deceased are competent evidence, it is not reversible error for the trial judge to omit to charge the jury that they should receive them with due caution in the absence of a special request to that effect. *Ibid.*

8. *Homicide—Criminal Law—Murder—Premeditation and Deliberation—Mental Weakness—Drunkenness—Burden of Proof.*—On a trial for a homicide, by killing the deceased with a shotgun, where the prisoner's counsel contends and offers evidence of the prisoner's weak mental condition and of intoxication, upon the question of premeditation and deliberation, to reduce the offense from murder in the first degree to murder in the second degree: *Held*, the fact of intoxication alone does not have the effect contended for, under the evidence in the case, and the offense will be that of murder in the first degree, if the condition of the prisoner's mind at the time of the killing was sufficient under the evidence for him to have premeditated and deliberated upon the act, the burden being upon the State to prove this beyond a reasonable doubt. *S. v. Williams*, 616.

9. *Same—Intent—Instructions—Appeal and Error.*—*Held*, under the facts upon this trial for a homicide, the charge upon first degree murder was sufficiently clear, and the jury could not have been misled as to the correctness of the application of the law as to the previous intent of the prisoner necessary to sustain a verdict of the highest degree of the crime. *Ibid.*

HOMICIDE—*Continued.*

10. *Homicide—Murder—Self-Defense—Instructions—Provocation—Quitting the Combat—Appeal and Error.*—In an action for a homicide, if there was evidence tending to show that the prisoner after provoking a quarrel with the deceased had left him and had gone off to attend to his business, without evidence of his having provoked the quarrel afterwards, an instruction to the effect that the prisoner may not successfully show justification as a defense under the circumstances is reversible error. *S. v. Bost*, 640.

HOSPITALS. See Corporations, 3, 4.

HUSBAND AND WIFE. See Actions, 1; Negligence, 4; Deeds and Conveyances, 12, 14; Evidence, 7; Estates, 1; Wills, 11.

Husband and Wife—Widow's Yearly Allowance—Statutes—Limitation as to Income of Deceased Husband.—Under the provisions of C. S., 4125, the limit of the widow's yearly allowance, that it shall not exceed one-half the annual net income of her deceased husband upon a basis of three years preceding his death, is the average yearly net income or the income for every twelve months, and not one-half of the sum total of the annual net income for three years next preceding his death. *Drewry v. Bank*, 173 N. C., 664. *Holland v. Henson*, 742.

IDENTIFICATION. See Criminal Law, 22.

IDENTITY. See Appeal and Error, 5; Negligence, 7.

ILLEGITIMATE CHILDREN. See Descent and Distribution, 1.

1. *Illegitimate Children—Contracts—Consideration—Support—Statutes—Actions—Limitation of Actions.*—The consideration of a contract by the father with the mother for the support of his illegitimate child then *en ventre sa mere* is not an immoral, but a valuable, consideration, both in justice and in contemplation of our statute (C. S., 267), and after his birth the child, for whose benefit it had been made, may maintain his action thereon against his father: *Held*, the statute of limitations did not run under the facts of this case. *Thayer v. Thayer*, 502.

2. *Same—Jury—Judgments.*—Where the jury have by their verdict sustained the illegitimate child in his action against the father, on a valid contract made with his mother in his behalf, the court may, as a matter of law, require the father to pay a certain sum for the child's maintenance up to the time of the rendition of the judgment, and fix a certain sum to be paid at intervals in the child's behalf to the clerk of the court or guardian, if appointed for him, until further orders, retaining the cause for that purpose. *Ibid.*

IMPEACHMENT. See Verdict, 2; Criminal Law, 9; Deeds and Conveyances, 14.

IMPLIED POWERS. See Principal and Agent, 6.

IMPROVEMENTS. See Municipal Corporations, 3, 4, 5.

INCOME. See Husband and Wife, 1.

INDEPENDENT CONTRACTOR. See Partnership, 1; Contracts, 21.

INDICTMENT. See Intoxicating Liquor, 1.

INFANTS. See Contracts, 7.

INFERIOR COURTS. See Courts, 5; Commerce, 3; Appeal and Error, 23.

INHERITANCE TAX. See Wills, 4.

INJUNCTION. See Courts, 8; Deeds and Conveyances, 23; Schools, 3; Taxation, 8.

1. *Injunction — Receiver — Accounting — Bond — Alternate Remedies — Courts.*—Injunctive relief will be afforded by equity when necessary to preserve the property rights of the party seeking it, but not when other and less drastic remedies will adequately do so; and where it appears that a gravel company, employing labor, and its operations affecting commercial conditions, is sought to be enjoined from exercising a continuous mining right, under its contract with the plaintiff, on the ground that, according to the necessarily incomplete information of the plaintiff, the defendant is not paying for the gravel under its agreement, according to tonnage mined: *Held*, the defendant, being in possession, and with the knowledge of the tonnage mined and being mined, should either give bond and file an accounting with the clerk of the court at stated periods, or a receiver should be appointed (C. S., 860), or, as a last resort, the injunctive relief granted, each of these remedies to be applied by the trial judge according to the necessities of the case, after inquiry into the relevant facts. *Hurwitz v. Sand Co.*, 1.

2. *Injunction—Hearings—Affidavits—Pleadings—Statutes.*—A motion to vacate or modify an injunction may be made, under the provisions of C. S., 856 *et seq.*, upon the complaint and affidavits upon which the injunction is sought or upon counter-affidavits filed on the part of the defendants, the verified answer, if filed, having only the effect of an affidavit if introduced upon the hearing of the motion, and it is not required that the answer should have been previously filed. *Tobacco Growers Association v. Harvey & Son Co.*, 494.

3. *Same—Issues.*—While a restraining order will be continued to the hearing when the pleadings raise material issues of fact, or where the relief sought is not merely ancillary, but is itself the principal relief demanded, if the plaintiff has made out a *prima facie* case, these allegations must be of the facts necessary to raise the appropriate issues, and the conclusions of the pleader from an insufficient statement of facts is ineffectual. *Ibid.*

4. *Same — Fraud — Collusion — Coöperative Marketing.* — A coöperative marketing association sought to enjoin its members from marketing their tobacco elsewhere in violation of their contracts, and alleged fraud and collusion by them and another in giving agricultural liens to defeat the plaintiff of its rights, and it appeared on the hearing that the liens had been given for advancements: *Held*, the plaintiff's rights had not been invaded, whatever the motive may have been in giving the liens, fraudulent or otherwise, and the injunction was properly dissolved. *Ibid.*

5. *Same—Solvency.*—In this case, *held* that an allegation in the complaint that members of the Coöperative Association had fraudulently given agricultural liens on their crops for which they were charged in excess of the ten per cent over the retail cash price as fixed by

INJUNCTION—*Continued.*

statute (C. S., 2482), was insufficient upon which to continue the injunction to the final hearing, especially in view of the admitted solvency of the lienors. *Ibid.*

6. *Same—Liens—Mortgages.*—The contract made by a tobacco growers cooperative association and its members does not transfer the title of the crop to be grown, and under the provisions of the statute the member may "place a mortgage" or lien thereon for agricultural advancements; and the agreement is an executory contract between the association and its members enforceable in equity by a suit for specific performance subject to valid liens thus given thereon. C. S., 2480. *Ibid.*

7. *Same—Trials.*—In this case, *held*, the Tobacco Growers Coöperative Association was not entitled to have the injunction it sought continued to the hearing on the question of whether the full amount of the advancements claimed by the agricultural lienors had actually been made, it appearing that to some extent the liens were valid, and whatever difference there may be can be determined in the present action. *Ibid.*

INJURY. See Highways, 3.

INSOLVENCY. See Statutes, 4.

INSTRUCTIONS. See Courts, 2; Commerce, 5; Homicide, 7, 9, 10; Bills and Notes, 10; Appeal and Error, 2, 4, 6, 9, 29; Evidence, 24, 25; Criminal Law, 6, 13, 18, 25, 27; Partnership, 1, 2; Register of Deeds, 1; Railroads, 3; Deeds and Conveyances, 7, 10; Negligence, 8, 9, 10; Murder, 2; Actions, 4; Employer and Employee, 6, 7, 8, 16, 17.

1. *Instructions—Contentions—Appeal and Error—Objections and Exceptions.*—Exceptions to the statement of the contentions of the parties must be made at the time. *S. v. Collins*, 16.

2. *Instructions—Appeal and Error.*—An exception to the charge of the court on a trial for murder that the court had not given the law on the principle of cooling time arising under the evidence in the case, will not be sustained on appeal when the charge construed as a whole sufficiently covers the matter. *Ibid.*

3. *Instructions—Evidence—Appeal and Error—Homicide—Murder.*—Under the evidence upon the trial for a homicide in this case: *Held*, not error for the court to refuse a requested instruction to the effect that the defendant was entitled to the most favorable inference from the evidence. *S. v. Brinkley*, 183 N. C., 720. *Ibid.*

4. *Instructions—Evidence—Issues—Negligence — Automobiles — Contributory Negligence.*—Where the charge, construed as a whole upon its related parts, is correct, it will not be held for error that it was incomplete in its parts, taken disjointedly or unconnectedly; and where the facts to be found are simple and readily understood by jurors of the average intelligence, in relation to correct instructions of the law given, it will not be held for error that the court failed to instruct the jury more particularly as to certain phases of the evidence, especially when no special requests thereto have been aptly tendered by the party complaining. *Davis v. Long*, 130.

INSTRUCTIONS—*Continued.*

5. *Instructions—Interpretation—Railroads — Negligence — Fires — Appeal and Error.*—An instruction to the jury will be given effect in its connected and related parts as a whole; and *held,* under the facts of this case, it is not objectionable as making the defendant railroad company liable for negligence as an insurer for cotton of its customer stored on its platform for accumulation to a sufficient number of bales for sale and shipment, and which, at the time, had not been tendered to the defendant for shipment or accepted by it therefor, etc. *Herring v. R. R.,* 286.

6. *Instructions—Evidence—Appeal and Error.*—A requested prayer for instruction that presents a principle of law not sustained by the evidence in the case is properly refused. *S. v. Stewart,* 341.

7. *Instructions—Evidence—Appeal and Error.*—The charge of the trial court to the jury will be sustained on appeal when it is supported by any evidence upon the trial, taken in the most favorable light to the appellee, and the principles of law arising thereon are correctly applied. *Faircloth v. Johnson,* 429.

8. *Instructions—Misleading—Appeal and Error—Requests for Instruction.* Where the judge, in his charge to the jury, instructs them upon principles of law arising from the pleadings and evidence, and omits therefrom such elements of the principles involved as will render the charge he has given misleading, an exception to the charge so given is sufficient for an appeal without requiring that a special instruction thereon should have been tendered and refused. *Construction Co. v. Wright,* 456.

9. *Instructions — Burden of Proof — Prima Facie Case — "Satisfy the Jury"—Appeal and Error—Reversible Error.*—Where the burden of the issue in a civil action remains with the plaintiff throughout the trial, an instruction that requires the defendant to satisfy the jury in his behalf is equivalent to requiring him to establish his defense by the preponderance of the evidence, and is reversible error. *Hunt v. Eure,* 483.

INSURANCE.

1. *Insurance, Fire—Policies—Conditions—Waiver—Iron-Safe Clause.*—The provisions of the "iron-safe clause" in a policy of fire insurance for the preservation of the inventories of the merchandise insured, books, etc., may be waived by the company in accepting premiums thereon, knowing that the same was not being complied with, and make ineffective the further provision that the policy would otherwise be void. *Bullard v. Ins. Co.,* 34.

2. *Same—Principal and Agent—Evidence—Declarations.*—While provisions in a policy of fire insurance may render inadmissible as evidence declarations of an agent and hold the party to the terms expressed in the printed or written form, the principle does not obtain when the local agent knowing that under the circumstances, inventories, etc., could not be made and kept in accordance with the iron-safe clause, delivered the policy, and the company has knowingly collected the premiums thereon, such being in effect a valid waiver of the written stipulations. *Ibid.*

INSURANCE—*Continued.*

3. *Same—Pleadings—Estoppel.*—Where a fire insurance company has waived the requirements of the iron-safe clause provision in its policy of insurance, and the merchandise covered by it has been lost by fire, it is not required that an estoppel be pleaded in order to introduce other and competent evidence of the value of the merchandise thus destroyed for a recovery in an action on the policy. The difference between a waiver of this character and an estoppel required to be pleaded pointed out by ADAMS, J. *Ibid.*

4. *Insurance—Evidence—Policies—Receipt Cards.*—In an action to recover upon a policy issued by an insurance order, the receipt card of the company, referred to in the policy, is competent as evidence of the payment of the premiums. *Alston v. Odd Fellows*, 204.

5. *Insurance, Accident—Policies—Contracts—Issues.*—Where the liability of an insurance company, in accordance with the terms of the policy contract, is made to depend upon whether the insured's death was wholly caused by an accident, it is proper for the trial court to refuse to submit an issue tendered by the defendant, insurer, as to whether the death was caused by a particular accident received in the course of the insured's employment of a certain corporation where a proper issue has been submitted. *Howell v. Ins. Co.*, 212.

6. *Insurance, Accident—Insurable Interest—Payment of Premiums—Beneficiary—Policy—Contracts.*—A person may take out a valid policy of insurance against death by accident on his own life, and pay the premiums thereon himself, and name as beneficiary one who has no beneficial interest in the life of the insured; and the principle that one without a beneficial interest may not take out a valid policy on the life of another applies when such other person pays the premiums, and has no application to the facts of this case. *Ibid.*

7. *Same — Application — Misstatement — Representations — Warranties—Statutes.*—Under the terms of our statute, representations made in an application for life and accident insurance are representations and not warranties (C. S., 6289), and the misrepresentation of the relationship of a beneficiary to the insured in an application therefor, as a matter of law for the court, will not be held as material or such as affect the consideration of the company in the issuance of the policy. When the evidence is conflicting, a mixed question of law and fact arises for the jury, under a proper instruction from the court. *Ibid.*

8. *Insurance, Fire — Contracts — Policies — Stipulations — Provisions — Waiver—Knowledge.*—Where a policy of fire insurance has been issued under the statutory standard form, the condition therein of sole and unconditional ownership of the insured cannot be held to have been waived by the insurer or its agent in the absence of knowledge that the insured's ownership was otherwise than stated in the policy contract. *Hardin v. Ins. Co.*, 423.

9. *Insurance, Fire—Contracts—Policies—Statutes—Parol Agreements—Sole Ownership.*—In the absence of fraud an insurance company cannot be held liable upon a parol contract alleged to have been made by its agent which is contradictory of and totally inconsistent with the standard form prescribed by statute. C. S., 6436, 6437. *Ibid.*

INSURANCE—*Continued.*

10. *Same—Tender—Unearthed Premiums—Trials.*—Where a contract of fire insurance provides that the insurer shall return the unearned portion of the premium to invalidate the policy under the condition that the insured had not the sole and unconditional ownership of the property insured without proper provision to that effect appearing in the written policy: *Held*, in an action upon the policy to recover the loss thereunder, a tender of the unearned premium made upon the trial is sufficient. *Ibid.*

11. *Insurance—Fraternal Orders—Beneficiaries—Statutes—Contracts—Policies—Change of Beneficiaries.*—A policy of life insurance of a fraternal order is limited to the wife, certain relations and dependents by statute, C. S., 6508 (Public Laws of 1913, ch. 89, sec. 5), with the right of the assured to change the beneficiary at any time, and where he has named his wife as beneficiary and afterwards substitutes the name of another, disqualified to take under the statute, such attempted change is not a revocation of the provisions of the policy first issued and leaves it in force. *Andrews v. Masons*, 697.

12. *Same—Vested Rights—Constitutional Law.*—Where an insured in a fraternal insurance order has named his wife as a beneficiary before the enactment of the laws of 1913, limiting those who may lawfully so take, and afterwards when the amended law is in effect attempts to change the beneficiary to a person prohibited thereby, the effect of the amendment is to prevent the beneficiary from making such change and cannot be considered as an unconstitutional reactive law impairing the obligations of a contract. *Ibid.*

INSURANCE, ACCIDENT. See Insurance.

INSURANCE, FIRE. See Insurance.

INTENT. See Wills, 16; Homicide, 9.

INTEREST. See Principal and Agent, 4; Insurance, 6; Appeal and Error, 8, 30; Partnership, 3; Evidence, 7; Advancements, 2; Deeds and Conveyances, 25.

INTERSTATE COMMERCE COMMISSION. See Commerce, 1; Railroads, 5.

INTERVENER. See Judgments, 4.

INTERVENTION. See Bankruptcy, 3.

INTOXICATING LIQUOR. See Criminal Law, 9.

1. *Intoxicating Liquor—Indictment—Counts—Statutes.*—An indictment charging violations of the Turlington Act that defendant did unlawfully and wilfully, etc., deliver, furnish, purchase, and possess intoxicating liquor, and did have and keep in his possession for the purpose of sale intoxicating liquor, though not separately numbered, charges two counts, one for unlawful delivery and the other the possession for the purpose of unlawful sale, the trying thereof under the same indictment as separate counts being within the sound discretion of the trial court. C. S., 4622. *S. v. Jarrett*, 516.

2. *Same—Evidence—Verdict.*—Where the charges in the bill of indictment are to be regarded as separate counts, one charging an unlawful

INTOXICATING LIQUOR—*Continued.*

delivery, etc., of intoxicating liquors, and the other the possession for the purpose of unlawful sales, evidence that the defendant had sold intoxicating liquor is sufficient for conviction upon a general verdict of guilty. *Ibid.*

3. *Same—Motion to Quash—Selection by Solicitor—Discretion of Court—Verdict.*—Where the bill of indictment charges several criminal offenses of the same grade and punishable alike, the court in its sound discretion may quash or compel the solicitor to elect, and a motion to quash comes too late after verdict. *Ibid.*

4. *Same—Bill of Particulars.*—Where an indictment charges several offenses separable into different counts, and the case accordingly comes on for trial, the defendant may upon motion request the trial judge, acting in his sound discretion, to require the solicitor to furnish a bill of particulars (C. S., 4613), and the indictment may not be quashed if in the bill the charge is sufficiently stated. C. S., 4623. *Ibid.*

5. *Same—Judgments—Appeal and Error—Harmless Error.—Held*, in this case there were but two criminal offenses charged in the bill of indictment, and the judgment of the court upon a third, not included, was not prejudicial, as it imposed no punishment and may be disregarded. *Ibid.*

IRON-SAFE CLAUSE. See Insurance, 1.

"ISSUE." See Wills, 7.

ISSUES. See Instructions, 4; Register of Deeds, 1; Insurance, 5; Evidence, 4, 6; Negligence, 6; Pleadings, 2, 3; Deeds and Conveyances, 7; Compromise and Settlement, 2; Courts, 12; Injunctions, 3.

1. *Issues—Pleadings—Appeal and Error.*—Where the issues submitted in a controversy arise from the pleadings, and are comprehensive enough to enable the parties to present to the jury all material matters involved in the inquiry, they will not be held for error on appeal. *Vest v. Utley*, 357.

2. *Issues—Appeal and Error.*—Error on appeal will not be held for the submission of issues to the jury when the party appealing has suffered no disadvantage and has been afforded opportunity of fully presenting his case thereunder. *DeLoache v. DeLoache*, 394.

JETTIES. See Constitutional Law, 3.

JOINT TORT FEASORS. See Removal of Causes, 3, 5.

JUDGMENTS. Statutes, 3; Courts, 6; Warehousemen, 5; Criminal Law, 7; Appeal and Error, 15; Estates, 1, 2; Pleadings, 4; Wills, 19; Illegitimate Children, 2; Lis Pendens, 2; Intoxicating Liquor, 5; Slander, 6.

1. *Judgments—Verdict—Parties—Appeal and Error.*—Where the verdict of the jury, in a suit properly constituted, and on evidence regularly presented, entitles the plaintiff to recover against two defendants in a certain amount, it is reversible error for the trial court to render judgment against only one of them in plaintiff's favor. *Swain v. Bonner*, 185.

JUDGMENTS—*Continued.*

2. *Same—Courts—Jurisdiction—Justice of the Peace.*—Where an action has been brought against two defendants before a justice of the peace having jurisdiction of the subject-matter, one of them living within and the other without the county, it appearing of record they had both been served with summons, and both had appealed to the Superior Court: *Held*, they should both be bound by an adverse judgment. *Ibid.*

3. *Judgments — Irregularities — Appeal and Error — Statutes—Laches.*—Negligence before judgment of a defendant in failing to appear and defend in an action prosecuted to judgment by default for the want of an answer will defeat his right to have the judgment set aside for excusable neglect under our statute, C. S., 600, but will not affect his right to have an erroneous judgment corrected on appeal or an irregular judgment vacated, in the absence of laches, on motion, after notice thereof and upon his showing that his rights have thereby been prejudiced. *Livestock Co. v. Atkinson*, 250.

4. *Judgments — Estoppel — Clerks of Court — Interveners — Appeal and Error—Actions.*—The guardian of the minor children of the deceased sued the administrator and surety on his bond for the distributive share of his wards, in which creditors of the deceased intervened and made themselves parties, claiming the amount should be distributed among them. The clerk rendered judgment, declaring that the surety company had properly settled with the guardian, and relieving them of further liability, to which the interveners did not except, and from which no appeal was taken: *Held*, the interveners could not thereafter maintain an independent action against the surety on the administrator's bond for the same cause of action. *S. v. Cahoon*, 254.

5. *Judgments—Default—Excusable Neglect—Clerks of Court.*—Where the principal on a note has been duly served with summons and he has failed to file an answer within the statutory time, relying upon an agreement with the surety on the note to file a joint answer: *Held*, no excusable neglect has been shown, and the clerk being without authority to extend the time, a judgment by default is properly entered by him. *Elramy v. Abeyounis*, 278.

6. *Judgments—Consent—Boundaries—Estoppel—Roads—Highways.*—In a suit to correct a deed for mutual mistake, a judgment was entered, by the consent of the parties, fixing one of the boundaries to the land as a certain public highway, which road was later changed by the State and county authorities so as to leave a strip of land between the old and the new road, upon which the plaintiff built a house and made certain other improvements, the value of which would be impaired by the discontinuance of the old road as an outlet to the new one: *Held*, the defendants are equitably estopped from obstructing the old road and denying the old road as a boundary to their lands, the doctrine applying only as to the parties and privies to the former suit. *Harris v. Carter*, 295.

7. *Judgment—Pleadings—Default and Inquiry—Damages.*—Where the court renders judgment by default for the want of an answer, and inquiry for the unliquidated damages, the plaintiff is at least entitled to nominal damages, and evidence tending to show a complete defense is not admissible. *Mfg. Co. v. McQueen*, 311.

JUDGMENTS—*Continued.*

8. *Judgments — Courts — Jurisdiction—Irregular Judgments.*—Where an irregular judgment has been rendered by a court having jurisdiction of the parties and the subject-matter of the action, it is voidable only as distinguished from one that is void, and may not be collaterally attacked. *Clark v. Homes*, 704.

9. *Same—Venue-Partition—Statutes.*—Objection that the executor having power under a will to sell lands lying in different counties has wrongfully filed a petition for the sale in the county of such portions of said lands lying in a different county from that wherein he has qualified is to the venue and not to the jurisdiction of the court, and proper motion should be taken in apt time to change the venue from the county wherein the proceedings had been pending, or the proper venue will be taken as waived, and the irregularity may not be taken advantage of by an independent action, and in case of partition our statute expressly confers jurisdiction in either of the counties wherein the land is situate. C. S., 3214. *Ibid.*

10. *Judgments—Clerks of Court—Jurisdiction—Statutes.*—The clerks of the Superior courts, under the provisions of chapter 92, Public Laws of 1921, Extra Session, are authorized to enter judgments final in proceedings for divorce, subject to appeal to the court in term, which have the same force and effect as judgments of the latter court regularly entered in term, the statute in this respect being an enabling one and not depriving the judge of his jurisdiction of rendering judgment also, the jurisdiction being concurrent in both courts. *Caldwell v. Caldwell*, 805.

11. *Same—Divorce.*—The clerk of the Superior Court, in instances prescribed by the statute, may not enter consent judgment in actions for divorce, and in other actions he may permit the plaintiff, in proper instances, to take a voluntary nonsuit. *Ibid.*

12. *Same—Notice.*—It is not required that the plaintiff notify the defendant before taking a voluntary nonsuit before the clerk of the court when such may be taken under the statute. *Ibid.*

13. *Same—Appeal and Error.*—Where the clerk of the Superior Court has exercised his statutory power to permit the plaintiff to take a voluntary nonsuit in his action against his wife for divorce, to whom alimony *pendente lite* has been allowed, the judge of the Superior Court in term may not set aside the judgment on motion of defendant originally made before him, the right to alimony ceasing at the time of the nonsuit, leaving defendant to pursue her further remedy by independent action, should she be so advised. *Ibid.*

14. *Same—Constitutional Law.*—From the judgment of the Superior Court reversing the clerk's order permitting the plaintiff to take a voluntary nonsuit in his action for divorce, an appeal to the Supreme Court will lie. Const. Art. IV, sec. 8. *Ibid.*

15. *Same—Objection and Exception.*—The judgment entered by the clerk of the Superior Court under his statutory jurisdiction can only be reversed for error upon appeal to the Supreme Court from that of the Superior Court in term upon exceptions originally and duly taken before the clerk, except upon the ground of mistake, inadvertence, or excusable neglect, C. S., 600; or from a motion made to remove the

JUDGMENTS—*Continued.*
cause as a matter of right, C. S., 913(a); or from an order made upon a motion to remove the cause to the Federal Court, C. S., 913(b). *Ibid.*

JURISDICTION. See Judgments, 2, 8, 10; Pleadings, 1; Courts, 13, 16; Equity, 1; Appeal and Error, 16; Wills, 20.

JURORS. See Jury.

JURY. See Verdict, 2, 3; Criminal Law, 14, 26; Grand Jury, 1; Trials, 1; Illegitimate Children, 2; Appeal and Error, 21; Instructions, 9.

Jury—Verdict—Polling Jurors—Constitutional Law.—The losing party in a civil action may demand a polling of the jury upon the return of the verdict, as a matter of right. Const., Art. I, sec. 19. *Culbreth v. Mfg. Co.*, 208.

JUSTICES OF THE PEACE. See Judgments, 2.

JUSTIFICATION. See Pleadings, 6.

KNOWLEDGE. See Insurance, 8.

LABOR. See Liens, 1; Contracts, 20, 22.

LACHES. See Judgments, 3; Appeal and Error, 24.

LANDS. See Deeds and Conveyances, 3; Limitation of Actions, 2; Lis Pendens, 1; Contracts, 24.

LAPPAGE. See Grants, 2.

LAST CLEAR CHANCE. See Carriers, 8.

LEASES. See Corporations, 4, 5.

LEGISLATIVE POWER. See Wills, 1.

LETTERS. See Evidence, 13, 16.

LEVY. See Education, 3.

LIABILITY. See Estates, 2; Physicians and Surgeons, 1.

LICENSE. See Taxation, 7; Register of Deeds, 1.

LIENS. See Employer and Employee, 4; Injunction, 6; Contracts, 23; Lis Pendens, 2.

1. *Liens—Material—Laborers—Statutes.*—The liens acquired by laborers and material furnishers on a building, in accordance with our statute, relate back to the furnishing of the material for and the doing the work on the building, and have priority over a mortgage registered since then, but not over one registered prior to the furnishing of the material and the doing of the work. *Harris v. Cheshire*, 219.

2. *Same—Mortgages—Deeds in Trust—Marshaling of Assets—Equity.*—Where a mortgage has been given on a dwelling having priority over the statutory labors and material liens thereon, but including also personal property of the owner, and the whole property has been sold under the mortgage by the trustee, those of the material men and laborers who have properly filed their liens in accordance with the

LIENS—*Continued.*

statute prior to the sale of the personalty have the right to have the money so derived from the sale of the personal property first applied to the satisfaction of the mortgage under the equitable doctrine of the marshaling of assets in order to reserve the application of the proceeds of the sale of the dwelling to the satisfaction of their liens, so far as the same may extend. *Ibid.*

3. *Same—Notice.*—Where a mortgagee has sold the dwelling of the owner upon which material men and laborers have acquired a statutory lien, together with certain personal property also covered by the same mortgage, the material men and laborers acquire the equity of marshaling of assets only when the mortgagee before the sale had notice of their claims by the filing of their liens in conformity with the statute or notice otherwise sufficient, and the material men or laborers have no equity in the proceeds of the sale of the personal property when, without sufficient notice of any kind, the mortgagee or trustee has sold the personal property and applied the proceeds to the satisfaction of the mortgage debt. *Ibid.*

4. *Same—Priority of Sale.*—Where a deed in trust embraces real and personal property with direction that the personalty first be sold and the proceeds applied to the satisfaction of the mortgage deed, a lienor on the realty for materials supplied for or labor performed in the erection of a dwelling on the lands whose lien is secondary to that of the mortgage, and who has not given notice before the sale, cannot successfully insist after the mortgage sale and the application of the proceeds to the mortgage debt that the terms of the mortgage as to the priority of sale should have been observed by the trustee to the protection of his lien. *Ibid.*

5. *Same—Commissions for Sale.*—Under the facts of this case: *Held*, the commission for the sale of the mortgaged premises was properly allowed and deducted, under the terms of the mortgage, as against the right of material men or laborers who had acquired a subsequent lien to that of the mortgage. *Ibid.*

LIFE ESTATE. See Wills, 9; Estates, 5.

LIMITATION. See Husband and Wife, 1.

LIMITATION OF ACTIONS. See Mortgages, 2; Illegitimate Children, 1; Usury, 2; Taxation, 13.

1. *Limitation of Actions—Nonsuit—Statutes—Pleadings—Questions of Law—Parol Evidence.*—Where upon plaintiff's voluntary nonsuit in an action he may bring the same again within one year under the provisions of our statute (C. S., 415), the question of whether the second action is in contemplation of the statute is a question of law for the court upon the construction of the complaints in both actions; and where no complaint has been filed in the first action (C. S., 506), testimony of the plaintiff as to the cause of action intended to have been alleged therein is properly excluded. *Young v. P. R.*, 238.

2. *Same — Railroads — Lands — Dower—Reversion—Remainders.*—In an action against a railroad company by a remainderman to recover lands covered by dower, the statute of limitations begins to run at the death of the widow, when the cause of action arose, and the reversionary or remainder interest as against a railroad is barred within the five-year period therefrom under the statute. *Ibid.*

LIMITATION OF ACTIONS—*Continued.*

3. *Same — Constitutional Law.* — C. S., 440 (1), requiring that no suit, action, or proceeding be brought against a railroad company for damages or compensation for lands, etc., unless within five years after the land has been entered, has now no exception, Public Laws 1893, ch. 152, sec. 2, the exception having been repealed. *Ibid.*

4. *Limitation of Actions—Deeds and Conveyances—Color of Title.—Held*, on this appeal, no error in the judgment upon the verdict that the plaintiff's action to recover lands was barred by the statute of limitations upon the question of defendant's adverse possession under color of title. *Triplett v. Hendrix*, 693.

LIQUIDATED DAMAGES. See Contracts, 9.

LIS PENDENS.

1. *Lis Pendens—Notice—Title to Lands—Registration.*—When the title of the owner of leased lands is in litigation at the time of making the lease, in the county wherein the lands lie, it is notice to the lessees of the title adversely claimed, and the question of *lis pendens* of proceedings in another county affecting the title does not apply. *Crawford v. Allen* and *Realty Co. v. Crawford*, 435.

2. *Lis Pendens—Statutes—Liens—Judgments.*—A *lis pendens* filed under the provisions of our statute is notice from the time of its cross-indexing, but cannot create a lien on lands in an action for a money demand. C. S., 500, 501, 502, 503. *Horney v. Price*, 820.

3. *Same—Real Estate—Words and Phrases.*—The intent of our statute, C. S., 501, 502, in the use of the words real property is in the sense of "lands, tenements, and hereditaments." *Ibid.*

LIVESTOCK. See Carriers, 1.

LOANS.

Loans—Contracts—Ejectment—Possession.—Where the landlord and tenant have entered into a written agreement for the payment of arrearages of rent, that it should be in a certain weekly amount in addition to the usual rental, giving the lessor the right at his option to declare the lease void, after five days from the tenant's failure to pay as in case of tenancy at will, a demand for the possession of the leased premises is not a prerequisite to proceedings in ejectment brought after demand for the rental price had been made and not complied with. *Midimis v. Murrell*, 740.

MALICE. See Slander, 4.

MANAGERS. See Warehousemen, 2.

MANDAMUS. See Taxation, 4; Schools, 2.

MAPS. See Municipal Corporations, 5.

MARRIAGE. See Wills, 11.

MARSHALING ASSETS. See Liens, 2.

MASTER AND SERVANT. See Employer and Employee, 1, 5, 6, 7, 8, 9, 13, 16, 17; Negligence, 5; Carriers, 3.

MATERIAL. See Liens, 1; Contracts, 20, 22.

MEASURE OF DAMAGES. See Mortgages, 1; Contracts, 6, 13; Physicians and Surgeons, 5.

MENTAL CAPACITY. See Homicide, 8.

MERCHANDISE. See Actions, 4; Sales, 1.

MINES AND MINERALS. See Deeds and Conveyances, 1.

MISJOINDER. See Actions, 2.

MISREPRESENTATIONS. See Insurance, 7.

MODIFICATION. See Appeal and Error, 7.

MONEY IN LIEU OF DOWER. See Wills, 15.

MORTGAGES. See Liens, 2; Bills and Notes, 5; Contracts, 1; Deeds and Conveyances, 4, 15, 19, 20, 25; Evidence, 5; Injunction, 6.

1. *Mortgages — Deeds in Trust — Contracts — Extension of Time to Redeem—Breach—Measure of Damages.*—Where the holder of the legal title has breached his valid contract to extend to the mortgagor the time for redemption, and the mortgagor remains in possession upon paying a consideration to the date thus extended, the measure of the mortgagor's damages is the consideration he has paid to remain upon the lands plus the price he could have sold the lands for at the later date, had he not redeemed it by then, and while the market value of the land was a circumstance that could be considered by the jury upon the issue of damages, it was not controlling. *Whedbee v. Ruffin*, 257.

2. *Mortgages—Statutes—Limitations of Actions—Constitutional Law.*—The conclusive presumption of the payment of a debt secured by mortgage, etc., after fifteen years, as against creditors or purchasers (Public Laws 1923, ch. 192), is prospective in its effect. Const. of N. C., Art. I, sec. 10. *Hicks v. Kearney*, 316.

3. *Mortgages—Deeds in Trust—Foreclosure—Sales—Clerks of Court—Statutes—Resales—Parties—Actions.*—C. S., 2591, requiring, among other things, all foreclosure sales of land under the power thereof contained in the mortgage to be kept open for an increase of bid, is for the protection of the mortgagor, requiring the clerk of the court to order a resale upon the offer of increase of the bid upon certain conditions, and where the clerk of the court in an action by the trustee under the deed of trust to compel the bidder at the foreclosure sale to accept a deed to the land, it is established that thereafter a resale had been ordered by the clerk, and the bid at such sale was unenforceable, the mortgagors are necessary parties to the action, and without them it is error for a judgment in plaintiff's favor to be entered. *Trust Co. v. Powell*, 372.

4. *Mortgages—Place of Sale.*—Where no place of sale is specified in a mortgage, a sale under the power, when not required by the statute to be at the courthouse door, may be made elsewhere in the county to be selected by the mortgagee with due regard to the interests of the mortgagor, and when such appears to have been done, and the property sold has brought a fair price, it will not be disturbed on appeal. *Clark v. Homes*, 704.

MORTGAGOR AND MORTGAGEE. See Laws, 1.

Mortgagor and Mortgagee—Estoppel.—Where a mortgagor attends the sale of the land by an executor of a will for the purpose of making certain distribution among the beneficiaries, in accordance with the terms of the will, and makes no objection, he is estopped to question the validity of the sale. *Clark v. Homes*, 704.

MOTIONS. See Courts, 6, 7, 10; Evidence, 24; Grand Jury, 1; Intoxicating Liquor, 3; Attachment, 1; Appeal and Error, 22.

MOTIVE. See Criminal Law, 22.

MUNICIPAL CORPORATIONS. See Evidence, 2; Highways, 1; Taxation, 5; Government, 1; Constitutional Law, 2.

1. *Municipal Corporations—Cities and Towns—Condemnation—Special Benefits—Offsets—Statutes.*—It is within the legislative power to allow an incorporated town the value of the special benefits of a street improvement to the owner of land abutting thereon, in proceedings by the town to condemn a part thereof for the purpose of widening its streets, and in the absence of statute to that effect such benefits are not allowable. *Stamey v. Burnsville*, 39.

2. *Same—Negligence—Damages.*—Where an incorporated town is allowed by statute to take by condemnation the lands of abutting owners along a street improved, the town is liable to the owner for such damages to his land so taken as is caused by its negligent construction of the improvement so made, though not such as may be caused by a construction of the improvements in a careful and workmanlike manner. The charge in this case is not *held* as prejudicial error. *Ibid.*

3. *Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Burden of Proof.*—Upon the question as to whether assessments had been lawfully made by a town against the plaintiff's land abutting upon a street, improved, for the purpose of the improvement, the burden is upon the defendant town to show the affirmative of the issue. *Holton v. Mocksville*, 144.

4. *Municipal Corporations—Cities and Towns—Streets—Improvements—Assessments—Evidence—Statutes—Records.*—Where the plaintiff contends in her action that assessments had not been made, in pursuance to a statute, upon her land abutting on a street, improved, it is competent for the defendant town to show, as a part of its public records affecting the question, the typewritten resolution, regularly adopted at a meeting of its commissioners, authorizing the assessment, among the other necessary requirements of the statute. *Ibid.*

5. *Same—Maps.*—Under the provisions of C. S., 2711, it is required that, in proceedings by a town to assess the owners of lots abutting upon streets improved, that an assessment roll be made, showing the names of the owners of the lots, amounts assessed against each, with a brief description of the lots, etc.: *Held*, competent to introduce a map made by the city engineer, duly approved by the city commissioners, as evidence that this statutory requirement had been complied with. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

6. *Municipal Corporations—Cities and Towns—Streets—Improvements—Assessments—Constitutional Laws.*—While a compliance with a statute requiring a petition from the owners of lots abutting a street to be improved by assessment of a part against the owners is material and imperative, the Legislature has the power to provide by local statute that such assessments be validly made, without the necessity of such position; and a curative statute, validating previous assessments, made without compliance with a like provision, is not objectionable as inhibited by our Constitution, Art. VIII, sec. 4, requiring general laws for the improvement of cities, or under the provisions of our Constitution prohibiting the passage of retroactive laws, etc. *Ibid.*

7. *Same—Special Benefits.*—The owner of lands along a street improved by a town receives special benefits to his lots by reason of the improvements, and for such benefits his property may be assessed equally with those of other owners thereon; and he may not complain that his property is subject to taxation for a bond issue for the general street improvements of the town, when the statute under which the special assessments are made provides that such assessments be used as a payment upon the bonds, thus giving him a benefit therein. *Ibid.*

8. *Municipal Corporations—Cities and Towns—Charter—Statutes—Actions—Presentation of Claims—Damages.*—Under the provisions of a city charter requiring that all claims arising in tort, etc., shall be presented in writing to the board of aldermen or the mayor, etc., within ninety days after the cause of action accrues: *Held*, a compliance with this requirement is necessary to the maintenance of the cause of action against the city for its alleged negligence, unless valid excuse is shown, and where this demand has not been so made, the utmost damages the plaintiff could recover would be those arising within the 90 days or from the time the cause of action accrued: plus all future damages accruing thereafter and an instruction that the plaintiff's recovery would relate back for three years next preceding the institution of the action, is reversible error. *Smith v. Winston-Salem*, 178.

9. *Municipal Corporations—Cities and Towns—Public Buildings—Public Purposes—Constitutional Law.*—The erection by a city of a public building with funds for the purpose on hand, for governmental offices, academy of music, public meetings, etc., if for a governmental purpose, and within the exercise of the discretionary powers conferred upon the governing body of the municipality, and where no further expense may be incurred such as to pledge the credit of the city, or therein impose an obligation upon it, there is no violation of our Constitution, Art. VII, sec. 7, C. S., 2673, 2786, 2787, (3), (4). *Adams v. Durham*, 232.

MURDER. See Homicide, 1, 2, 3, 4, 5, 6, 7, 8, 10; Instructions, 3; Criminal Law, 14; Appeal and Error, 26.

1. *Murder—Evidence—Parties—Strangers.*—Under the facts in this case, *held*, it was not error for the trial judge to exclude evidence that the deceased police officer had warrants for arrest of another person as well as of the prisoners on trial, for the purpose of showing animus against the deceased by another, and that he had committed the murder for which the prisoners were on trial. *S. v. Stewart*, 341.

MURDER—*Continued.*

2. *Murder—Circumstantial Evidence—Instructions.—Held*, under the evidence on this trial for murder, the instruction of the court as to the requisites of circumstantial evidence was correct, and it was not error for him to refuse to give a requested prayer of defendants upon the same principle differently expressed. *Ibid.*

NECESSARIES. See Constitutional Law, 3.

NEGLIGENCE. See Damages, 1; Carriers, 1, 8; Commerce, 4; Courts, 4; Employer and Employee, 1, 6, 7, 8, 9, 13, 16; Instructions, 4, 5; Municipal Corporations, 2; Partnership, 1; Judgments, 5; Bills and Notes, 7; Railroads, 2, 6; Electricity, 1; Evidence, 24; Government, 1, 2; Removal of Causes, 3.

1. *Negligence—Evidence—Opinion Upon Facts — Carriers — Railroads.* — Where a carload of livestock over connecting carriers has been received at destination in bad condition, a witness experienced in such matters may testify that he had seen the livestock when they left the initial point of shipment, and also en route, and when they arrived at destination, and as to their appearance and condition at the time he observed them, as conclusions derived from his own observation as facts, and *Held*, competent in this case for him to testify that they were in good condition except upon their arrival at their destination. *Farming Co. v. R. R.*, 63.

2. *Negligence—Automobiles—Statutes—Speeding Regulations—Crossings—Evidence—Nonsuit.*—In an action to recover damages of the defendant, caused by a collision of two automobiles at an intersecting street of a town, by the defendant's negligence: *Held*, a motion as of nonsuit was properly denied, upon evidence tending to show that the defendant was traveling at the time at a speed excessive of that allowed by C. S., 2617, while plaintiff was using the care required of him under the circumstances. C. S., 567. *Davis v. Long*, 129.

3. *Negligence—Statutes—Automobile—Speed Regulations—Negligence per se—Proximate Cause—Contributory Negligence—Burden of Proof.*—In an action to recover damages for the negligence of the defendant in causing a collision with plaintiff's automobile at a street intersection, and the only question arising from the evidence is whether the defendant was running at a speed prohibited by C. S., 2617, the violation of the statute is negligence *per se*, leaving only the question of whether this negligence was, under the circumstances, the proximate cause of the injury complained of, the burden of the issue as to plaintiff's contributory negligence being upon the defendant. *Ibid.*

4. *Negligence—Wrongful Death—Survival of Actions—Parties—Statutes—Husband and Wife—Actions.*—While the common law not permitting the recovery of damages for an injury inflicted, resulting in death, has now been changed by statute, allowing the cause of action to survive (C. S., 160), the statute requires that the action be brought by the personal representative of the deceased; and while a cause of action may, under certain circumstances, be open to the widow, as where she has independently suffered loss during the period between the injury to and the death of her husband, it cannot be upheld where the injury inflicted and the death are instantaneous. As to her recovery for loss of her husband's society, support and consortium, see *Hinnant v. Power Co.*, *ante*, 120. *Craig v. Lumber Co.*, 137.

NEGLIGENCE—*Continued.*

5. *Negligence—Evidence—Nonsuit—Employer and Employee—Master and Servant.*—In an action to recover damages by an employee for a personal injury alleged to have been received through his employer's negligence, there was evidence tending to show that his employment was changed to the dangerous one of assisting at a saw table operated by electricity, without experience or instruction; that the edge of the saw was only visible above the table through a narrow slit that had become worn, permitting pieces of the sawed product to fall beneath with the sawdust, which the plaintiff, 18 years of age, removed, and was informed by his superior or vice-principal that this was right, and to continue to do so when the saw became clogged, and that soon thereafter on the same day the plaintiff was injured by his hand being drawn to the saw by a piece of wood that had fallen beneath the saw table that he was attempting to remove to relieve the clogged condition of the saw: *Held*, a motion of judgment as of nonsuit was properly denied. *Mathis v. Mfg. Co.*, 140 N. C., 531, cited and distinguished. *Parker v. Mfg. Co.*, 275.

6. *Same—Issues—Contributory Negligence—Assumption of Risks—Appeal and Error.*—*Held, further*, under the evidence in this case, it was not reversible error for the court to withdraw from the consideration of the jury the issue of assumption of risks and submit the question of the defendant's liability upon the issues of defendant's negligence and the plaintiff's contributory negligence. *Pressly v. Yarn Mills*, 138 N. C., 410, cited and applied. *Ibid.*

7. *Negligence—Automobiles—Identity of Persons—Evidence—Nonsuit.*—Upon motion as of nonsuit upon the evidence in an action to recover damages of defendant for negligently driving his automobile upon the highway, wherein the evidence was sufficient as to the negligence alleged, testimony of a witness that he had seen defendant driving the car that caused the injury to plaintiff, with the admission that the license plate upon the car was issued in the name of the defendant, is sufficient to take the case to the jury as to the identity of the defendant as the one causing the injury. *Hensley v. Helvenston*, 636.

8. *Negligence—Proximate Cause—Instructions—Appeal and Error.*—Damages proximately caused by the negligent act of another and recoverable are the efficient cause of the alleged negligent act, not necessarily those that are nearest in time or space, and an instruction thereon given plainly in the substance of this principle is not error. *Martin v. Hanes Co.*, 644.

9. *Negligence—Evidence—Questions for Jury—Instructions—Proximate Cause.*—Upon motion for nonsuit in an action for negligent injury to plaintiff's team of horses by defendant's driving his automobile into them on the street of a town: *Held*, evidence that the defendant negligently drove his automobile into the team and injured one of the horses, though lessened on cross-examination of the witness by his evidence tending to show he could not have seen the occurrence from his position on the wagon to which the team was hitched; and that the weight and credibility of the evidence are for the determination of the jury, with instructions upon the principles of proximate cause, and the motion was improperly allowed. *Casada v. Ford*, 744.

NEGLIGENCE—*Continued.*

10. *Negligence—Contributory Negligence—Burden of Proof—Instructions—Appeal and Error.*—Where there is evidence and *per contra* that the defendant's driver caused injury to the plaintiff by swerving his truck against him as he was riding his bicycle with his hand on the truck along a city street, upon the issue of contributory negligence: *Held*, an instruction was correct that if the defendant had so satisfied the jury by the greater weight of the evidence, it would be negligence as a matter of law, and if the proximate cause would bar recovery, and unrelated to the issue as to the defendant's negligence. *Gilland v. Stone*, 784.

11. *Negligence—Evidence.*—In this action to recover damages for the negligent injury to plaintiff's hand caused by a burn, the defendant's objection to the explanation of the plaintiff that he had kept his hand tied up to keep people from worrying him is untenable. *Solomon v. Koontz*, 837.

12. *Negligence—Automobiles—Proximate Cause—Nonsuit.*—Where there is evidence tending to show that the plaintiff was driving his automobile at night along a public highway and was damaged by defendant's truck standing along the side of the road without a light, as required by C. S., 2615, defendant's motion as of nonsuit is properly granted when his violation of the statute had not in any way produced the injury or aided in causing it. *Hughes v. Luther*, 841.

NEGOTIABLE INSTRUMENTS. See Warehousemen, 1, 3; Bills and Notes, 1, 3, 5.

NEGOTIATIONS. See Contracts, 4.

NEWLY DISCOVERED EVIDENCE. See New Trials, 1.

NEW TRIALS. See Compromise and Settlement, 2; Appeal and Error, 19, 27; Railroads, 5; Evidence, 27.

New Trials—Newly Discovered Evidence—Discretion of Court.—The refusal of a motion to set aside a verdict in a criminal case on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge, and its refusal, in the absence of an abuse of this discretion, is not reviewable on appeal. *S. v. Dickerson*, 328.

NONEXPERT WITNESSES. See Evidence, 8, 10.

NONNEGOTIABLE INSTRUMENTS. See Bills and Notes, 9.

NONSUIT. See Carriers, 1, 3, 8; Criminal Law, 1, 4, 20; Employer and Employee, 2, 9; Evidence, 1, 2, 3, 6, 11, 12, 18, 26, 27; Negligence, 2, 5, 7, 12; Limitation of Actions, 1; Bills and Notes, 8; Electricity, 1; Pleadings, 4; Contracts, 18; Appeal and Error, 28.

NOTICE. See State Treasurer, 2; Bills and Notes, 1, 3; Liens, 3; Appeal and Error, 15, 20; Evidence, 15; Lis Pendens, 1; Banks and Banking, 4; Judgments, 12; Principal and Agent, 6; Taxation, 11.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 1, 6, 17, 22; Courts, 2; Instructions, 1; Evidence, 24, 25; Judgments, 15.

OBSTRUCTIONS. See Criminal Law, 15, 16; Highways, 2.

OFFICERS. See Taxation, 4; Banks and Banking, 4; Principal and Agent, 6.

OFFSETS. See Municipal Corporations, 1.

OPINIONS. Appeal and Error, 7.

OPINION EVIDENCE. See Evidence, 10, 23; Negligence, 1.

OPTIONS. See Contracts, 16, 19.

ORDERS. See Pleadings, 1; Removal of Causes, 2.

ORDER NOTIFY. See Carriers, 4.

ORDINANCES. See Highways, 1; Taxation, 5; Constitutional Law, 4.

ORGANIZATION. See Schools, 1.

OWNERSHIP. See Insurance, 9; Estates, 5.

PARENT AND CHILD. See Employer and Employee, 6.

PAROL AGREEMENTS. See Insurance, 9.

PAROL EVIDENCE. See Limitation of Actions, 1; Contracts, 1, 19; Compromise and Settlement, 1; Wills, 23.

PARTIES. See Negligence, 4; Removal of Causes, 1, 3; Appeal and Error, 13, 20, 30; Judgments, 1; Actions, 2, 3; Bills and Notes, 6; Mortgages, 3; Murder, 1.

PARTITION. See Wills, 8; Judgments, 9.

PARTNERSHIP. See Deeds and Conveyances, 2; Actions, 2.

1. *Partnership—Employer and Employee—Independent Contractor—Evidence — Share in Profits — Negligence — Instructions — Appeal and Error.*—While an agreement for the sharing of the profits of a business undertaking is strong evidence of a partnership creating a joint and several liability of the parties, it may be shown that it was to fix the compensation one of them was to receive from the other as an independent contractor, and to exclude the one from liability to an employee of the other, the independent contractor, who was physically injured by the latter's negligence; and where the evidence is conflicting, an instruction that fixes them both with joint and several liability depending upon the evidence of the partnership is reversible error. *Gurganus v. Mfg. Co.*, 202.

2. *Partnership—Principal and Agent—Choses in Action—Collections—Misappropriation of Funds—Presumptions—Instructions—Appeal and Error.*—In an action against the surviving partner to recover for collections made by the partnership from its fertilizer purchasers under a contract making the partnership the agents of the plaintiff for the sale of the fertilizer, collect from its customers and apply the proceeds on the partnership notes given to the manufacturer, the evidence tended to show that the firm had collected moneys from some of its customers at various times and had not paid these collections to plaintiff under the contract, and that others had paid direct to plaintiff: *Held*, the extent of defendant's liability for wrongful conversion is to be measured by the value of the property

PARTNERSHIP—*Continued.*

actually converted, plus interest from the time of conversion, and it was error to shift the burden of proof to defendant on plaintiff's prima facie case. This was still a question for the jury, with the burden of the issue on plaintiff. *Mfg. Co. v. McQueen*, 311.

3. *Same—Interest.*—And, under the evidence in this case: *Held, further,* reversible error for the trial judge, in his instructions, to fix a time for the running of interest in accordance with plaintiff's evidence alone, the transactions running through a period of time, with evidence also to show that collections had been made at various times during that period. *Ibid.*

PAYMENT. See Insurance, 6; Taxation, 14; Bills and Notes, 7; Deeds and Conveyances, 18; Contracts, 12; Banks and Banking, 2.

PENALTIES. See Usury, 1.

PENDENTE LITE. See Divorce, 1.

PETITION. See Removal of Causes, 1, 3; Education, 1.

PHYSICIANS AND SURGEONS. See Evidence, 23.

1. *Physicians and Surgeons — Principal and Agent — Substitutes — Contracts—Liability.*—Where a surgeon has performed an operation upon his patient and left her under the care of another surgeon or physician for further treatment, the former may be liable for the malpractice of the latter, proximately resulting in injury to the patient, in the absence of a special contract with the patient, or those having her in charge, that he would not be responsible therefor; and evidence of the practice in such instance is competent upon the trial. *Nash v. Royster*, 408.

2. *Same—Questions for Jury—Trials.*—A surgeon may contract only to surgically operate upon the patient and not be responsible for the treatment of another in taking charge after the operation; and where the operation has been properly performed, and injury results from the malpractice of the one taking charge of the patient thereafter, and the evidence is conflicting as to whether the latter was acting as agent for the former, or independently employed by the parents or others having charge of the patient, an issue of fact is raised for the determination of the jury. *Ibid.*

3. *Same—Damages.*—A physician or surgeon who sends a substitute practitioner to treat a case, on becoming unable personally to fill a professional engagement, is not liable for the latter's negligence or malpractice, unless the substitute acts as his agent in performing the service, or due care is not exercised in selecting the substitute practitioner. *Ibid.*

4. *Same—Duration of Employment.*—Where a surgeon takes charge of a case and is employed to attend the patient, in the absence of a special contract to the contrary, the relation of physician and patient will be presumed in law to continue until ended by the mutual consent of the parties, or revoked by dismissal of the physician, or until his services are no longer needed. *Ibid.*

PHYSICIANS AND SURGEONS—*Continued.*

5. *Physicians and Surgeons—Measure of Responsibility for Damages to Patient.*—A surgeon or physician, in accepting a patient for treatment, implies that he has the knowledge therein of the average practitioner, and that he will diligently apply this knowledge to the proper treatment of the particular case, without neglect or omission of duty, until the term of his employment be terminated, nor is he responsible for an error in professional judgment when the opinions of those in like profession reasonably differ. *Ibid.*

PLACE OF SALE. See Mortgages, 4.

PLEADINGS. See Insurance, 3; Taxation, 3; Appeal and Error, 7; Limitation of Actions, 1; Actions, 2; Judgments, 7; Issues, 1; Injunction, 2; Courts, 14; Removal of Causes, 5.

1. *Pleadings — Clerks of Court — Courts — Jurisdiction — Order Allowing Extension of Time.*—The powers of the trial judge to permit the filing of an answer to a complaint are not affected by Public Laws 1921, Extra Session, ch. 92, sec. 1 (3), restricting the power of the clerk of the court to allow answer to be filed after the statutory time. *Roberts v. Merritt*, 194.

2. *Pleadings—Issues—Statutes.*—Where the answer raises new matter controverted by reply, it raises an issue for the jury to determine, C. S., 582 (2), and where it involves the sole defense it is error for the trial court to refuse an issue submitted thereon by the defendant. *Brown v. Ruffin*, 262.

3. *Pleadings — Issues — Statutes — Deeds and Conveyances — Grants — Boundaries.*—Issues can only be raised by the pleadings (C. S., 580); and where the complaint alleges plaintiff's boundaries under the calls in his deed to the land in dispute, which the defendant admits, but denies the location on the land of an adjoining line as claimed by plaintiff, the only issue permissible without amendment is one as to the true location of this boundary. *Geddie v. Williams*, 334.

4. *Pleadings — Counterclaims — Judgments — Nonsuit.* — While ordinarily where no complaint is filed there can be no demurrer or answer upon which to file a counterclaim or cross action, and plaintiff may take a voluntary nonsuit, it is otherwise where a judgment has been taken by defendant in his counterclaim set up in answer to the affidavit in claim and delivery in the action, and set aside for excusable neglect, wherein the plaintiff showed a meritorious cause of action and obligated himself to plead the same if thereafter permitted to do so.—*Shearer v. Herring*, 460.

5. *Same—Statutes.*—Where the defendant in answer to the affidavit of the plaintiff in claim and delivery in the action has set up and recovered judgment upon his counterclaim in the absence of the plaintiff, who has thereafter had the judgment set aside for excusable neglect, and thereafter fails to file answer to the defendant's counterclaim, the plaintiff may not take a voluntary nonsuit as of right, and a judgment in defendant's favor upon his counterclaim is properly rendered. C. S., 519, 521, 522. *Whedbee v. Leggett*, 92 N. C., 470, cited and applied. *Ibid.*

PLEADINGS—*Continued.*

6. *Pleadings—Evidence—Justification.*—Where the defendant, in an action of slander, has pleaded qualified privilege in defense only, he may not contend on the trial in justification that the alleged defamatory words were true. *Elmore v. R. R.*, 659.

7. *Same—Good Faith.*—Where the defamatory matter in an action for slander is the published statement of the defendant corporation, uttered by its superintendent in the discharge of his duties, affidavits upon which he had based his remarks are inadmissible as hearsay. *Ibid.*

8. *Pleadings—Answer—Verification—Demurrer.*—Where the complaint has been verified, an unverified answer is insufficient, and a proper motion for judgment for the want of an answer aptly made will be sustained. *Horney v. Mills*, 725.

POLICE POWERS. See Trade Names, 1.

POLICIES. See Insurance, 1, 4, 5, 6, 8, 9, 11.

POSSESSION. See Deeds and Conveyances, 10, 28; Actions, 3; Chattel Mortgage, 1; Loans, 1.

POSTHUMOUS CHILD. See Wills, 12.

POWERS. See Wills, 6, 9, 18.

PRECEDENTS. See Commerce, 3.

PREJUDICE. See Courts, 1; Appeal and Error, 5, 6, 21, 26; Evidence, 17.

PREMEDITATION. See Homicide, 3, 8.

PREMIUMS. See Insurance, 6, 10.

PRESUMPTIONS. See Appeal and Error, 2, 29; Partnership, 2; Deeds and Conveyances, 16, 19, 21, 28; Evidence, 14; Bills and Notes, 9.

PRIMA FACIE CASE. See Evidence, 3, 17; Bills and Notes, 9; Instructions, 9.

PRINCIPAL AND AGENT. See Corporations, 1; Insurance, 2; Partnership, 2; Physicians and Surgeons, 1; Actions, 3; Government, 1; Contracts, 19, 21, 24; Evidence, 20; Banks and Banking, 4; Courts, 15.

1. *Principal and Agent—Special Authority—Evidence—Contracts—Specific Performance—Equity.*—Evidence that a resident real estate agent began by correspondence a negotiation of sale with the nonresident owner of a city lot, who rejected several tentative propositions to sell to customers of the real estate agent and finally stated a minimum price at which he would sell, is not, in itself, sufficient to authorize the agent to sell at that price or for the attempted purchaser to enforce specific performance of a contract of sale against the owner he had made with the supposed agent; and *Held, further,* the fact that the supposed agent had advertised the sale of the lot without the owner's knowledge cannot vary the result. *O'Donnell v. Carr*, 77.

PRINCIPAL AND AGENT—*Continued.*

2. *Principal and Agent—Commission.*—In order for an agent for the sale of real estate to recover commissions on the sale of lands under his contract, he must show that he has obtained a bona fide purchaser upon its terms, etc. *Gossett v. McCracken*, 115.

3. *Same—Revocation.*—Under a written contract for the sale of a farm, the owner agreed that the agent therein appointed may sell at a certain price per acre net to him, or at a price he would thereafter consent to, with the provision to pay commissions under further-stated conditions: *Held*, the contract was revocable at the will of the owner before a sale had been effected by the agent under the terms of his contract. *Ibid.*

4. *Same—Agency Coupled with an Interest.*—Where there is an agency for the sale of real estate created, in order for it to be irrevocable by the owner for an interest therein of the agent, such interest must be in the land, and not merely in the result of the sale or the execution of the power. *Ibid.*

5. *Principal and Agent—Revocation—Damages.*—The damages recoverable by an agent for the sale of land revocable at the will of the owner, when the former has not procured a purchaser upon the terms specified, are such expenses as had been incurred by the agent prior to the revocation of the power to sell, and a reasonable compensation for any labor performed and services rendered which were fairly within the contemplation of the parties at the time of the making of the contract. *Ibid.*

6. *Principal and Agent—Implied Powers—Secret Limitations—Notice—Corporations—Officers.*—The president of a corporation ordinarily has implied authority to authorize a real estate agent to sell its lands and evidence that he informed a proposed purchaser making inquiry that the sale of the property was in the hands of a real estate agent and referred such purchaser to him without informing such purchaser that the agency was only for the purpose of securing offers for the board of directors or trustees to approve: *Held*, sufficient for the jury to determine whether the agent had sufficient power to bind the corporation to the sale of the land by a proper writing. *McCall v. Institute*, 775.

7. *Same.*—A purchaser of land from an agent to sell is not bound by secret limitations upon the agent's general power not disclosed to him. *Ibid.*

PRINCIPAL AND SURETY. See Warehousemen, 2; Appeal and Error, 7; Contracts, 20, 22.

PRIORITY. See Liens, 4.

PRIVIES. See Bills and Notes, 6.

PRIVILEGE. See Slander, 3.

PROBATE. See Deeds and Conveyances, 11, 12, 13, 14, 15, 25; Wills, 20.

PROCEDURE. See Taxation, 1; Courts, 9; Statutes, 4.

PROCESS.

Process—Summons—Service—Copies—Seals—Statutes.—The purpose of C. S., 476, 479, in requiring the seal of the clerk of the court to a summons issued to be served outside of the county is to evidence the authenticity of the summons, and its omission from the copy alone becomes immaterial where it is in all other respects a replica of the original, and the defendants could not have been prejudiced by the lack of information concerning the action they were called upon to defend. *Elramy v. Abeyounis*, 278.

PROFITS. See Partnership, 1.

PROOF. See Insurance, 4.

PROPERTY. See Wills, 3.

PROSTITUTION. See Criminal Law, 20.

PROVISIONS OF POLICY. See Insurance, 8.

PROVOCATION. See Homicide, 10.

PROXIMATE CAUSE. See Negligence, 3, 8, 9, 12; Railroads, 2.

PUBLIC OFFICERS. See Officers.

PUBLIC BUILDINGS. See Municipal Corporations, 9.

PUBLIC POLICY. See Wills, 16.

PUNISHMENT. See Constitutional Law, 1.

PURCHASERS. See Deeds and Conveyances, 24, 26; Taxation, 12.

QUASHING. See Grand Jury, 1; Intoxicating Liquor, 3.

QUESTIONS AND ANSWERS. See Appeal and Error, 1, 22.

QUESTIONS FOR JURY. See Criminal Law, 1, 4, 16; Wills, 14; Employer and Employee, 2; Evidence, 1, 23; Homicide, 6; Slander, 1; Register of Deeds, 1; Bills and Notes, 8; Deeds and Conveyances, 8; Physicians and Surgeons, 2; Bankruptcy, 2; Contracts, 18; Negligence, 9.

QUESTIONS OF LAW. See Limitation of Actions, 1; Deeds and Conveyances, 8; Courts, 14.

RAILROADS. See Carriers, 1, 3; Negligence, 1; Limitation of Actions, 2; Instructions, 5.

1. *Railroads—Rules—Waiver.*—By permitting its shippers to accumulate bales of cotton upon its platform, in spaces thereon assigned to them, for a long period of time, a railroad company waives a rule it has promulgated that no liability for fires thereon will attach to it unless and until the cotton has been offered to and accepted by it for shipment, and its bill of lading accordingly issued, though notice of this rule has remained posted on the platform in question. *Herring v. R. R.*, 285.

2. *Railroads—Negligence—Proximate Cause—Fires—Burden of Proof.*—Evidence that the plaintiff's cotton was destroyed by fire while on the defendant railroad company's platform at night; that half an hour

RAILROADS—*Continued.*

before the fire a freight train was stopped near the platform with a caboose car attached, whereon was a fire in the stove for cooking; that live coals were on the track beneath this car on an inflammable right of way, with the wind blowing toward the platform, is sufficient to take the issue of defendant's negligence to the jury, with the burden of proof on plaintiff, permitting plaintiff to recover, if the negligence is found by the jury to be the proximate cause of plaintiff's damage. *Ibid.*

3. *Same—Instructions.*—Where there is evidence tending to show only that the plaintiff's cotton on the defendant's platform was set fire to and destroyed by fire set out negligently from the defendant's caboose car, and no evidence that it was caused by fire set out by the locomotive attached to the train, it is not reversible error, as tending to confuse the jury in its deliberations, for the trial judge to read, by way of analogy, so far as it would extend, opinions of the Supreme Court on the question of the defendant's liability for setting out sparks from its locomotive, with instructions that properly confined the analogous cases to the law involved in the instant case. *Ibid.*

4. *Same—Rights of Way.*—Where the issue is presented as to whether the defendant railroad company negligently set out fire on its foul right of way, which was communicated to and destroyed the plaintiff's property, a definition that defined the right of way as coextensive with the defendant's right to use the land for railroad purposes, and not confining it to its actual present use, is correct. *Ibid.*

5. *Railroads — Demurrage — Rule — Interstate Commerce Commission — Findings—New Trials.*—In an action by a railroad company to recover demurrage charges on an interstate carload shipment, the determinative question was whether the demurrage charges began to accrue at the time of notice or constructive placement or at the time of the actual placement of the cars, the defendant contending that by special agreement with the plaintiff the rule of constructive placement as required by the rule of the Interstate Commerce Commission did not apply, and the plaintiff that this rule was enforceable to prevent discrimination among shippers, and would necessarily control any agreement to the contrary: *Held*, it was necessary for a determination of the case that there should have been a finding as to whether a condition preventing the placement of the cars was attributable to the consignee. *Davis v. Gill*, 542.

6. *Railroads—Negligence—Contributory Negligence—Damages.*—The contributory negligence of an employee against a railroad company, his employer, will not be held under our statute as a complete bar to his recovery of damages inflicted by the defendant's negligence, but the jury must take it into consideration under proper instructions from the court in diminishing the amount of damages recoverable. *Hicks v. R. R.*, 548.

RATIFICATION. See Constitutional Law, 4.

REAL ESTATE. See Lis Pendens, 3.

REASONABLE DOUBT. See Criminal Law, 18, 21, 27.

RECALLING WITNESS. See Homicide, 5.

RECEIPTS. See Warehousemen, 1, 3; Insurance, 4.

RECEIVERS. See Injunction, 1; Employer and Employee, 4; Statutes, 4.

RECITALS. See Bills and Notes, 9; Wills, 25.

RECOGNIZANCE. See Appeal and Error, 11.

RECORDARI. See Appeal and Error, 21.

RECORDS. See Appeal and Error, 1, 2, 3, 14, 16, 18; Municipal Corporations, 4; Warehousemen, 5.

REDEMPTION. See Mortgages, 1.

REGISTER OF DEEDS.

Register of Deeds — Marriage License — Statutes — Issues — Evidence — Questions for Jury—Instructions—Appeal and Error.—In an action by the father against the register of deeds to recover the penalty for his issuing a marriage license to his daughter under 18 years of age, C. S., 2503, it is a question of law for the court when the facts are admitted or not controverted, but otherwise for the jury, it then being for the court to instruct them in the law arising upon the evidence in the case, as to the recoverable injury, and upon exception aptly taken, his failure to do so is reversible error. *Spencer v. Saunders*, 183.

REGISTRATION. See Deeds and Conveyances, 5, 16, 19, 24, 25; Lis Pendens, 1; Trade Names, 1; Chattel Mortgage, 1..

REINSTATEMENT. See Appeal and Error, 24.

REMAINDERS. See Wills, 6, 17; Limitation of Actions, 2; Advancements, 2; Estates, 4.

REMAND. See Corporations, 5.

REMARKS. See Courts, 1, 4.

REMEDY. See Rights and Remedies.

REMOVAL OF CAUSES.

1. *Removal of Causes — Federal Courts — Petition — Bond — Fraudulent Joinder—Parties.*—Upon the filing in apt time by a nonresident defendant of a proper and sufficient petition and bond for the removal of a cause from the State to the Federal Court, under the Federal Removal Act, and sufficient allegation of a fraudulent joinder of a resident defendant to oust the jurisdiction of the Federal Court, the cause should be removed and the controverted facts determined in the latter court upon the plaintiff's motion to remand. *Johnson v. Lumber Co.*, 81.

2. *Removal of Causes—Federal Court—Order to Remove—Waiver.*—Under the facts of this case: *Held*, no error in the ruling of the Superior Court judge that defendant had not waived his right to the removal of the cause from the State to the Federal Court under a former order by offering copies of the papers in the case to the clerk of the State court to be used as a part of the record to be transmitted. *Dixon v. R. R.*, 249.

REMOVAL OF CAUSES—*Continued.*

3. *Removal of Causes—Federal Courts—Negligence—Joint Torts—Fraudulent Joinder—Parties.*—Where in an action brought in the State court against a nonresident and resident defendant, it is alleged that the resident defendant was the manager in charge of the factory of the nonresident defendant for the installation and placing of power-driven machinery, and states that, through the negligence of both in the installation and placing the machinery, a pulley block burst and caused the injury in suit by a flying fragment therefrom, a joint tort is alleged against both the defendants, jointly and severally, and a motion to remove to the Federal Court made in the State court on the ground of diversity of citizenship will be denied, when based without more upon allegations in the petition that the actions were severable. *Swain v. Cooperage Co.*, 528.

4. *Same—Petition to Remove.*—In order to sustain a motion for the removal of a cause from the State to the Federal Court for diversity of citizenship on the ground of a fraudulent joinder of a resident defendant, the petition must state facts sufficient for the granting of the motion on this ground, and the pleader's conclusions otherwise are insufficient. *Ibid.*

5. *Removal of Causes—Federal Courts—Wrongful Joinder—Joint Torts—Pleadings.*—Where the complaint alleges a joint tort against a resident and nonresident defendant, a motion to remove the cause from the State to the Federal Court for misjoinder of the resident defendant will be denied in the absence of allegation or evidence that the misjoinder was fraudulent. *Crisp v. Lumber Co.*, 733.

6. *Same—Election of Remedies.*—Upon defendant's motion to remove a cause from the State to the Federal Court for diversity of citizenship, for the reason that the cause was severable against the nonresident defendant, the question of whether the cause was removable for wrongful joinder of parties defendant depends upon the allegations of the complaint, and under the facts of this case: *Held*, the allegations of negligence against both of the defendants, one as a principal and the other as a vice-principal, in failing to provide plaintiff's intestate a safe place to work in blasting, and proper tools and materials, alleged a joint tort against both defendants, and plaintiff's election to sue them both for the joint tort will control without regard to his motive in pursuing his legal remedy. *Ibid.*

7. *Same—Extraneous Matters of Defense.*—Where the defendant on his motion to remove a cause from the State to the Federal Court for diversity of citizenship alleges or offers matter extraneous to the complaint, such matter is in the nature of a speaking demurrer, and will not be considered. *Ibid.*

REPRESENTATION. See Insurance, 7.

REPUGNANCY. See Wills, 17.

REPUTATION. See Criminal Law, 20.

REQUESTS. See Instructions, 8; Appeal and Error, 29.

RESALE. See Mortgages, 3.

RES GESTÆ. See Evidence, 5.

RESPONSIBILITY. See Physicians and Surgeons, 5.

RESTRICTIONS. See Deeds and Conveyances, 22.

REVERSAL. See Verdict, 3; Instructions, 9.

REVERSION. See Limitation of Actions, 2.

REVIEW. See Taxation, 9.

REVOCATION. See Principal and Agent, 3, 5.

RIGTHS AND REMEDIES. See Statutes, 2, 4; Injunction, 1; Taxation, 1.

RIGHT OF WAY. See Railroads, 4.

ROADS AND HIGHWAYS. See Government, 2; Contracts, 21; Judgments, 6.

RULES. See Railroads, 1, 5.

RULES OF COURT. See Appeal and Error, 17, 24.

RULE IN SHELLEY'S CASE. See Estates, 3.

SAFE PLACE TO WORK. See Employer and Employee, 1, 15, 17.

SALES. See Statutes, 3, 4; Courts, 15; Liens, 4, 5; Taxation, 10; Mortgages, 3, 4; Actions, 4; Wills, 18; Contracts, 24.

Sales—Merchandise in Bulk—Statutes.—While the sale of merchandise in bulk of practically or nearly all of the seller's property is void without compliance with C. S., 1611, it is necessary to effect this result to show the insolvency of the seller, and applies only between the purchaser and one holding a debt, etc., preëxisting the time of the sale. *Cowan v. Dale*, 684.

SATISFACTION. See Instructions, 9.

SCHOOLS. See Appeal and Error, 23.

1. *Schools—Education—County-wide Organization—Statutes—Taxation.*—The provisions of C. S., 5473, with regard to counties adopting a county-wide plan of organization of public schools, is brought forward and enlarged under those of sec. 75, ch. 136, Public Laws of 1923, and under neither statute is it required that the voters of combined districts approve the plan of consolidation when the tax rate of each remains the same. *Scroggs v. Board of Education*, 110.

2. *Schools—Taxation—Elections—Statutes—Ministerial Duties—Mandamus.*—C. S., 5645 provides for the holding of another local election for the imposition of a tax in a school district after six months from the time this question had been unfavorably voted upon in the district under C. S., 5640, and where the provisions of 5639, 5640 have been complied with as to the sufficiency of the first petition, no discretionary or judicial power is vested in the commissioners in calling the election under C. S., 5645, and when its provisions have been complied with, the duty of the county commissioners is purely ministerial, and mandamus will lie to compel them to perform it. *Board of Education v. Comrs. of Yancey*, 650.

3. *Schools—School Districts—County-wide Plan—New Districts—Statutes—Injunction—Appeal and Error.*—C. S., 5481 is now solely appli-

SCHOOLS—*Continued.*

cable to the creation, etc., of new school districts within the county, and upon the facts found on this appeal, it not sufficiently appearing that the proposed changes come under the provisions of this statute, it is *Held*, that the order dissolving the preliminary restraining order was properly entered, and will not be disturbed unless it is more clearly made to appear in the Superior Court that the new contemplated district to be voted on comes within the provisions of said section. *Howard v. Board of Education*, 675.

SCHOOL DISTRICTS. See Appeal and Error, 23.

SEALS. See Process, 1; Contracts, 16.

SEASIDE RESORTS. See Constitutional Law, 3.

SECONDARY EVIDENCE. See Evidence, 13.

SECRET LIMITATIONS. See Principal and Agent, 6.

SEDUCTION. See Criminal Law, 19.

SELF-DEFENSE. See Homicide, 10.

SENTENCE. See Criminal Law, 7, 17.

SEQUESTRATION. See Wills, 15.

SERVICE. See Process, 1; Contracts, 13.

SETTLEMENT OF ISSUES. See Appeal and Error, 3, 20.

SIGNATURE. See Appeal and Error, 13; Wills, 13; Evidence, 19.

SITUS. See Wills, 3.

SLANDER. See Corporations, 1.

1. *Slander—Principal and Agent—Employer and Employee—Evidence—Questions for Jury.*—Where there is evidence that an employee of an incorporated retail store acting within the scope of his employment as store detective, in a threatening manner questions a customer, a girl fourteen years of age, accompanied by her mother, about a comb, after looking over a counter of them in the store, stops the exit of the girl and her mother from the store in the meanwhile, and then permits them to depart, it is competent for the jury to consider the facts and circumstances and determine whether the employee intended to charge the customer with theft; and when there is evidence that the customer and her mother so understood and indicated the same in their language to the employee at the time, which he did not deny, it is sufficient to take the case to the jury in an action for slander. *Sawyer v. Gilmers, Inc.*, 7.

2. *Slander—Special Damages—Evidence.*—Where, within the scope of his employment as store detective, an employee of a corporation has openly and wrongfully accused the plaintiff, a customer in the store at the time, of theft in the presence of other employees and customers, in an abrupt and threatening manner, the false accusation is actionable *per se* and it is competent for the plaintiff to introduce evidence

SLANDER—*Continued.*

of her special damages, tending to show that she had been humiliated by the comments of her friends and others upon the occurrence, such results being natural to the occasion and likely to follow under the circumstances of the accusation. *Ibid.*

3. *Slander—Corporations—Employer and Employee—Qualified Privilege.*—Where the superintendent of a railroad company in investigating a conductor employed by the company as to whether the conductor in collusion with its agent, was not punching the tickets taken from passengers on his train, but selling them again, and misappropriating the money, tells the agent that the conductor was so acting when such was not the fact, which is the subject-matter in the conductor's action against the company for slander, the words of the superintendent are qualified privilege, and in the absence of malice are not actionable. *Elmore v. R. R.*, 658.

4. *Same—Malice Implied.*—And where the superintendent under these circumstances, has informed the agent in his conversation that the conductor has taken up cash fares from passengers and has misappropriated the money, the false words so spoken are actionable *per se*, implying malice in law, and being spoken by the superintendent in pursuance of his duties to the company, such words are actionable, and the company may be held liable in damages. *Ibid.*

5. *Same—Damages.*—Where in pursuance of his duties to his employer a railroad company, its superintendent has uttered slanderous words to its agent in reference to the conductor, though in the conversation the superintendent may have spoken words that were actionable upon several charges, they can be made the subject of only one action. *Ibid.*

6. *Same—Judgment—Appeal and Error.*—Where in an action for slander the words falsely spoken were in part *quasi* privileged and not actionable and in part part actionable, and damages have been awarded in plaintiff's favor by the jury upon separate issues, the Supreme Court on appeal, may affirm the judgment on one of the issues, and reverse the judgment on the other. *Ibid.*

SOLICITOR. See Criminal Law, 8; Appeal and Error, 18; Intoxicating Liquor, 3.

SOLVENCY. See Injunction, 5.

SPECIFIC PERFORMANCE. See Principal and Agent, 1; Appeal and Error, 28.

SPEED. See Highways, 1; Negligence, 2, 3.

SPIRITUOUS LIQUOR. See Intoxicating Liquor.

STARE DECISIS. See Appeal and Error, 27.

STATES. See Warehousemen, 5.

STATE BOARD OF EXAMINERS. See Taxation, 2.

STATE COURTS. See Statutes, 1.

STATE SYSTEMS. See Warehousemen, 1.

STATE TREASURER.

1. *State Treasurer—Actions.*—Where the local manager of a cotton warehouse, formed and existent under the provisions of our statute (C. S., 4925), has failed in his duty to cancel warehouse certificates the warehouse has delivered to its customers, but, instead, has used these certificates, properly endorsed in blank by the owner, with guarantee of their integrity, as provided by the statute, as collateral to a note given to a bank for borrowed money which the bank has taken without notice of the fraud thus practiced, and the maker has failed to pay his note at maturity, the receipt being thus negotiable by the terms of the statute, it is within the sound discretion of the State Treasurer to pay the bank the loss it has thus sustained, and the State Treasurer may maintain his action against the surety on the manager's bond, given in accordance with the terms of the statute, as being primarily liable. *Lacy v. Indemnity Co.*, 24.

2. *Same—Banks and Banking—Notice.*—While it is provided in the statute that where a receipt is given for cotton belonging to a local manager of a cotton storage warehouse existent thereunder, it shall specify that fact on its face, this provision does not apply to cotton placed therein by others, nor when the local manager in breach of his duty has unlawfully and fraudulently withheld these receipts and used them as collateral to a note of his own he has had discounted at a bank, and the bank, without knowledge of the fraud, has been deprived of this collateral and has suffered loss. *Ibid.*

3. *Same—Holder in Due Course.*—Where a warehouse, existent under the statute (C. S., 4925), issues its warehouse receipts to the owners storing their cotton therein, by the terms of the statute, these receipts are made negotiable; and by delivery when endorsed in blank (C. S., 3010), and when taken as collateral security by a bank for a note, for value, without notice of this fraud or infirmity therein, they confer upon the bank the position of holder for value in due course, to the extent of the bank's liens. C. S., 3005, 3007. *Ibid.*

4. *Same.*—Where the local manager of a cotton storage warehouse, existent under the statutory State system of warehouses, has fraudulently used the warehouse receipts given to the owners as collateral to his own note given to and discounted by a bank, in order to vitiate the receipts thus hypothecated, it is necessary for the bank, under the provisions of C. S., 4087, to have had notice of this fraud going to the integrity of the receipts, or that the bank itself acted in bad faith with respect thereto. *Ibid.*

STATUTES. See Process, 1; Actions, 1, 3; Courts, 1, 4, 13, 16; Deeds and Conveyances, 1, 11, 12, 20, 25; Descent and Distribution, 1; Pleadings, 2, 3, 5; Evidence, 1, 2, 11, 18, 19; Grants, 2; Municipal Corporations, 1, 4, 8; Negligence, 2, 3, 4; Schools, 1, 2, 3; Taxation, 1, 6, 7, 10, 15; Warehousemen, 1, 3; Bills and Notes, 1, 5, 11; Constitutional Law, 1, 3; Criminal Law, 4, 6, 12, 15, 17, 19, 20, 24; Register of Deeds, 1; Wills, 1, 7, 12, 13, 17, 20, 22; Mortgages, 2, 3; Insurance, 7, 9, 11; Judgments, 3, 9, 10; Liens, 1; Limitation of Actions, 1; Trials, 1; Appeal and Error, 10, 20; Illegitimate Children, 1; Injunction, 2; Intoxicating Liquor, 1; Education, 1; Husband and Wife, 1; Trade Names, 1; Attachment, 1; Divorce, 1; Sales, 1; Usury, 1; Lis Pendens, 2; Bonds, 1.

STATUTES—*Continued.*

1. *Statutes—Decisions of Other States on Statutes Adopted Here.*—Great weight will be given by our courts to the decisions of another State upon its statute which has been substantially adopted by our Legislature as a law. *Bank v. Doughton*, 50.

2. *Statutes—Rights and Remedies—Special Remedies.*—Where a statute creates a new right or liability and provides a special remedy for its enforcement, the remedy thus prescribed is exclusive, and actions or proceedings otherwise and ordinarily available may not be resorted to. *Trust Co. v. Burke*, 69.

3. *Same—Banks and Banking—Corporation Commission—Assessments—Sale of Stock—Personal Judgments.*—Where the shareholders in a State bank have voted an assessment among themselves to make good a deficiency in its capital stock, at a meeting called for that purpose under the direction of the Corporation Commission, according to the amendment to our general banking laws of 1921, the statutory remedy provided where one of its stockholders fails to pay the assessment against him is by the sale of his stock, and there being no other statutory remedy, a personal judgment in the bank's action may not be maintained when the stock has failed to bring the amount of the assessment at the sale. *Ibid.*

4. *Statutes — Amendments — Procedure — Remedial Statutes — Actions—Insolvent Corporations—Receivers—Sales.*—Under a statute amendatory of the procedure under an existing statute, the legislative intent, nothing else appearing, is presumed to be that it apply to existing actions and is remedial in its nature, and the statute of 1924 amending C. S., 1214, relating to the sale of the property of insolvent corporations by receivers under certain conditions, retaining the liens and priorities thereon as attached to the proceeds of the sale, is held to apply to pending actions theretofore commenced. *Martin v. Vanlaningham*, 656.

STATUTE OF FRAUDS. See Contracts, 1; Deeds and Conveyances, 5, 6, 24; Compromise and Settlement, 1.

STIPULATIONS. See Insurance, 8.

STOCK. See Statutes, 3.

STRANGERS. See Murder, 1.

STREETS. See Evidence, 2.

STREET IMPROVEMENTS. See Municipal Corporations, 3, 4, 6; Courts, 16.

SUBROGATION. See Banks and Banking, 3.

SUBSTANTIVE EVIDENCE. See Criminal Law, 23.

SUBSTITUTES. See Physicians and Surgeons, 1.

SUMMONS. See Process, 1.

SUPERIOR COURTS. See Courts, 5.

SUPPORT. See Illegitimate Children, 1.

SUPREME COURT. See Courts, 5, 13. Appeal and Error, 7.

SURETY. See Bills and Notes, 1; Appeal and Error, 13.

SURVIVAL. See Actions, 1; Negligence, 4.

SUSPENSION OF JUDGMENT. See Criminal Law, 7.

TAXATION. See Schools, 1, 2; Wills, 4; Education, 2, 3; Constitutional Law, 2.

1. *Taxation—Statutes—Remedies—Actions—Procedure.*—Where a statute prescribes the method for the valuation of property for taxation, and a remedy for the taxpayers who desire to contest the validity of the assessment thereunder made against his property, he must first exhaust the statutory remedy given before he can successfully apply to the court for redress. *Mfg. Co. v. Comrs. of McDowell*, 99.

2. *Same—State Board of Examiners—Appeal.*—Chapter 12, Laws 1923, provides for the local assessment of property for taxation, among other things constituting certain State officials the State board of assessors to receive complaints as to property that has been fraudulently or improperly assessed, through the county commissioners constituting the local board, and acting through certain designated agencies in certain detail respects, gives express authority to the State Board of Examiners, or any member thereof, "to take such action and do such things as may appear necessary and proper to enforce the provisions of this act." *Ibid.*

3. *Same—Pleadings—Demurrer.*—A taxpayer paid his taxes under protest on an assessment of his property by the county board of equalization, ch. 12, Laws of 1923, and in his action to recover an alleged excess he had been required to pay, he alleged that the county board acted arbitrarily and without evidence as required by sec. 70 of said act, and it appeared from his complaint that he had not appealed to the State Board of Equalization in the manner prescribed by the statute: *Held*, a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was properly sustained. *Ibid.*

4. *Same—Public Officers — Mandamus.* — In this action the complaint alleged that upon inquiry made to the State Board of Equalization the plaintiff was informed they were without power to proceed to pass upon the assessment of the local board: *Held*, upon proper application to the State Board and its refusal to act, the plaintiff's remedy was by mandamus to compel them to act in the matter under the power conferred by the statute. *Ibid.*

5. *Taxation — Automobiles — Chauffeurs—Municipal Corporations—Cities and Towns—Ordinances—Constitutional Law.*—Where an ordinance of a town expressly includes nonresidents thereof who conduct a business, practice a profession, or who are employed therein, requiring them to obtain a chauffeur's license for driving their automobiles, it includes within its terms such persons as are employed within the town and live beyond its limits and drive to and from their work, and the tax being imposed upon all of that class alike is not discriminatory, and the ordinance is constitutional. *S. v. Denson*, 173.

6. *Same—Statutes.*—The second proviso of chapter 2, section 29, Public Laws 1921, refers to the privilege of operating a motor vehicle, and the third for regulating, licensing, and controlling chauffeurs and

TAXATION—*Continued.*

drivers; and *Held*, the words "any such car" in the third proviso does not restrict the drivers' license to the cars on which the privilege tax is laid; and an ordinance imposing a chauffeur's tax upon those driving cars within the corporate limits of the town is authorized by the statute. *Ibid.*

7. *Taxation — Gifts — Chance — Gaming — License—Statutes.*—An advertising arrangement by which the purchaser of certain merchandise at a store by the payment of one cent in addition to the price asked for one article may obtain two is a definite proposition free from the element of chance or gambling, and does not fall within the provisions of our revenue statute taxing any person or establishment offering articles for sale and proposing to present the purchaser with a gift or prize, and is not within the intent and meaning of the criminal law. *Drug Co. v. Doughton*, 720.

8. *Taxation—Confiscation—Injunction—Burden of Proof.*—While ordinarily a restraining order for the collection of an unlawful tax will not be granted, it is an exception which the plaintiff must show, when the imposition of this tax will cause the irreparable loss of property rights or amount to an unlawful confiscation of his property. *Advertising Co. v. Asheville*, 737.

9. *Same—Appeal and Error—Findings of Fact—Review.*—Whether the license tax imposed in this case by city ordinance will amount to a confiscation of plaintiff's property or cause him to operate his business at a loss, being a matter of calculation, the Supreme Court remands the case for the ascertainment of the expenditures, so as to show in comparison with the profits stated the status of plaintiff's business as affected by the tax imposed by the ordinance. *Ibid.*

10. *Taxation—Sales—Deeds and Conveyances—Tax Deeds—Statutes—Constitutional Law—Due Process.*—The acquisition of title under a tax deed is in derogation of the common-law right of the owner, C. S., 970, and the statutory requirement must be strictly followed; and while the Legislature may prescribe the method in such instances, its power is limited by the organic law, and due notice to the owner of the proposed sale is a part of the due-process clause, and may not be dispensed with, and for the purchaser at the sale and claimant under the sheriff's deed to acquire title as against the owner under the paper title, he must show a compliance with the prescribed statutory procedure and the organic law. *Price v. Slagle*, 758.

11. *Same—Notice to Owner.*—It is mandatory under the provisions of C. S., 8028, that the notice of sale for taxes shall state in whose name the lands are taxed, though the listing in the wrong name, C. S., 8019, does not necessarily make the sale void. *Ibid.*

12. *Same—Purchasers.*—The purchaser of lands under a tax deed must show a compliance with C. S., 8028, by showing the sufficiency of the sheriff's affidavit and notice of sale as to "when the time of redemption would expire." *Ibid.*

13. *Same—Equity—Cloud on Title—Limitation of Actions.*—Where the owner of the paper title to lands seeks to remove the defendant's claim to the land in dispute under a tax title as a cloud upon his own title, the three-year statute of limitations does not apply to his suit. *Ibid.*

TAXATION—*Continued.*

14. *Same—Payment.*—Where the owner of the paper title to lands seeks to remove the defendant's claim under a void tax deed as a cloud upon his title, it is not required that plaintiff, or some one for him, must have paid the taxes thereon, but the plaintiff is required as a requisite of a judgment in his favor to pay all taxes properly assessed against the land. *Ibid.*

15. *Taxation—Deeds and Conveyances—Actions—Foreclosure—Statutes.*—A purchaser of land at a sale for taxes may at his election pursue his remedy to have a judicial foreclosure instead of the remedy provided by C. S., 8028, 8029, 8030, to demand from the sheriff a tax deed. *Ibid.*

TAX DEEDS. See Taxation, 10; Title, 1.

TENDER. See Deeds and Conveyances, 18; Insurance, 10; Contracts, 17.

THREATS. See Homicide, 2.

TIMBER. See Deeds and Conveyances, 18.

TIME. See Pleadings, 1; Mortgages, 1; Contracts, 11.

TITLE. See Wills, 6, 12; Evidence, 27; Deeds and Conveyances, 4, 10; Actions, 3; Lis Pendens, 1; Carriers, 4.

Title—Common Source—Evidence—Deeds and Conveyances—Tax Deeds.—Where the plaintiff claiming title to the land in controversy under a chain of title from a State's grant of the land for the purpose of attack introduces a tax deed of the same land under which the defendant claims, and the defendant has also introduced this tax deed, with the sheriff's affidavit, together with a deed without warranty from the original owner: *Held*, this evidence is competent to show that both parties were claiming title under a common source. *Price v. Slagle*, 757.

TORRENS LAW. See Courts, 8.

TORTS. See Commerce, 2; Employer and Employee, 5; Government, 1.

TRADE NAMES.

1. *Trade Names — Assumed Names — Statutes — Registration—Actions—Police Powers.*—While the violation of C. S., 3288, prohibiting carrying on a mercantile business under an assumed name without registration, is made a misdemeanor by C. S., 3291, a further provision is made by the Public Laws of 1919, ch. 2, that such violation shall not prevent a recovery by "said person or persons in any civil action," etc., evidencing the intent of the Legislature that the protection of C. S., 3288, as to creditors, should not extend to giving the courts the power to strike out an answer setting up a valid defense upon the admission that defendant had violated sec. 3288, and render judgment in favor of the plaintiff; and *Held, further*, the courts will not lend their aid to extend the provisions of C. S., 3288, 3291, highly penal in their nature, and coming within the police powers of the State. *Finance Co. v. Hendry*, 549.

2. *Same—Defenses—Fraud.*—In an action upon his promissory notes, the defendant alleged that the plaintiff held the notes sued on as the

TRADE NAMES—*Continued.*

agent for the payee, who had procured them through fraud, sufficiently stated: *Held*, the pleadings raised issuable matters for the determination of the jury. *Ibid.*

TRANSFER TAX. See Wills, 2.

TRESPASS. See Courts, 8.

TRESPASSER. See Employer and Employee, 14.

TRIALS. See Criminal Law, 15, 20; Injunction, 7; Insurance, 10; Physicians and Surgeons, 2; Bankruptcy, 2; Contracts, 15.

Trials—Courthouse—Statutes—View of Jury.—Upon a trial for murder, and at the request of the prisoners, the court permitted the jury to view the scene of the crime for the purpose of locating certain places and positions that had been testified to, and, over defendant's objection, testimony of certain witnesses who had not theretofore testified: *Held*, the organization of the court at the place of the homicide is regarded as a continuance of the trial held at the courthouse, and not prohibited by C. S., 1443, prohibiting trials to be had elsewhere than at the courthouse; and under the facts of this case it is not reversible on appeal as error prejudicial to the defendants. The inherent power of the court in such instances discussed by ADAMS, J. *S. v. Stewart*, 341.

TROVER AND CONVERSION. See Carriers, 5.

TRUSTS. See Deeds and Conveyances, 26.

TRUSTEES. See Wills, 6; Deeds and Conveyances, 26.

ULTRA VIRES ACT. See Corporations, 2.

UNDERTAKINGS. See Attachment, 1.

UNDUE INFLUENCE. See Wills, 10.

UNITED STATES MAIL. See Evidence, 14.

USURY.

1. *Usury—Actions—Counterclaim—Penalty—Statutes.*—Where interest at an usurious rate has been charged for the loan of money, the note therefor is stripped of its interest-bearing quality under the provisions of our statute, C. S., 2306, and the penalty is recoverable either in reduction of the principal sum in counterclaim in the payee's action upon the note, or in the payor's action as in the nature of a debt. *Sloan v. Ins. Co.*, 690.

2. *Same—Limitation of Actions.*—Where a note is given for money borrowed, and extended upon the payment of usury knowingly received, C. S., 2305, the statute of limitations bars the right of recovery of the penalty two years after each usurious transaction, C. S., 442 (2): and in this action, the plaintiff having elected to sue under the statute for the penalty, the action will not be considered as one for an accounting, regarding the payment of the usurious interest as payment upon the note, and thus repel the bar of the statute. *Ibid.*

VALUE. See Bills and Notes, 9; Deeds and Conveyances, 26.

VENUE. See Judgments, 9.

VERDICT. See Courts, 7, 10; Judgments, 1; Jury, 1; Evidence, 4; Appeal and Error, 8, 25; Criminal Law, 14; Intoxicating Liquor, 2, 3.

1. *Verdict—Evidence—Deliberation—Appeal and Error.*—Where upon the evidence in several consolidated cases to recover damages to the lands of the various parties, it is shown that the amount of damages, if any, each should recover would depend upon the establishment of different elements as to each, a verdict fixing a uniform per cent of the amount claimed by each as his damages obviously does not meet the requirement that the jury should deliberate upon the evidence and find the amount of damages in each case, and is properly set aside on motion. *Daniel v. Belhaven*, 181.

2. *Verdict—Jurors—Impeachment of Verdict.*—After the rendition of the verdict, the verdict may not be impeached by the testimony of one of the jurors. *S. v. Dove*, 248.

3. *Verdict—Polling Jury—Reversal of Verdict—Appeal and Error.*—After a jury has rendered its verdict upon the evidence, without indication by any of the jurors of any dissatisfaction therewith, and have been discharged from further consideration of the case, and have mingled with those upon the outside of the panel, it is reversible error for the trial judge to ask them if they had not made a mistake in their answer to an issue, poll them, and reverse the issue in accordance with their answer to his question. *Alston v. Alston*, 299.

VERIFICATION. See Pleadings, 8.

VESTED RIGHTS. See Insurance, 12.

VETERANS' LOAN FUND ACT. See Bonds, 1.

VICE-PRINCIPALS. See Employer and Employee, 1, 5; Carriers, 3.

VIEW. See Trials, 1.

VOLUNTEER. See Employer and Employee, 14.

VOTING. See Corporations, 4.

WAIVER. See Insurance, 1, 8; Removal of Causes, 2; Contracts, 17; Railroads, 1; Evidence, 11; Carriers, 4; Courts, 13.

WAREHOUSEMEN.

1. *Warehousemen—State System—Statutes—Warehouse Receipts—Negotiable Instruments.*—It was the intent and purpose of C. S., 4925 (Laws 1921), entitled "An act to provide improved marketing facilities for cotton," in regard to the establishment of a system of warehouses in which this staple may be stored, and warehouse receipts issued to those thus using the same, making the warehouse receipts negotiable and acceptable as collateral security, to afford, in addition to the bonds required of those who have the management thereof, further security by levying a certain tax on the cotton when ginned, and placing these funds in the hands of the State Treasurer, to be used by him, in his sound discretion, for the purpose stated. *Lacy v. Indemnity Co.*, 24.

2. *Same—Local Managers—Fraud—Principal and Surety.*—Where a storage warehouse has been formed under the provisions of C. S.,

WAREHOUSEMEN—*Continued.*

4925, and has become a part of the cotton warehouse storage system of the State, and the local manager has given his bond in conformity with the provisions of the statute, to guarantee the faithful performance of his duties under the law, the surety on his bond is liable in damages, among other things, for his failure to cancel the warehouse receipts in accordance with the statute that he has issued to those storing cotton therein, when the cotton has been legally withdrawn therefrom, and when he has instead fraudulently used these receipts, endorsed by the owner in blank, as collateral to his own personal note to a bank discounting the same without notice of the fraud. *Ibid.*

3. *Warehousemen—Receipts—Negotiable Instruments—Statutes.*—Whether an individual, partnership, or corporation, the warehouse receipts issued for tobacco by a storage warehouse company for profit, formed under our statute, are made negotiable when properly endorsed by the one storing tobacco therein, and passes the title to the transferee (C. S., secs. 4041, 4042, 4044, 4045, 4046), and it is immaterial whether those operating the warehouse use the same for the storage of their own tobacco with that of others. *Webb v. Friedberg*, 166.

4. *Same—Attachment.*—Where the owner of tobacco stores the same in a warehouse organized under the provisions of our statute receives a warehouse receipt therefor in conformity with the law, C. S., 4045, 4046, the goods represented by the receipts are not subject to attachment, C. S., 4065, and a specific remedy for creditors of the owner is given against the holders of these receipts, C. S., 4066, and attachment will not lie against the tobacco stored by a creditor of the owner that will impair the rights of one who is a holder of the receipts thus issued. *Ibid.*

5. *Same—Judgments of Other States—Records—Evidence—Constitutional Law.*—Where tobacco was stored in a warehouse here existing under the laws of this State, and in conformity with our statute a negotiable receipt had been issued the owner thereof, and the funds of such owner had been attached in New York in the courts of that State, and a surety or replevin bond given to await the determination of that suit, and that court upon sufficient evidence had adjudged that the surety is liable and that the owner endorse the receipts to the surety company upon the payment of the money, which the surety company accordingly has paid: *Held*, the duly authenticated record in this Court, according to our statutes (C. S., Vol. 2, appendix III) and under the Federal Statutes (U. S. Rev. Stat., 905 *et seq.*), is properly received in our courts as evidence, and given effect under Art. IV, sec. 1, Constitution of the United States. *Ibid.*

WARRANTY. See Deeds and Conveyances, 3; Insurance, 7.

WIDOWS. See Descent and Distribution, 1; Husband and Wife, 1.

WIFE. See Husband and Wife.

WILLS. See Advancements, 2.

1. *Wills—Statutes—Legislative Powers.*—The right to make testamentary disposition of property is subject to the legislative power of the State and may be denied or allowed upon such constitutional conditions as the Legislature may impose. *Bank v. Doughton*, 50.

WILLS—*Continued.*

2. *Same—Transfer Tax—Constitutional Law.*—The tax imposed by ch. 34, sec. 6 of the Laws of 1921, upon any person or corporation exercising a power of appointment derived from any disposition of property as a "transfer taxable," is a constitutional and valid provision and does not attempt to impose a tax upon personal property having its *situs* outside of the State when coming under its provisions, but upon the exercise of the power of appointment itself by a resident of this State. *Ibid.*

3. *Same—Situs of Property.*—A nonresident of this State devised certain personal property in trust for his daughter at the place of his domicile and gave her the power of disposition thereof by will. Afterwards she became a resident of this State and died, having exercised her power of appointment by will in North Carolina: *Held*, the intent of ch. 34, sec. 6, of the Laws of 1921, was to levy an inheritance or transfer tax upon the exercise of the power by a resident here, and such exercise of the power is construed to be valid transfer tax under the provisions of this act, though the *situs* of the property disposed of was in the State wherein her father died a resident. *Ibid.*

4. *Same—Succession Tax.*—The transfer tax imposed by ch. 34, sec. 6, Laws of 1921, is a succession tax and collected as such as the statute provides. *Ibid.*

5. *Wills—"Home Place"—Evidence de hors.*—In construing a devise of testatrix's home on a designated street of a city, it is competent to introduce evidence *de hors* the description in the devise to fit the place to the description, as in this case, where there were two adjoining lots, it was competent to show by parol that the testatrix had instructed that a fence be put around them both, and that in her payment of taxes and otherwise she regarded the adjoining vacant lot as a part of the home place in which she had resided. *Thomas v. Summers*, 74.

6. *Wills—Devise—Powers—Estates—Trustees—Title—Remainders.*—A devise to a trustee of testator's estate with direction that the trustee shall turn over to the testator's wife a part or all thereof, to be used by her without let or hindrance, upon her written demand, with direction that the receipt shall be a full and complete discharge of the trustee's liability, and should any part remain, then to his wife's daughter by a former marriage whom he designated as his own daughter in his will: *Held*, upon the wife's demand in conformance with the terms of the will of the entire estate, it was the testator's intent that she should have a fee-simple title thereto, the limitation over to take effect only as to such part, if any, as the widow may not have thus acquired. *O'Quinn v. Crane*, 97.

7. *Wills — Estates — Contingent Remainders — "Issue" — "Children" — Statutes.*—The intent of the testator, as gathered from the language of his will, construed as a whole, will control its interpretation, and he may so use the word "issue," in a devise of lands, in connection with the word "children," etc., as to mean lineal descendants. *Edmondson v. Leigh*, 196.

8. *Same—Partition.*—A devise of lands to testator's two sons for life, if either should die without issue the lands to go to the whole of their children—that is, one-half to the children of each—according to the

WILLS—*Continued.*

law of the land: *Held*, upon the happening of the contingency, the children of the two sons, the grandchildren of the testator, will take the lands so devised, and the grandchildren of the first takers were not excluded under the terms of the devise; and *Held, further*, a partition of the lands between the first takers, the testator's two sons, could only affect their own life estate. *Ibid.*

9. *Wills—Estates—Powers of Appointment—Life Estate—Heirs—Fee Simple—Contingent Interests.*—Where there is a devise of an estate for life with power in the devisees to dispose of the same by will to whomsoever he may choose, the devisee under the power when exercised takes from the testator, and where the lands are held by the donee under the power and another in common, a partition thereof of the fee-simple title may not be had between them, and this cannot be remedied by having the heirs at law made parties, as the exercise of the appointment by the life tenant will deprive them of their inheritance thereof. *White v. White*, 236.

10. *Wills—Caveat—Undue Influence—Evidence—Appeal and Error.*—Upon the trial of a caveat to a will upon the issue of undue influence, it is not required that the evidence upon the affirmative of the issue be direct, for such may be inferred from circumstances tending to show the affectionate relationship between the testator and certain of his children by a former marriage whom he had omitted from benefits, and had given his entire estate for life to his second wife with remainder to two of the children of that marriage, his being under the full care of his second wife during the latter years of his life when the will was written, and the weakened condition of his mind that would tend to subject him to her influence, with circumstances tending to show she had exercised such influence with the effect of causing him to make a will he would not otherwise have made; and the rejection of such evidence by the trial judge is reversible error. *In re Stephens*, 267.

11. *Same—Admissions of Wife of Second Marriage.*—Where a testator has devised his estate to his second wife for life, with remainder to two of his children by that marriage in exclusion of those of his first marriage, by will made while living with her, the issue of the first marriage being grown and living in their own separate homes, evidence of admissions of the second wife relative to the question of her undue influence in procuring the will goes to show the validity of the will itself, and may be received as evidence against the interests of her children. *Ibid.*

12. *Wills—Devise—Posthumous Child—Deeds and Conveyances—Title—Statutes.*—A devise to the testator's wife "to do with as she thinks best for herself and (our) children," the word "our" being stricken out by the testator, is construed as evidencing the testator's intent to include a child *in ventre sa mere* at the time of the execution of the will and born within a short time after his death, and the wife can convey a good fee-simple title to the purchaser, C. S., 4169, as to a provision for a posthumous child, and Rule 7, Canon of Descent, C. S., 1654. *Rawls v. Ins. Co.*, 368.

13. *Wills—Execution—Witnesses—Statutes—Signing by Testator.*—The requirements of C. S., 4131, as to the signing of the witnesses to a will

WILLS—*Continued.*

in the testator's presence and at his request, must be met in order to be a valid will, and testimony of the witnesses to a joint will of three persons that each of them requested each witness to sign, who accordingly did so in the presence of each testator, and so situated in plain view that each of the testators could see them sign, is sufficient, and it is unnecessary that all of the testators should have signed at the same time, but it is sufficient if they did so on different occasions, under the circumstances required by the statute. *In re Fuller et al.*, 509.

14. *Same—Evidence—Questions for Jury—Cross-Examination—Burden of Proof.*—Where the direct testimony of the witnesses to a will is sufficient for its validity under the provisions of our statute, C. S., 4131, and on cross-examination its force is weakened so as to leave a doubt of its sufficiency, the issue is for the determination of the jury, with the burden of proof on the caveators. *Ibid.*

15. *Wills—Conflict of Laws—Elections—Sequestration—Moneys in Lieu of Dower.*—The personal property of the estate of the deceased domiciled in another State is disposed of according to the law thereof, and where he had died leaving a will including the disposition of lands in North Carolina with two witnesses, which are sufficient here, but insufficient as to the laws of the State of his domicile, he has died intestate, in the place of his domicile, and a beneficiary may take here as the will provides, and the fact that as heir at law he may thus take a larger share of the estate does not put her to an election in equity, there being no provision of the will requiring it, or sequester her estate in favor of a disappointed devisee or legatee, the equitable doctrine of the latter depending upon that of the former; and *Held, further*, these principles apply where the testator has bequeathed to his widow a certain sum of money in lieu of her dower rights in land situated here. *McGehee v. McGehee*, 558.

16. *Wills—Intent—Public Policy—Provisions Against Contesting Will.*—There is nothing in the disposition of real estate under a will against public policy or fixed principles of law (to prevent the plain intent of the testator) that those contesting it should not take thereunder and their interests shall "revert" to those who may stand firmly by the testator's wishes; and where the will has been caveated by some of the devisees without good reason, and some of its beneficiaries have remained neutral, those who actively participate in sustaining the will will receive the portion that would otherwise have been taken by the caveators, and those who remained neutral only such interests as were devised to them. *Whitehurst v. Gotwalt*, 577.

17. *Wills — Estates — Remainders — Fee Simple—Repugnancy—Executory Devise—Statutes.*—Where the will devises realty to the testatrix's husband "to be his own, entirely and solely without restriction," but should he die leaving issue by a subsequent marriage, to be divided as set forth in the will: *Held*, by the first provision the husband takes the fee, not a life estate with power of disposition, and the further and restricted provision being repugnant thereto is void, and he may convey to a purchaser a fee-simple title under the devise. C. S., 4162. *Roane v. Robinson*, 628.

WILLS—*Continued.*

18. *Wills—Sales—Powers.*—Where a will directs the executor to exercise its discretion in making a physical equality of the division of the estate, or otherwise make the division thereof as it should decide, and acting within this discretion it has concluded that a sale of certain of the testator's lands was more beneficial to the devisees and legatees, it is not required that the will expressly specify that the lands be sold, as this power is implied, and a fair sale thereof for the stated purpose will not be disturbed on appeal. *Clark v. Homes*, 703.

19. *Same—Judgments.*—Where a court of competent jurisdiction of the parties and the subject-matter has construed a will and finally adjudged that certain of the testator's lands be sold for distribution as the will directs, the purchaser may not set up a lack of title in an independent action against him to compel performance of the terms of his purchase, there being no element of fraud in the judgment previously rendered, and all parties in interest having been represented. *Ibid.*

20. *Wills—Probate—Clerks of Court—Jurisdiction—Statutes.*—By express provision of statute, the clerk of the Superior Court who first gains and exercises jurisdiction in probate matters acquires sole and exclusive jurisdiction over the decedent's estate, and the objection is untenable that an executor thus appointed has not authority, for the existence of equitable principles, to file a petition for the partition of lands in another county wherein the same are situate. C. S., 2. *Ibid.*

21. *Same—Guardian and Ward.*—Where the executor is given power to sell lands for partition to make distribution under the terms of the will, in an adversary proceeding; it is *Held*, the fact that it is also guardian for minor beneficiaries does not affect the matter, the proceedings being proper to put the interests of the minors at arms' length, and have disinterested representation for them if the preservation of their rights should thereafter require it. *Ibid.*

22. *Wills—Dower—Statutes.*—Where the widow takes certain of her husband's lands under his will in lieu of dower, it is unnecessary as against the interests of the heirs at law that the statutory proceedings should have been followed to lay off her dower interest, C. S., 4099, 4100, 4104, 4105, and as against creditors it has the same effect. C. S., 4108. *Freeman v. Ramsey*, 790.

23. *Wills—Sufficiency of Designation—Parol Evidence.*—A devise to the wife of a certain number of acres of land surrounding the testator's dwelling and located according to her desire, and "as near four-square as consistent, to be taken by her in lieu of dower," is a sufficient description of the lands, and will admit of parol evidence of identification. *Ibid.*

24. *Same—Deeds and Conveyances.*—Where the grantees under the widow's deed to her dower interest in lands agree as to its location before or after the time of the transaction, the recitation in the deed that it was the dower interest of the wife in the lands of her deceased husband is evidence against the grantees and those claiming under them that the dower interest was properly allotted within the boundaries set out in the deed. *Ibid.*

WILLS—*Continued.*

25. *Same—Recitals in Deeds—Estoppel.*—The recitals in a deed to lands that the *locus in quo* is the wife's dower interest in the lands of her deceased husband estops the grantees in the deed and those claiming under them from denying the truth thereof. *Ibid.*

WITNESSES. See Criminal Law, 12; Wills, 13; Evidence, 19.

1. *Witness—Character—Cross-Examination.*—Upon cross-examination, a witness for a party as to character, in an action to recover damages in a negligence case, cannot be directly questioned as to unrelated acts of the defendant to that complained of, though upon his own volition he may answer as to general character, and then qualify his former evidence on the subject. *Davis v. Long*, 129.

2. *Witness—Evidence—Cross-Examination.*—Where the defendant is on trial for the illicit manufacture of whiskey, and there is evidence tending to show that others, among them his brothers, were also engaged with him therein, the fact that the defendant takes the stand in his own defense places his character in question, and a broad latitude is given to the cross-examination to impeach his character within reasonable grounds ordinarily within the sound discretion of the trial judge, and where the witness has testified that he did not know where his brother was on that occasion: *Held*, not error for the trial judge to permit the prosecuting attorney to ask him whether he wished to disclaim kin with his own brother. *S. v. Dickerson*, 527.

WORDS AND PHRASES. See Lis Pendens, 3.

WRONGFUL DEATH. See Negligence, 4; Carriers, 3.

WRONGFUL JOINDER. See Removal of Causes, 5.